FACULTY OF LAW
Lund University

Adam Olofson

The Protection of LGBT+ rights in International Criminal Law

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Supervisor: Valentin Jeutner

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Contents

Summary

Sexual and gender minorities have historically and globally been vulnerable to persecutory and discriminatory acts. Today, sixty-eight United Nations member states criminalize consensual same-sex sexual conduct and nine states expressively criminalize the gender identity/expression of transgender people. These discriminatory laws are exposing millions of individuals to the risk of arbitrary arrest, prosecution, and imprisonment. In at least five of these states, LGBT+ conduct is punishable by death.

The legal persecution of LGBT+ people violates international human rights law. However, there remains a debate whether the rights of LGBT+ people are equally protected under international criminal law. It is a controversial and highly debated issue if the criminalization of LGBT+ people can be considered a crime against humanity of persecution under Article 7(1)(h) of the Rome Statute.

This thesis examines if LGBT+ people can be considered a protected group under Article 7(1)(h) and thus internationally protected from legal persecution. The research is conducted through a critical examination of a number of arguments arguing for the inclusion of LGBT+ people under the three different protected grounds of “gender”, “political” and “other grounds that are universally recognized as impermissible under international law”. Additionally, with a purpose of assessing and furthering the rights of all LGBT+ people in international criminal law, the examined arguments are analysed from a queer critical perspective.

The thesis concludes that there are valid and strong arguments for the inclusion of some LGBT+ people under all of the examined protected grounds in Article 7(1)(h). However, as revealed through the queer critical analysis, the protection of all LGBT+ people, especially non-binary people and intersex, remains dubious.

Sammanfattning

Historiskt och globalt har sexuella minoriteter och könsminoriteter varit utsatta för förföljelse och diskriminering. Idag är samtyckliga sexuella handlingar mellan personer av samma kön kriminaliserat i sextioåtta av FN:s medlemsstater och ytterligare nio stater kriminaliserar uttryckligen könsidentiteten eller könsuttrycket hos transpersoner. Dessa diskriminerande lagar utsätter miljoner människor världen över för godtyckliga arresteringar, åtal, och fängelsestraff. I minst fem av dessa stater är hbtq-kodat beteende förlagt med dödstraff.

Legal förföljelse av hbtq-personer bryter mot de internationella mänskliga rättigheterna. Dock kvarstår en debatt om hbtq-personer är lika skyddade under den internationell straffrätten. Huruvida kriminaliseringen av hbtq-personer utgör ett brott mot mänskligheten i form av förföljelse under artikel 7(1)(h) av Romstadgan är en kontroversiell och vida debatterad fråga.

I detta examensarbete undersöks om hbtq-personer kan anses utgöra en skyddad grupp under artikel 7(1)(h) av Romstadgan och således skyddade under den internationella straffrätten från legal förföljelse. Undersökningen är genomförd genom en kritisk granskning av ett antal argument som argumenterar för inkluderandet av hbtq-personer under de tre skyddade grunderna: ”genusmässiga”, ”politiska” och ”andra skäl som universellt är erkända som otillåtna enligt folkrätten”. Ytterligare, med ett syfte att bedöma och främja rättigheterna för alla hbtq-personer, analyseras argumenten utifrån ett kritiskt queerperspektiv.

I examensarbetet dras slutsatsen att det finns grundade och giltiga argument för inkluderingen av vissa hbtq-personer under alla de undersökta grunderna i artikel 7(1)(h). Dock klargör den kritiska queeranalysen att situationen gällande skyddet för alla hbtq-personer, särskilt för icke-binära och intersexpersoner, kvarstår tvetydlig och betänklig.

Förord

Med detta examensarbete avslutar jag min sju år långa universitetsresa. En resa som påbörjades som en ensam nittonåring i Malmö och som senare kom att ta mig till Korea två gånger om och en gång hela vägen till Australien.

Jag vill ge ett särskilt tack till Radio AF, Lunds Studentradio. Utan denna kreativa mötesplats hade jag nog aldrig tagit mig igenom juridikstudierna med sådan bibehållen glädje och ork. I soffan i Redax har jag kunnat lufta tankar om allt från arvsrätt till havsrätt samt fått möjligheten att vältra mig i otaliga intellektuella debatter om alla livets ämnen. Tack till alla på Radio AF som genom åren bidragit till att göra min studietid i Lund magisk.

Tack till svenska ambassaden i Seoul. Genom min praktik våren 2019 fick jag på riktigt upp ögonen för diplomatins värld och juridikens internationella möjligheter. Dessutom var talet jag skrev åt ambassadör Hallgren till invigningen av Seoul Pride 2019 den inledande inspirationen och startskotten för det här examensarbetet.

Självklart vill jag tacka mina nära och kära, mina vänner i Lund och mina vänner runt om i världen. Tack till alla som stöttat och peppat. Tack till min handledare Valentin Jeutner för råd och feedback i skrivandet.

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Lund den 27 Maj 2020
Adam Olofson

Abbreviations

ECHR	European Court of Human Rights
Genocide Convention	UN Convention on the Prevention and Punishment of the Crime of Genocide
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ILGA	International Lesbian, Gay, Bisexual, Trans and Intersex Association
LGBT+	Initialism for lesbian, gay, bisexual, transgender/transsexual plus. The plus refers to the inclusion of other marginalized gender and sexual minorities such as queer and intersex.
OHCHR	Office of the High Commissioner for Human Rights
OTP	Office of the Prosecutor
The Rome Statue	Rome Statute of the International Criminal Court
UN	United Nations
UNHRC	United Nations Human Rights Council

1 Introduction

'For LGBT people the law is a paradox. The law can operate as an instrument of repression and control, but also as a tool for resistance and liberation' - Graeme Reid, Human Rights Watch

1.1 Introduction and purpose

Sexual and gender minorities[1] have historically and globally been vulnerable to persecutory and discriminatory acts. According to the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), sixty-eight United Nations (UN) member states criminalize consensual same-sex sexual conduct and nine states expressively criminalize the gender identity or the gender expression of transgender people. Additionally, thirty-one member states have legal barriers to the freedom of expression of LGBT+[2] people and only a few states prohibit non-consensual genital surgeries performed on intersex children.[3] These discriminatory laws

[1] The term "sexual minorities" will be used when describing lesbian, gay and bisexual people. The term "gender minorities" will be used when describing non-cisgender people. Cisgender (cis) is a term for a person whose gender identity matches the sex assigned at birth. The opposite of cisgender is transgender. Transgender includes both people who identify with male and female, but also people who identify with third gender, a fluctuating gender or no gender. Intersex people are neither a sexual or gender minority but refers to people born with sex characteristics that do not fit the typical binary notions of male or female bodies.

[2] The thesis will use the term LGBT+ as an initialism for lesbian, gay, bisexual, transgender/transsexual plus. The plus refers to the inclusion of other marginalized sexual and gender minorities such as queer and intersex.

[3] Lucas Ramón Mendos, 'State-Sponsored Homophobia' (*ILGA*, 2019) <https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019_light.pdf> accessed 26 May 2020, 197-203: Human Dignity Trust states that seventy-three 'jurisdictions criminalize private, consensual, same-sex sexual activity' Human dignity trust, 'Map of Countries that Criminalise LGBT People' (*Human Dignity Trust*) <https://humandignitytrust.org/lgbt-the-law/map-of-criminalisation/> accessed 26

are exposing millions of individuals to the risk arbitrary arrest, prosecution, and imprisonment. In at least five of these states, LGBT+ conduct is punishable by death. Moreover, the criminalization of LGBT+ people legitimizes prejudice at large and exposes these minorities to police abuse, hate crimes and torture.[4] The 2014 Anti-Homosexuality Act in Uganda, the declaration of "LGBT-free-zones" in Poland, and the so-called "gay propaganda bill" in Russian constitute current controversial examples of anti-LGBT+ laws with serious, occasionally fatal, consequences for LGBT+ people.[5]

Legal persecution, in the form of criminalization of LGBT+ people, violates international human rights law.[6] However, there remains a debate whether LGBT+ people are equally protected under international criminal law. Historically, the Nuremberg Tribunal excluded the atrocities committed against LGBT+ people in the criminal charges, which in effect created a continued legitimization of such atrocities. Subsequently, the UN Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) did not include LBGT+ as a protected group under Article 2. The issue of including LGBT+ people as a protected group under the definition of "genocide" was considered during the negotiations of the Rome Statute of the International Criminal Court (the Rome Statute) (ICC). LGBT+ people were however excluded as a protected group under the

May 2020: Amnets Suess Schwend 'International Intersex Depathologization Activism and Theoretical Reflections' in Zowie Davy, Anna Cristina Santos, Chiara Bertone, Ryan Thoreson and Saskia E. Wieringa (eds), *The Sage Handbook of Global Sexualities* (SAGE 2020) 803.

[4] United nations human rights office of the high commissioner, 'Fact Sheet - Criminalization' (*United Nations Free & Equal*) <https://www.unfe.org/Fact-Sheet-Criminalization> accessed 26 May 2020.

[5] 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, 66: Human Rights Watch, 'Poland' (*World Report 2020)* <https://www.hrw.org/world-report/2020/country-chapters/poland> accessed 26 May 2020.

[6] Further explained in part 2.2.

following Article 6 of the Rome Statute. This was partly due to the intent of reproducing the definition contained in the Genocide Convention and the fear of creating unwanted controversy.[7]

Nonetheless, there is a continued and contentious debate whether the protection of LBGT+ people can be addressed through other avenues in international criminal law.[8] It is a controversial and highly debated issue whether the criminalization of LGBT+ people can be considered as a crime against humanity of persecution under Article 7(1)(h) of the Rome Statute.[9] In part, the discussion revolves around the definitions and extent of the protected grounds of "gender", "political", and "other grounds that are universally recognized as impermissible under international law" and whether LGBT+ people can be encompassed by any of these definitions.[10] This discussion is critical since, whether or not LGBT+ people conform to the definition of one or more of the protected groups listed in Article 7(1)(h) will ultimately determine if legal persecution of LGBT+ people can be considered and prosecuted as an international crime under the Rome Statute.

The issue of LGBT+ rights in international criminal law is highly topical since there is a growing recognition of the need to hold human rights violators, who have committed persecution on the basis of sexual orientation, criminally liable in the ICC.[11] However, despite the fact that the

[7] Alycia T Feindel, 'Reconciling Sexual Orientation: Creating a Definition of Genocide that Includes Sexual Orientation' (2005) 13 Michigan State Journal of International Law 197, 199.

[8] The American non-governmental organization coalition for the international criminal court, 'LGBT and the International Criminal Court' (*AMICC*, 2010) <http://amicc.org/LGBT-and-the-international-criminal-court > accessed 26 May 2020.

[9] Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambrige University Press 2019) 70.

[10] The American Non-Governmental Organization Coalition for the International Criminal Court (n 8).

[11] Charles Barrera Moore, 'Embracing Ambiguity and Adopting Propriety: Using Comparative Law to Explore Avenues for Protecting the LGBT Population under Article 7

Rome Statute is the first international instrument to expressly include sexual and gender-based crimes, there has yet been no successful LGBT+-based persecution prosecution in the ICC.[12] Furthermore, as of today, thirty-seven of the state parties to the ICC have penal codes that criminalise LGBT+ people in some way.[13]

The thesis will therefore research if LGBT+ people can be considered as a protected group under Article 7(1)(h) of the Rome Statute and thus internationally protected from legal persecution. This will be conducted through a critical examination of a number of arguments arguing for the inclusion of LGBT+ people under the three different grounds of "gender", "political", and "other grounds that are universally recognized as impermissible under international law" enumerated in Article 7(1)(h) of the Rome Statue. Additionally, with a purpose of assessing and furthering the rights of all LGBT+ people in international criminal law, the examined arguments will be analysed from a queer critical perspective. The analysis will ultimately reveal the strengths and weaknesses of the arguments for the protection of all LGBT+ people from legal persecution.

of the Rome Statute of the International Criminal Court' (2017) 101 Minnesota Law Review 1287, 1288.

[12] Office of the Prosecutor, 'Policy Paper on Sexual and Gender-based Crimes' (*International Criminal Court,* 2014) <https://www.ice-cpi.int/icedoes/otp/OTP-PolicyPaper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> accessed 26 May 2020: Valerié V. Surh, 'Rainbow Jurisdiction of the International Criminal Court?' (*Völkerrechtsblog* 12 March 2018) <https://voelkerrechtsblog.org/rainbow-jurisdiction-of-the-international-criminal-court/> accessed 26 May 2020.

[13] Michael Bohlander, 'Criminalising LGBT Persons Under National Criminal Law and Article 7(1)(h) and (3) of the ICC Statute' (2014) 5 Global Policy 401, 408.

1.2 Research Questions and Deliminations

In order to research if LGBT+ people can be considered as a protected group under Article 7(1)(h) of the Rome Statute and thus protected from legal persecution, the thesis will ask the following research questions:

1. Can LGBT+ people be considered as a protected group under Article 7(1)(h) of the Rome Statute and thus protected from legal persecution?
   1.1 Under the ground of "gender"?
   1.2 Under the ground "political"?
   1.3 Under the ground of "other grounds that are universally recognized as impermissible under international law"?

The thesis will not examine other material elements nor the contextual elements of the crime against humanity of persecution. This has previously partly been studied by Josh Scheinert in his article 'Is Criminalization Criminal', where he concluded that, at times, the 'enforcement of antigay laws does satisfy the material elements of a crime against humanity of persecution'.[14] However, Scheinert's research was limited to the enforcement of so called "antigay laws". Further research is needed on the criminality of the enforcement of laws criminalizing other sexual and gender minorities. It is also of interest whether the mere existence of laws, allowing for the killing, imprisonment and corporal punishment of LGBT+ people, can constitute a crime against humanity of persecution. Moreover, this thesis will not examine the issue of the criminal liability for the enforcement of laws criminalizing LGBT+ people.

[14] Josh Scheinert 'Is Criminalization Criminal?: Antisodomy Laws and the Crime Against Humanity of Persecution' (2015) 24 Law & Sexuality: A Review of Lesbian, Gay, Bisexual & Transgender Legal Issues 99, 103.

1.3 Method and material

1.3.1 Legal dogmatics

The thesis will employ a method of legal dogmatics with critical elements when studying the research questions. The method of legal dogmatics entails an analysis of the sources of positive law, in order to describe how the law should be perceived in a certain context and subsequently how the law should be applied. The research will therefore be conducted through analysing the relevant primary and secondary sources of positive international law.[15] According to the statute of the of the International Court of Justice (ICJ), international conventions, international customs, and the general principles of law are the primary sources of international law. Article 38 of the ICJ Statute further states that judicial decisions from international courts and the teachings of the most highly qualified publicists function as subsidiary sources of international law. However, the method of legal dogmatics will be modified with a critical element. The sources of international law will be examined in light of queer critical legal theory, which will be further explained in part 1.4.2.

1.3.2 Material

The central norms of the thesis are Article 7(1)(h) and 7(3) of the Rome Statute of the ICC. Article 7(1)(h) of the Rome Statute offers the most logical avenue towards the international protection of LGBT+ people from legal persecution. These norms will be examined through reliable subsidiary sources of law in the form of scholarly literature and decisions from international courts. In order to provide a broad examination, arguments from several scholars will be researched.

[15] Anders Henriksen, *International Law* (Oxford University Press 2017) 23.

The ground of "gender" is the most commonly argued ground for the inclusion of LGBT+ people as a protected group under Article 7(1)(h), wherefore it constitutes a major part of the research and analysis. Articles from Valerie Oosterveld, Legal Officer of the UN and member of the Canadian delegation to the 1998 UN Diplomatic Conference of Plenipotentiaries on the Establishment of the ICC, constitute the main basis for the arguments under the ground of "gender". This is due to the fact that Oosterveld's articles and arguments are widely referenced to in scholarly literature when discussing the protection of LGBT+ people under Article 7(1)(h). Josh Scheinert and Charles Barrera Moore also argue for the inclusion of LGBT+ people under the ground of "gender". Their arguments are of interest since they differ from Oosterveld's and provide valid alternatives for protection.

Andre Sumner Hagopian is the only scholar to present an argument for the inclusion of LGBT+ people under the ground of "political". Therefore, Sumner Hagopian's article 'Persecution and Protection of Sexual and Gender Minorities under Article 7(1)(h) of the Rome Statute' is central when examining the ground of "political".

Scheinert is also the only scholar to present an argument for the inclusion of LGBT+ people under the ground of "other grounds that are universally recognized as impermissible under international law". However, support for Scheinert's argument can be found in William A. Schabas commentary on the Rome Statute and Oosterveld briefly mentions the ground as a possibility for inclusion. In addition, Sumner Hagopian presents a directed counterargument to Scheinert's argument.

In general, counterarguments and research of other scholars will partly provide the base for the critical and queer critical analysis. Especially Brian Kritz article 'The Global Transgender Population and the International Criminal Court' is of interest since it provides a transgender rights perspective on international criminal law.

Due to the continuously increasing recognition of LGBT+ rights in international law and the 2014 Policy Paper on Sexual and Gender-Based Crimes by the Office of the Prosecutor (OTP) of the ICC (further explained in part 2.5), it is important to examine the scholarly literature in light of the year of publishing.[16]

Decisions from international courts such as the ICC and the European Court of Human Rights (ECHR) are also examined in the research of the thesis. The jurisprudence from the ICC is crucial since the Rome Statute serves as the courts guiding legal instrument.[17]

1.4 Theory

This part will introduce queer legal theory as the chosen theory of analysis of the thesis. Additionally, a short introduction will be made about the origin theory of critical legal theory.

1.4.1 Critical Legal Theory

Critical Legal Theory, sometimes referred to as Critical Legal Studies, first emerged in the United States in the late 1970's as an alternative method of analysing and studying positive law.[18] Critical legal theory states that the positive law is intertwined with social issues and provides not only criticism of particular legal rules and outcomes, but the larger structures of conventional legal thought and practice. Proponents of critical legal theory

[16] Brian Kritz, 'The Global Transgender Population and the International Criminal Court'(2014) 17 Yale Human Rights and Development Law Journal 1: Office of the Prosecutor (n 12).

[17] 'About' (*International Criminal Court)* < https://www.icc-cpi.int/about> accessed 26 May 2020.

[18] Bill Bowring, 'Critical legal theory and international law' in, (2019) in Emilios Christodoulidis, Ruth Dukes and Marco Goldoni (eds), *Research Handbook on Critical Legal Theory* University of Glasgow (Glasgow) 495.

argue that the positive law supports the interest of those who create the law and thus many critical legal theory scholars want to overturn hierarchical structures by using law as an essential tool. Critical legal theory encompasses many subgroups of critical perspectives on law, including feminist, critical race, postcolonial and queer legal theory.[19]

1.4.2 Queer Legal Theory

Since the start of the LGBT+ rights movement, legal strategies have figured prominently as a way of gaining protection and recognition. Queer legal theory emerged out of critical legal theory and feminist legal theory as a scholarly and activist approach to positive law and builds upon insights about gender and sex articulated by critical legal feminists.[20] Similar to feminist and postcolonial theories, queer legal theory criticizes the discipline of law and 'presents a fundamental challenge to the usual way of framing international legal problems and crafting solutions'.[21] This challenge is conducted through realizing how ideas of gender and sexual orientation are implicated in and affect norms and moreover, how these norms work to reinforce unequal relations of power.[22] Although the application of queer

[19] 'Critical Legal Theory' (*Cornell Law School Legal Information Institute*) <https://www.law.cornell.edu/wex/critical_legal_theory> accessed 26 May 2020: 'Legal Theory: Critical Legal Theory' (*The Bridge – Materials on Legal Reasoning*) <https://cyber.harvard.edu/bridge/CriticalTheory/critical1.htm> accessed 26 May 2020.

[20] 'Critical Theory - Queerlaw', *(The Bridge – Materials on Legal Reasoning)* <https://cyber.harvard.edu/bridge/CriticalTheory/critical5.htm> accessed 26 May 2020.

[21] Dianne Otto, *Queering International Law: possibilities, alliances, complicities, risks* (Routledge 2017) 1.

[22] Dianne Otto, 'Taking a break" From "Normal": Thinking Queer in the Context of International Law' (2007) 101 Proceedings of the Annual Meeting (American Society of International Law) 119, 120*:* Otto, *Queering International Law: possibilities, alliances, complicities, risks* (n 21) 2.

theory to the discipline of law is an established tradition, the practice of applying it to international law remains uncommon.[23]

In general, queer theory, a term coined by Teresa de Lauretis in 1991, views human sexuality as 'a widespread social condition' and therefore an important matter to all individuals irrespective of whether they belong to the sexual majority or not.[24] Queer theorists challenge the assumption that sex and gender is binary (male and female) and presents a pluralized perspective. While sex refers to biological and anatomical distinctions, gender refers to the 'series of roles, practices and acts that a given society of subcommunity expects and assigns to people presumed to have a particular sex'. [25] In queer theory, gender is not an automatic and definite consequence of sex, but a social construct. There are more than the two genders of masculinity and femininity and the expectations of gender performance can also vary across class, race, religion and over time. Further, gender and sex are distinct from sexual orientation. Sexual orientation concerns the identity of those who an individual seeks as a romantic or sexual partner. Sexual orientation is also pluralized an incorporates more than the binary notion of homosexuality and heterosexuality. Queer legal theory emphasises that sex, gender, and sexual orientation are not necessarily aligned, although this is often presumed by law. [26]

One way of applying queer legal theory to international law is through extending the existing international legal framework to include non-heterosexual and non-cisgender people without altering the specific legal provisions. For example, broadening international human rights law to prohibit homophobic discrimination is one activist approach of queer legal

[23] Otto, '"Taking a break" From "Normal": Thinking Queer in the Context of International Law' (n 22) 120.

[24] Laurie Rose Kepros, 'Queer Theory: Weed or Seed in the Garden of Legal Theory' (1999-2000) 9 Law & Sexuality 279, 281-282.

[25] 'Critical Theory - Queerlaw' (n 20).

[26] ibid.

theory.[27] However, Dianna Otto argues that queer legal theory goes beyond LGBT+ normative inclusion and aims at rethinking the conceptual and analytical fundaments of international law's assessment of "normal".[28]

Queer legal theory will be employed in the thesis in the critical analysis of the examined arguments for the inclusion of LGBT+ people under Article 7(1)(h) of the Rome Statute. Since the purpose of the thesis is to assess and further the rights of all LGBT+ people in international criminal law and protect all LGBT+ people form legal persecution, the merits and deficiencies of the arguments will be analysed from a perspective of inclusivity. An attempt will be made to analyse the arguments outside the internationally prevailing norm of a binary gender and sexual orientation system. The thesis will not present examples of possible alterations to existing legal provisions but rather analyse if the examined arguments can be utilized as legal tools to extend the scope of the existing legal framework to encompass all LGBT+ people. Further, an attempt to rethink the "normal" will be made.

1.5 Outline

First, in part 2, the thesis will provide a background on the general issues of the global criminalization of LGBT+ people (2.1), LGBT+ rights in international law (2.2), the International Criminal Court and international crimes (2.3), the international crime of crimes against humanity and the crime against humanity of persecution (2.4), and the OTP Policy Paper on Sexual and Gender-Based Crimes (2.5). Secondly, in part 3, the research question of 'Can LGBT+ people be considered as a protected group under Article 7(1)(h) of the Rome Statute and thus protected from legal persecution?' will be examined under the three grounds of: "gender" (3.1),

[27] Otto, '"Taking a break" From "Normal": Thinking Queer in the Context of International Law' (n 22) 120.

[28] Otto, *Queering International Law: possibilities, alliances, complicities, risks* (n 21) 1.

"political" (3.2), and "other grounds that are universally recognized as impermissible under international law" (3.3). Additionally, the examined arguments will be critically analysed from a queer critical perspective. Lastly, in part 4, conclusions of the research an analysis will be presented.

2 Background

In order to provide a background for the subsequent examination and analysis in part 3, this part will introduce the issues of the global criminalization of LGBT+ people (2.1), LGBT+ rights in international law (2.2), the International Criminal Court and international crimes (2.3), crimes against humanity and the crime against humanity of persecution (2.4), and lastly the OTP Policy Paper on Sexual and Gender-Based Crimes (2.5).

2.1 The global criminalization of LGBT+ people

Sexual and gender minorities constitute marginalized groups that have historically and globally been vulnerable to persecution and discriminatory acts. Today, sixty-eight UN member states criminalize consensual same-sex sexual acts and nine states expressively criminalize the gender identity/expression of transgender people.[29] However, since many states do not recognise the gender identity of transgender people, they often are labelled or perceived as either gay or lesbian and thus arbitrarily prosecuted under provisions that criminalise same-sex conduct.[30]

Despite the lack of legal recognition globally, intersex people are not directly criminalized per se in any state.[31] However, only a few states prohibit non-consensual genital surgeries performed on intersex children.[32]

[29] Mendos (n 3) 197-202: Human Dignity Trust (n 3).

[30] United Nations Human Rights Office of the High Commissioner, 'Transgender' (*United Nations Free & Equal*) <https://www.unfe.org/wp-content/uploads/2017/05/UNFE-Transgender.pdf> accessed 26 May 2020.

[31] 'Intersex' (*ILGA*) <https://www.ilga-europe.org/what-we-do/our-advocacy-work/trans-and-intersex/intersex> accessed 26 May 2020.

[32] Amnets Suess Schwend (n 3) 803.

The provisions in force vary when referring to the criminalized LGBT+ related acts and conduct. Often, vague and euphemistic terms and wordings are employed such as: "indecency", "acts against nature", "immoral acts", "morality", and "the order of nature". Anti-transgender criminal provisions often criminalize "cross-dressing" or 'imitating members of the opposite sex'.[33] Consequently, these undefined terms often result in arbitrary interpretations and discretionary use.[34] Sentences for the crimes range from fines to life imprisonment and ultimately the death penalty. In some states, the law enforcement agencies aggressively purse and prosecute people suspected of being LGBT+, resulting in grave human rights abuses in the form of loss of property, homes and incomes, physical threats, arbitrary arrest, torture and murder.[35] In other states, the laws are not frequently enforced, but have other severe consequences for LGBT+ people in the form of serious discriminatory treatment.[36]

Thirty-one member states have legal barriers to the freedom of expression of LGBT+ people. These laws, imposed on individuals, educators, and the media, criminalize or restrict expressions of same-sex intimacy, expression of support or positive portrayals of non-heterosexual identities and relationships. Moreover, in some states, new laws have been introduced that criminalize communications between same-sex individuals on dating applications or websites.[37]

[33] United Nations Human Rights Office of the High Commissioner, 'Transgender' (n 30).
[34] Mendos (n 3) 197.
[35] Sexual Minorites Uganda 'From Torment to Tyranny: Enhanced Persecution in Uganda Following the Passage of the Anti-Homosexuality Act 2014' (*Human Dignity Trust* 2014) <https://www.humandignitytrust.org/resources/from-torment-to-tyranny-enhanced-persecution-in-uganda-following-the-passage-of-the-anti-homosexuality-act-2014/> accessed 26 May 2020.
[36] Human Rights Watch, 'The love that dare not speak its name' (LGBT Rights - *#Outlawed)* <http://internap.hrw.org/features/features/lgbt_laws/> accessed 26 May 2020.
[37] Mendos (n 3) 203.

It is important to mention that in many cases, the criminal provisions criminalizing LGBT+ people are a legacy of colonial rule. During the 19th Century, these laws were imposed by the colonial powers.[38] For example, forty-two states of the Commonwealth have continued to criminalise same-sex sexual behaviour.[39]

2.2 LGBT+ rights in International Law

Attention to LGBT+ rights in international law began with the historical decision in the *Dudgeon v. The United Kingdom* case of 1981, which was the first case before the ECHR on the matter of criminalisation of male homosexuality. In *Dudgeon*, the court held, with fifteen votes to four, that the Northern Irish criminal acts in question, prohibiting the "gross indecency" between males and buggery, constituted violations of Article 8 of the European Convention on Human Rights. The acts were found to unjustifiably interfere with the right to respect for private life.[40] After *Dudgeon,* the ECHR invalidated similar criminal provisions in *Norris v. Ireland* (1988) and *Modinos v. Cyprus* (1993).[41]

Toonen v. Australia of 1994 was a similar landmark case brought before the United Nations Human Rights Committee (UNHRC). In the case, Nicholas Toonen, brought a complaint about two provisions of the Tasmanian Criminal Code, which criminalized various forms of sexual contact between consenting adult homosexual men. Toonen claimed that these provisions constituted violations of his right to privacy under Article 17 of the International Covenant on Civil and Political Rights (ICCPR). UNHRC stated that the reference to "sex" in Article 2 paragraphs 1 and 26 of the

[38] United Nations Human Rights Office of the High Commissioner (n 4).

[39] Rahul Roa, 'A tale of two atonements' in Dianne Otto (ed), *Queering International Law: possibilities, alliances, complicities, risks* (Routledge 2017) 15.

[40] *Dudgeon v. United Kingdom* App no 7525/76 (ECHR 22 October 1981).

[41] *Norris v. Ireland*, App no 10581/83, (ECHR 26 October 1988): *Modinos v. Cyprus* App no 15070/89 (ECHR 23 March 1993).

ICCPR should be read and interpreted as including sexual orientation, therefore entitling sexual minorities to equal protection from discrimination under the ICCPR. The disputed criminal provisions were deemed as arbitrary interferences of privacy and unlawful breaches of Article 17.[42] *Toonen* was a breakthrough case since it further resulted in the UNHRC questioning various states about criminal laws criminalising same-sex conduct. [43]

Today, the right to non-discrimination on the basis of sexual orientation and gender identity is widely recognized in international human rights law and has received considerable global attention in recent years.[44] Despite any direct reference, The Universal Declaration of Human Rights, the ICCPR, and the International Covenant on Economic, Social Cultural and Rights all prohibit discrimination on the basis of sexual orientation and gender identity.[45] The right to non-discrimination of LGBT+ people has additionally been recognized by various UN treaty committees.[46]

The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles), released in 2007, have played a key role in advancing LGBT+ rights in international human rights law. [47] The

[42] *Toonen v. Australia*, CCPR/C/50/D/488/1992 (UN Human Rights Committee 4 April 1994).

[43] Douglas Sanders, 'Human Rights and Sexual orientation in international law' (2002) 25 International Journal of Public Administration 13, 13.

[44] Kritz (n 16) 1.

[45] United Nations Human Rights Office of the High Commissioner, 'Born Free and Equal' (2012) <https://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf> accessed 26 May 2020: Sanders (n 43) 14.

[46] 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 Harvard Human Rights Journal 55, 78.

[47] 'Yogyakarta Principles' (2016) < http://yogyakartaprinciples.org/principles_en.pdf> accessed 26 May 2020.

Yogyakarta Principles, developed by a group of human rights experts and organizations form diverse regions, list twenty-nine human rights standards claimed to affirm binding international legal standards.[48] Although the principles have not been adopted by the UN, they have been endorsed by and influenced various UN entities. For example, in 2008, the first UN General Assembly statement, supporting the full protection of human rights for persons of diverse sexual orientations and gender identities, was delivered on behalf of sixty-six states.[49]

In June 2011, UNHRC adopted resolution 17/19 on human rights, sexual orientation and gender identity. It is the first UN resolution on sexual orientation and gender identity and states that the UNHRC expresses 'grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity'.[50] The resolution paved the way for the first official UN report on the issue prepared by the Office of the United Nations High Commission of Human Rights (OHCHR).[51] The OHCHR's report declares that 'The obligations of States to prevent violence and discrimination based on sexual orientation and gender identity are derived from various international human rights instruments'.[52] The report further states these obligations include the

[48] 'About Yogyakarta Principles' (*Yogyakarta Principles)* <http://yogyakartaprinciples.org/principles-en/about-the-yogyakarta-principles/> accessed 26 May 2020.

[49] UN General Assembly, 'Statement on Human Rights, Sexual Orientation and Gender Identity' (18 December 2008) <https://www.refworld.org/docid/49997ae312.html> accessed 26 May 2020.

[50] UN General Assembly, UNHRC 17th Session, 'Human Rights, Sexual Orientation and Gender Identity' (July 14, 2011) A/HRC/RES/17/19.

[51] OHCHR 'Combatting discrimination based on sexual orientation and gender identity' (*United Nations Human Rights – Office of the High Commissioner)* <https://www.ohchr.org/en/issues/discrimination/pages/lgbt.aspx> accessed 26 May 2020.

[52] UN General Assembly, UNHRC 19th Session, 'Discriminatory Laws and Practices and Acts of Violence against Individuals based on their Sexual Orientation and Gender Identity' (17 November 2011) A/HRC/19/41, para 8.

obligations to protect the right against arbitrary detention, protect individuals from discrimination based on ground of sexual identity and gender identity, and protect the right to freedom of expression, association and assembly in a non-discriminatory manner.[53]

2.3 International Crimes and the International Criminal Court

International criminal law, through national or international criminal courts and tribunals, authorizes the criminal prosecution of individual perpetrators of certain serious offences. According to the common perception of international criminal law, 'international crimes are so serious that they affect the international community as a whole' and thus 'injure something fundamental to being a human in a way that domestic legal systems fail to address'.[54] There are various approaches of defining "international crimes", however only four core crimes are directly criminalized and directly binding on individuals under international law. These core crimes are genocide, crimes against humanity, war crimes, and the crime of aggression.[55]

The ICC is a permanent international criminal court with jurisdiction over the four core international crimes. The ICC was established through the adoption of the Rome Statute of the International Criminal Court in 1998 and entered into force in 2002. With a purpose of prosecuting 'the most serious crimes of international concern', the adoption of the Rome Statute was a crucial step in creating a legal mechanism by which individual human right offenders would be punished.[56] However, the court can only prosecute international crimes committed after the entry into force of the Statute. Also, with regard to subsequent state parties to the Rome Statute, the court has a

[53] ibid.

[54] Stahn (n 9) 18.

[55] Henriksen (n 15) 306-315.

[56] Rome Statute Article 1: Barrera Moore (n 10) 1287.

limited jurisdiction to international crimes committed after the Statute entered into force for that specific state.[57]

According to the complementarity principle found in Article 17 of the Rome Statute, national criminal jurisdiction takes precedence over the jurisdiction of the ICC. However, the unwillingness or inability to carry out a genuine investigation or prosecution nullifies national precedence.

Article 21 of the Rome Statute states the law applicable to the ICC. Article 21(1)(a) states that the first source of law is the statue itself, the Elements of Crimes and the Rome Statute's Rules of Procedure and Evidence. Therefore, any interpretation of the Rome Statue must start with the wording of the articles. Article 21(1)(c) further states that in second place, 'where appropriate, applicable treaties and the principles and rules of international law, including the established principles of international law of armed conflict' shall be applied. Additionally, Article 21(3) requires that the application and interpretation of the sources of law 'must be consistent with internationally recognized human rights, and be without any adverse distinction founded on ground such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion…'. Rather than providing a new source of applicable law, Article 21(3) makes the applicable law subject to internationally recognized human rights. In its practice, the ICC has referred to case law and provisions of the ECHR and the European Convention on Human Rights. The ICC has made no distinction between binding or non-binding legal instruments of human rights and the ICC has additionally invoked the customary law of human rights. Since Article 21(3) mentions internationally recognized human rights, the application is not limited to *jus cogens* norms.[58]

[57] Henriksen (n 15) 306-312.

[58] William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, Oxford University Press 2016) 530.

2.4 Crimes against humanity and the crime against humanity of persecution

2.4.1Crimes against humanity

Crimes against humanity constitute one of the four core crimes of international criminal law. The international crime is closely interconnected with the protection of human rights and has been increasingly regarded as an avenue for 'protecting individual legal interests such as liberty, autonomy and human dignity'.[59]

Unlike genocide, there is no international convention codifying crimes against humanity. However, the international crime was codified in the Charter of the Nuremberg Tribunal and has been included in the statutes of other major international criminal courts and tribunals. Today, the Rome Statute contains the most comprehensive modern treaty codification.[60] Article 7(1) of the Rome Statute defines crime against humanity as:

'[A]ny of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy,

[59] Stahn (n 9) 52.

[60] Stahn (n. 9) 53.

enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.'

Article 7(2) further states the definitions of the terms and phrases used in Article 7(1). Lastly, Article 7(3) states the specific definition of the term "gender" as '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'.

2.4.2 Crime against humanity of persecution

The first time persecution was qualified as a crime against humanity was after the Armenian genocide of 1915.[61] The first time individuals were convicted for the international crime of persecution was in 1946, when the International Military Tribunal at Nuremberg (Nuremberg Tribunal) handed down its judgment in the Trial of German Major War Criminals. The Nuremberg Tribunal was trying the individuals for 'persecution on political,

[61] Stahn (n 9) 70.

racial or religious ground' under the heading of "Crimes Against Humanity".[62]

Persecution is stated as a crime against humanity in Article 7(1)(h) of the Rome Statute and defined in Article 7(2)(g) as 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectively'. The Rome Statute's enumerated discriminatory grounds cover a wider scope of protected groups compared to the *ad hoc* tribunals of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.[63] Article 7(1)(h) of the Rome Statute states that the persecuted group or collectivity need to be identifiable 'on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law'. Article 7(1)(h) further specifies that the act of persecution needs a nexus to any act referred to in the crimes against humanity paragraph or any other crime within the jurisdiction of the ICC. The nexus requirement was introduced in order to limit the interpretation of the crime to incorporate all kinds discriminatory practices.[64]

Criminal provisions, criminalizing the existence or certain conduct of a protected group or collectivity, can constitute a crime against humanity of persecution under Article 7(1)(h).[65] Historically, during the Nuremberg Tribunal, individuals, who were criminally responsible for the legal persecution of Jews and other victims of Nazism, were convicted for the crime against humanity of persecution. A framework of how legal persecution constituted a valid basis for the crime against humanity of persecution was later developed by subsequent trials.[66] In *United States v.*

[62] Scheinert (n 14) 102.

[63] Stahn (n 9) 70.

[64] ibid.

[65] Scheinert (n 14) 99.

[66] ibid 109-111.

Alstötter et al. the Tribunal stated that the German criminal provisions 'became a powerful weapon…for the extermination of certain nationals of the occupied countries' and that the enforcement of these laws constituted a crime against humanity.[67] Additionally, it was stated that legal persecution on its own can rise to the level of a crime against humanity despite an absence of an overarching goal of extermination.[68] In order to determine if cases of legal persecution constitute a crime against humanity of persecution under Article 7(1)(h) of the Rome Statute, the existence and enforcement of discriminatory laws must meet the four chapeau elements stated in Article 7(1); 1. being widespread or systematic, 2. constitute an attack, 3. directed against any civilian population, and 4. carried out with knowledge of the broader attack.

In his article 'Is Criminalization Criminal', Scheinert, found that "antigay laws" can rise to the gravity associated with international crimes, taking into account the presumption that gay people constitute a protected group under Article 7(1)(h), and satisfy the other material elements of a crime against humanity of persecution.[69]

2.5 OTP Policy Paper on Sexual and Gender-Based Crimes

In 2014, the OTP of the ICC published a Policy Paper on Sexual and Gender-Based Crimes. This, in addition to being the first policy issued by the OTP, was the culmination of the efforts by the ICC's Prosecutor Fatou Bensouda to strengthen the office's focus and expertise on the prosecution of sexual and gender-based crimes. Oosterveld argues, that the Policy Paper

[67] *United States v. Alstötter et al,* Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Council Law No. 10 (Nuremberg Military Tribunals 1946-49), para 23 and 983.

[68] ibid.

[69] Scheinert (n 14) 103.

is an important step within international criminal law and that it is innovative in three significant ways. First, it presents an inclusive understanding of the term "gender", avoiding conflations with the narrower terms of "women", "sex" and "female".[70] In the policy, the OTP states that the definition of "gender" in Article 7(3) 'acknowledges the social construction of gender' and that "sex" 'refers to the biological and physiological characteristics that define men and women'.[71] Second, the policy paper 'clarifies the meaning and application of the term "gender" in order to address confusion created by the Rome Statute's definition' in Article 7(3).[72] Third, it provided a framework for the best practices for the investigation and prosecution of sexual and gender-based crimes.[73]

[70] Valerie Oosterveld, 'The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law' (2018) 24 William & Mary Journal of Women and the Law 443, 443-444.

[71] Office of the Prosecutor (n 12) 3.

[72] Oosterveld, 'The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law' (n 70) 444.

[73] ibid.

3 Can LGBT+ people be considered as a protected group under Article 7(1) of the Rome Statute and thus protected from legal persecution?

This part of the thesis will critically examine different arguments for how LGBT+ people can be considered as a protected group under the crime against humanity of persecution in Article 7(1)(h) of the Rome Statute and thus protected from legal persecution. The arguments of different scholars will be categorized under three different grounds of protection enumerated in the article; "gender" (3.1), "political" (3.2), and "other grounds that are universally recognized as impermissible under international law" (3.3). Initially, a short introduction to each protected ground will also be made. Additionally, with an overarching purpose of assessing and furthering the rights of all LGBT+ people in international criminal law, the examined arguments will be analysed from a queer critical perspective.

3.1 Under the ground of "Gender"?

During the 1998 negotiations of the Rome Statute, the term "gender" initiated a polarized debate about the inclusion of sexual minorities under the crime against humanity of persecution in Article 7(1)(h). Prior to the negotiations, the term "gender" had not used in the International Law Commission's 1994 draft statute. The term was eventually added and

referenced to in a number of subsequent draft provisions due to the cooperation and advocacy from progressive gender-supportive states and the Women's Caucus for Gender Justice in the International Criminal Court. Ultimately, "gender" was added to the list of persecutory grounds within the crimes against humanity provision in Article 7(1)(h). However, several Arab states, the Holy See, and conservative non-governmental organizations opposed an inclusive definition of "gender", arguing that the term would provide rights based on sexual orientation and create rights for a "third sex". Consequently, the negotiations resorted to constructive ambiguity, a diplomatic tactic using indefinite language to resolve contrasting points of view. "Gender" in the Rome Statute is therefore defined in Article 7(3) as referring 'to the two sexes, male and female, within the context of society' and that the definition 'does not indicate any meaning different from the above'. This definition is arguably intentionally opaque and has led to a continued discussion about the actual meaning and scope.[74]

In scholarly literature, "gender" is the most commonly argued ground for the inclusion of LGBT+ people under the crime of humanity of persecution in Article 7(1)(h). However, jurisprudence is divided, and opinions vary. Some scholars argue that the definition of "gender" in Article 7(3) is narrow and restraining while others claim that it provides the sole avenue for the protection of LGBT+ rights in international criminal law.[75]

3.1.1 Oosterveld's argument

In her article 'The Definition of "Gender" in the Rome Statute of the International Criminal Court', Valerie Oosterveld argues that persecution

[74] Valerie Oosterveld, 'Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court' (2014), 16 International Feminist Journal of Politics 563, 563-566.

[75] Oosterveld, 'The Definition of Gender in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice' (n 46) 56.

based on the ground of "gender" includes persecution based on sexual orientation. Oosterveld presents three reasons for the argued inclusion. First, the wording of Article 7(3) does not explicitly support or mention an exclusion of sexual orientation. Oosterveld argues that the wording, resulting from the lack of consensus during the negotiation process and the subsequent constructive ambiguity, effectively leaves the definition of "gender" open for the ICC and the OTP to interpret. Oosterveld even argues that the last sentence of Article 7(3), 'The term "gender" does not indicate any meaning different from the above', is superfluous and circular. Oosterveld defends this first reason of the argument with general principles of treaty interpretation. Second, Oosterveld argues that it is 'dubious to argue that any ambiguity should be resolved in favour of discrimination'.[76] Oosterveld supports this reason by the fact that various UN treaty committees have recognized LGBT+ people's right to non-discrimination. This argument can be supported by the increasing recognition of the rights LGBT+ people further elaborated above in part 2.2. It can additionally be argued that this second reason finds support in Article 21(3) of the Rome Statute, which states that the application and interpretation of the sources of law applicable to the ICC 'must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3'.Third, Oosterveld argues that the 'conceptions of "gender" and sexual orientation are inextricably linked' and that "within the context of society" allows the ICC to consider gender as a social construct.[77] The violence and discrimination that sexual minorities face because of their non-heterosexual sexual orientation is intertwined with the violence men and women face when they diverge from the cultural norms of masculinity and femininity. Oosterveld states that the "definition of "gender" must be broad enough to capture instances of groups challenging culturally defined gender roles, which would encompass both groups defined by sexual orientation and

[76] ibid 75-78.

[77] ibid 78.

individuals who deviate norms of gender conformity 'through their dress and other social, non-sexual forms of expressions, such as transgendered individuals'.[78] It can be argued that James D. Wilets supports this third reason when claiming that 'to the extent societies are uncomfortable with homosexuality, it is usually because that activity is perceived as crossing gender, rather than sexual, boundaries' and 'thus, how a society views gender roles often determines how it treats sexual minorities'.[79]

Contrary to Oosterveld's argument, Rana Lehr-Lehnardt claims that the definition of "gender" in Article 7(3) is restraining and excludes homosexuals. Lehr-Lehnardt supports the counterargument by stating that during the Rome Statute negotiations, there were no legally binding document to draw on for the inclusion of rights for homosexuals. Lehr-Lehnardt further argues that "within the context of society" cannot be interpreted as including socially constructed concepts of gender.[80] However, I would like to argue that, with time, Lehr-Lehnardt's argument from 2002 has been proven erroneous. As elaborated above in part 2.5, in 2014, the OTP published a Policy Paper on Sexual and Gender-Based Crimes that affirmed that the definition in Article 7(3) 'acknowledges the social construction of gender and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and girls and boys'.[81] Further, the Policy Paper states that gender-based crimes committed against persons, because of their sex and/or socially constructed gender roles, includes persecution on the ground of "gender".[82] Therefore it can clearly be argued

[78] ibid.

[79] James D Wilets, 'Conceptualizing Private Violence against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective' (1997) 60 Albany Law Review 989, 1007.

[80] Rana Lehr-Lehnardt, 'One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court' (2002) 16 BYU Journal of Public Law 317, 351-352.

[81] Office of the Prosecutor (n 12) 15.

[82] ibid 16.

that the definition of "gender" can be interpreted in accordance with Oosterveld's argument as including socially constructed concepts of gender. This, in addition with Oosterveld's claim that the 'conceptions of "gender" and sexual orientation are inextricably linked' increases the inclusivity of the argument for the protection of all LGBT+ people.

Michael Bohlander argues against the basic premise of Oosterveld's first reason, claiming that 'it appears unconvincing to assume that the drafters engaged in a conspiratorial exercise of "constructive ambiguity"'.[83] Bohlander argues that it would not have been in the interest of the opposing states that wording of Article 7(3) would allow a possibility for the inclusion sexual and gender minorities. However, Bohlander includes a private email from Oosterveld in the article where Oosterveld explains that:

'Those opposed to the inclusion of the term were in the minority, and therefore they face the possibility of losing if 7(3) was put to a vote…This, it was in their interest to try to seek wording that could be ambiguous enough to be read narrowly. Conversely, while those supportive of the term were in the majority, they were also from states opposed to voting. Thus, they sought wording that could be understood in light of future developments within international law in support of LGBT rights.'[84]

Therefore, it can be established that Article 7(3) is the result of constructive ambiguity and that the term "gender" is open to an inclusive definition.

From a queer perspective, it is crucial to mention that the discrimination of sexual and gender minorities encompasses more than just oppression of cis-gender homosexuals. As Wilets argues, 'focusing solely on groups defined by their sexual orientation…would not address human rights violations against a wide range of other individuals who violate norms of gender

[83] Bohlander (n 13) 409.

[84] ibid.

conformity through their dress and other social, non-sexual forms of expression, such as transgender individuals'.[85] Despite Oosterveld's argument that the definition of "gender" is broad and inclusive enough to encompass both groups defined by sexual orientation and individuals who deviate norms of gender conformity, I argue that the protection that can be offered by her argument for certain sex and gender minorities, e.g. non-binary transgender and intersex people, is more complicated and dubious. The umbrella term of "transgender people" includes more than individuals who self-identify as male or female. Individuals who identify as having a third gender, a fluctuating gender or no gender, i.e. non-binary, are also categorized as transgender people.[86] Brian Kritz argues that the definition of "gender" in Article 7(3) excludes non-binary transgender and intersex persons. Due to the fact that Article 7(3) states "male and female", Kritz argues that only transgender people who identify as male or female fall into the purview of protection, hence excluding non-binary transgender.[87] Oosterveld's argument does not take these groups into account. Although Kritz argument is compelling, one might think that the sole solution would be a revision or alteration of the Rome Statute. However, non-binary transgender and intersex people might still be protected from legal persecution through Oosterveld's argument, if one regards the fact that in international criminal law, the victim's membership in a group is defined by the perception of the perpetrator. A protected groups does not only compromise persons who personally carry the characteristics of the groups, but also persons who are perceived by the perpetrator to be a part of the group.[88] For example, if a state criminalizes transgender people, the

[85] Wilets (n 79) 1007.

[86] Kimberly Tauches, 'Transgender' (*Encyclopædia Britannica*) <https://www.britannica.com/topic/transgender> accessed 5 May 2020.

[87] Kritz (n 15) 36.

[88] That the victim's membership in a group is defined by the perception of the perpetrator has been revealed and affirmed in jurisprudence from the ECCC, the ICTY and the ICC. *Prosecutor v Kaing Guek Eav alias Duch* (Judgement) 001/18-07-2007/ECCC/TC (26 July 2010), para 377: *Prosecutor v Naletilic and Martinovic* (Judgment) IT-98-34-T (31 March

persecution of non-binary transgender persons could constitute crimes against humanity of gender persecution, if the perpetrator perceives these individuals as being male or female and thus not conforming to socially constructed norms of maleness and femaleness. In states that criminalize the gender identity or the gender expression of transgender people, it is highly unlikely that the perpetrators of the legal persecution acknowledge or recognise the actual existence of non-binary transgender people. Additionally, despite the lack of legal recognition globally, intersex people are not directly criminalized in any state.[89] However, they can be arbitrarily targeted under laws targeting homosexual and transgender people. Thus, the perpetrators' perception of non-binary transgender and intersex people as being homosexuals or binary transgender could grant these groups international legal protection from persecution under Article 7(1)(h) in accordance with Oosterveld's argument. This protection would also be offered without a revision of the Rome Statute. Although, this pathway to protection is both problematic and precarious since the protection is exclusively dependent on the perception of the perpetrators.

Furthermore, tying the protection from legal persecution of non-binary transgender and intersex people to the restrictive definition of "gender" in Article 7(3) would in a way be a failure to validate and recognize the identity of these groups.[90] As mentioned above in part 1.4.2, Otto argues that queer legal theory goes beyond LGBT+ normative inclusion and should aim at rethinking the conceptual and analytical fundaments of international law's assessment of "normal". Interpreting the definition of "gender" as to not de facto include non-binary transgender and intersex people, but only

2003), para 636: *Prosecutor v Laurent Gbagbo* (Decision on the Confirmation of Charges against Laurent Gbagbo) ICC-02/11-01/11 (12 June 2014), paras 67 and 205: *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-02/11 (23 January 2012).

89 'Intersex' (n 31).

90 Sumner Hagopian (n 5) 64.

rely on the perception of perpetrators, would neither be a definite normative inclusion nor a reassessment of "normal". It would rather manifest that these gender minorities are deviations of normal and excluded. However, the specific wording of 7(3) seems to make the inclusion of non-binary transgender and intersex people impossible in any other way.

Within queer legal theory, rethinking and analysing the "normal" is fundamental. Therefore, it is crucial to rethink and analyse what constitutes "normal" or typical legal persecution. As mentioned above, despite the fact that intersex people are not directly criminalised per se, it is arguable that laws requiring intersex children to undergo unnecessary surgical and other medical procedures, or the lack of laws prohibiting such practice, for the purpose of conforming their bodies to male or female, constitute a form of legal persecution. It has been proven that these, often irreversible and non-consensual, procedures cause both permanent physical and mental suffering. OHCHR has equated these procedures with violations of the right to physical integrity, the right to freedom from torture and ill-treatment, and the right to freedom from harmful practices.[91] In accordance with Oosterveld's argument it can further be argued that these intersex children are being targeted on the ground of gender since they are perceived to be either male or female and that their bodies are not conforming with the gender norms 'within the context of society'.

3.1.2 Josh Scheinert's argument

In the article 'Is Criminalization Criminal?' Josh Scheinert argues that the opaque definition (constructive ambiguity), in Article 7(3) is open enough that the arrest of two men or two women under domestic antigay laws can constitute legal persecution based on gender. In essence, Scheinert's main

[91] United Nations Human Rights Office of the High Commissioner, 'Intersex' *(United Nations Free & Equal)* <https://www.unfe.org/wp-content/uploads/2017/05/UNFE-Intersex.pdf> accessed 20 April 2020.

argument is that criminal provisions criminalizing sexual activities between two persons of the same sex can be considered as legal persecution of a protected group since gender figures prominently in the targeting. It is the underlying gender of the two individuals that provides the sanction for arrest. Therefore, such criminal provisions would constitute a crime against humanity of persecution. Scheinert claims that the arguably restrictive definition of "gender" in Article 7(3) does not exclude legal persecution targeting two individuals of the same gender.[92] Scheinert concludes that 'the fact that there is another aspect of their identity, their sexuality, whether know or perceived, that also causes them to be targeted, does not detract from the fact that gender plays a key role in targeting them.'[93]

Unlike Oosterveld, Scheinert does not discuss or mention that gender, within the realm of the OTP, is socially constructed. Nor does he mention that homosexuals would be targeted due to their gender non-conformity. I agree that gender indeed plays a key role in the targeting. However, altogether omitting an analysis of the actual underlying reasons for the targeting of homosexuals, which I claim, with support from Wilets and Oosterveld, stem from non-conformity to societal gender norms, is precarious.[94] Contrary to Scheinert, I would argue that the preliminary perceived ground for the legal persecution of homosexuals is not the gender of the targeted individuals, but the sexuality. As an example, in states that criminalize homosexuality, affectionate but non-romantic acts between two men, e.g. hugs and other kinds of physical contact, are likely to not be perceived as criminal acts if the men are not perceived to be homosexuals. The perceived sexuality of the individuals is therefore crucial in the eyes of the enforcement of the legal persecution.

[92] Scheinert (n 14) 130.

[93] ibid 129-130.

[94] Wilets (n 79) 1007: Oosterveld (n 76) 78.

Scheinert further omits discussing the protection of gender minorities and intersex people in his article. However, it is worth analysing if Scheinert's argument can be used to incorporate these groups. It can be argued that in states that criminalize people whose gender expression is perceived to be different from the assigned sex at birth (birth sex), "gender" figures prominently in the targeting. The fact that the persecuted individuals identify with a gender different from birth sex does not annul that this birth sex provides the sanction for arrest. This analysis is in line with the analysis previously elaborated in part 3.1.1. Although, the dependency on the perception of the perpetrator presents again a complex dilemma.

3.1.3 Charles Barrera Moore's argument

Charles Barrera Moore uses comparative law in his note 'Embracing Ambiguity and Adopting Propriety' to argue that the definition of 'gender' found in Article 7(1)(h) of the Rome Statute should include the protection of LGBT+ people. Barrera Moore argues that the ambiguity that followed the definition of 'gender' during the negotiations of the Rome Statue does not preclude the protection of LGBT+ people. Despite the fact that human right courts deal with the responsibility of states and the ICC with individual criminal responsibility, Barrera Moore claims that the two are interconnected since they promote and protect the same human rights. This interconnectedness thus allows the courts to borrow from each other.[95] This argument is consistent with Article 21(3) of the Rome Statute stating that 'the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender'. Additionally, as described in part 2.2, the ICC has referred to case law and provisions of the ECHR and the European Convention on Human Rights in its practice. However, the Rome Statute also states in Article 22(2) that 'the definition of

[95] Barrera Moore (n 11) 1291-1318.

a crime shall be strictly construed and shall not be extended by analogy'. Barrera Moore continues by arguing that the ICC should and must consider acts of other human rights courts. He exemplifies with practice by the ECHR and the Inter-American Commission on Human Rights (IACHR) that has made steps towards protection LGBT+ people.[96]

Barrera Moore refers to two cases from the ECHR supporting his argument: *Kozak v. Poland*, *X v. Turkey*. I argue that the relevance of these cases to the issue of whether the definition of "gender" in Article 7(3) of the Rome Statute can include LGBT+ people is questionable. In the referenced cases, the ECHR found protection from discrimination for homosexual men under Article 14 of the European Convention on Human Rights. ECHR stated in *X v. Turkey* that 'sexual orientation attracts the protection of Article 14'.[97] Article 14 enumerates the grounds that offer protection from discrimination under the Convention, however, the list does not include "gender" but "sex" and "other status".[98] Barrera Moore mentions that 'it appears as though the ECHR determined that the LGBT community fell under the more restrictive term of "sex"' and that 'it is doubtful that the ECHR would find that the LGBT community fell under the categorization of the other protected grounds'.[99] I argue that this statement is incorrect. The ECHR states in their 'Guide on Article 14 of the European Convention on Human Rights' that 'the Court has repeatedly included sexual orientation among "other grounds" protected under Article 14' making reference to both *Kozak v. Poland and X v. Turkey*.[100] Additionally, the guideline states that gender

96 ibid 1321.

97 *X v. Turkey*, App no 24626/09 (ECHR, 9 October 2012), para 50.

98 European Convention on Human Rights Article 14 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'

99 Barrera Moore (n 11) 1306-1309.

100 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (*ECHR* 31 December 2019)

identity is also included under "other status" and that gender identity and sexual orientation are two distinctive and intimate characteristics.[101] Barrera Moore continues to claim that despite the fact that the European Convention of Human Rights refers to discrimination based on "sex" rather than "gender", the logic from the ECHR can 'certainly be applied under a broader "gender" framework".[102] Since Barrera Moore's argument is based on false premises, it is undoubtedly weak from a queer critical perspective. Adopting propriety from the ECHR, in the way Barrera Moore argues, would not advance the rights of LGBT+ people under international criminal law. Barrera Moore is further neglecting the protection of others than homosexuals. A reference to *Identiba and Others v. Georgia,* a case where the Court recognized that 'Article 14 of the Convention duly covers questions related to sexual orientation and gender identity', would have made his argument more inclusive and stronger from a queer critical perspective.[103] However, as mentioned above, Barrera Moore outright denies that LGBT+ people would fall under the "other status" ground. Furthermore, the fact that terms "gender" and "sex" have different meanings is essential. In the OTP Policy Paper, "sex" refers strictly to the biological and physiological characteristics that define men and women, while "gender" acknowledges the social construct of gender roles.[104] Barrera Moore's employed method of comparative law and adoption would perhaps be more adequate if he would have tried to interconnect the terms "other status" and "other grounds that are universally recognized as impermissible under international law". However, as will be presented later in 3.3, Barrera Moore argues that "universally recognized" implies a high burden of international recognition that LGBT+ people are not able to meet.[105]

<https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf> accessed 24 May 2020, 149-150.

[101] ibid 145.

[102] Barrera Moore (n 11) 1287.

[103] *Identoba and Others v. Georgia,* App no 73235/12 (ECHR, 12 May 2015), para 96.

[104] Office of the Prosecutor (n 15) 3.

[105] Barrera Moore (n 11) 1305.

3.2 Under the ground of “political”?

In the Rome statute, political grounds are not limited to grounds that ‘concern membership of a particular political party or adherence to a particular ideology’[106]. The term “political” should be understood as including a variety of public affairs issues and that a political ground for persecution covers ‘the existence of a difference of opinion concerning these issues as a reason for committing the acts concerned’.[107] According to the Report of the Expert Group Meeting on Gender-Based Persecution, political opinion or imputed political opinion can be determined from the expressed opinion of a group, but also the behaviour of a group. The report exemplifies by stating that the non-conformity to cultural or social gender norms by a woman might constitute a political opinion of behaviour. A woman could therefore be imputed the political opinion of feminism due to her behaviour and subsequent breach of gender norms.[108] Although, it is worth to mention that the legal definition recommendations presented in the report were made in the context of the term ‘political opinion’ in the 1951 Refugee Convention.

3.2.1 Andre Sumner Hagopian’s argument

In his article ‘Persecution and Protection of Sexual and Gender Minorities under Article 7(1)(h) of the Rome Statute’, Andre Sumner Hagopian argues that LGBT+ people, in some cases, may be considered groups on political

[106] Christopher K. Hall, ‘Jurisdiction, Admissibility and Applicable Law – Crimes against humanity’ in Otto Triffterer and Kai Ambos (eds.) *Rome Statute of the International Criminal Court: A Commentary* (Bloomsbury T&T Clark 2016), 77.

[107] ibid.

[108] UN Division for the Advancement of Women, Department of Economic and Social Affairs, ‘Gender-based persecution – Report of the Expert Group Meeting’ (9-12 November 1997) EMG/GBP/1997/Report, para 44.

grounds. Sumner Hagopian bases his argumentation on two premises. One, the fact that, for the purpose of the Rome Statute, an individual's membership within a specific group is determined by the perpetrator. Two, as mentioned above, political grounds do not require membership of a political party or adherence to a particular ideology. Sumner Hagopian argues that an individual's political activism, for the advancements of the rights of the political group, can meet the definition of a political group. Essentially, if the perpetrator defines LGBT+ individuals as for example "gay activists" or "gender activists" they can be considered as a political group under Article 7(1)(h).[109] Different to other arguments for the inclusion of LGBT+ people, Sumner Hagopian's argument would encompass legal persecution in the form of laws banning "gay propaganda". However, Sumner Hagopian's argument is weaker concerning persecution that is motivated by the perpetrator's phobia towards LGBT+ people rather than their belonging to a politically active group.

From a queer perspective, Sumner Hagopian presents a unique and interesting argument. However, as mentioned above in part 3.1.1 and part 3.1.2 the fact that the protection is dependent on the perception of the perpetrator is precarious. Furthermore, an argument exclusively based on considering LGBT+ people as a political group under Article 7(1)(h) is problematic. Sumner Hagopian's argument is weak since it presumably would not be able to protect the vast majority of LGBT+ people. It is unlikely that the perpetrators of legal persecution, in countries where LGBT+ people are criminalized, would perceive all LGBT+ people to be political activists rather than immoral and unnatural outcasts. In fact, based on the wordings used in the Ugandan Penal Code ('against the order of nature') and the Jamaican Offences against the Person Act ('outrages on decency', 'abominable crime of buggery'), I argue that these states would

[109] Sumner Hagopian (n 5) 59-60.

not perceive LGBT+ people to be a political group.[110] A comparison can be made to criminal acts criminalizing certain political groups or political activities.[111] However, it can be argued that the criminal provisions criminalising LGBT+ people reflect the perceptions of the former colonial rule. As an example, in the 2014 Ugandan Anti-Homosexuality-Act, no reference is made to "the order of nature" or "unnatural offences".[112] However, Sumner Hagopian's argument has one important merit in the fact that it could protect LGBT+ people in states such as Russia, where same-sex sexual activity is legal, but "homosexual propaganda" is regulated and criminalized.[113]

Further, analysing Sumner Hagopian's argument from a queer critical perspective of inclusivity, it is improbable that intersex people would be perceived as a political group. As an example, it is highly unlikely that the unnecessary surgical and medical procedures, performed involuntarily on intersex children, are carried out because of the perceived political affiliation of these children. Rather, these children are targeted since their bodies do not conform to the binary sex norm of the society in question.

110 'Penal Code Act 1950' (*Uganda Legal Information Institute)* <https://ulii.org/ug/legislation/consolidated-act/120> accessed 24 May 2020, para 145: 'Offences against the Person Act' (Ministry of Justice – Government of Jamaica) <https://moj.gov.jm/sites/default/files/laws/Offences%20Against%20the%20Person%20Act_0.pdf> accessed 24 May 2020, para 76 and 79.

111 Examples of criminal provisions criminalizing certain political groups can be found in: 'Communist Control Act of 1954' (United States of America) <https://www.govinfo.gov/content/pkg/STATUTE-68/pdf/STATUTE-68-Pg775.pdf> accessed 25 May 2020: Korean Legislation Research Institute, 'National Security Act' (Korean Law Translation Center, Republic of Korea) <https://elaw.klri.re.kr/eng_service/lawView.do?hseq=26692&lang=ENG> accessed 25 May 2020.

112 'Anti Homosexuality Act, 2014, 2013' (*Uganda Legal Information Institute)* <https://ulii.org/ug/legislation/act/2015/2014> accessed 25 May 2020.

113 Paul Johnson, 'Homosexual Propaganda' Laws in the Russian Federation: Are They in Violation of the European Convention on Human Rights?' (2015) 3 Russian Law Journal 37, 37.

Therefore Sumner Hagopian's argument is weak concerning the protection of intersex people.

3.3 Under the ground of "other grounds that are universally recognised as impermissible under international law"?

In addition to the explicitly enumerated protected groups in Article 7(1)(h), persecution under the Rome Statute can be committed on the basis of 'other grounds that are universally recognized as impermissible under international law'. Although the requirement of "universally recognized" might present a critical challenge to the inclusion of new protected groups, it allows for a degree of flexibility and 'invites the Court to extend the scope of persecution to cover analogous ground'.[114]

3.3.1Josh Scheinert's argument

In his article, 'Is Criminalization Criminal', Josh Scheinert presents an argument for why sexual orientation can constitute a protected ground universally recognized as impermissible under international law. Despite the fact that seventy-six states (2013) criminalize acts associated with homosexuality, Scheinert argues that domestic legality does not constitute a veto over international human rights.[115] Scheinert claims that an argument for the permissibility under international law to arrest gay individuals under domestic laws, because several states do precisely that, would set a precedent leading to 'an absurd reality'.[116] This argument aligns with

[114] Schabas (n 56) 197.

[115] Scheinert bases this number (76) on a 2013 ILGA Report see Lucas Paoli Itaborahy and Jingshu Zhu, 'State-Sponsored Homophobia' (ILGA 2013) <https://ilga.org/state-sponsored-homophobia-report-2013-ILGA> accessed 25 May 2020.
The 2019 report states 68 (n 3).

[116] Scheinert (n 14) 130.

William A. Schabas commentary on the Rome Statute stating that 'in the identification of "other grounds" it would be a mistake to exclude categories based upon national practice'. The fact that negative or contrary practice, in respect to the listed protected grounds in the Rome Statute, exists in many parts of the world, does not elicit admissibility under international law. In essence, whether the ground is universally recognized as impermissible under international law or not is not dependent on if persecution based on the ground actually occur.[117] Scheinert further states that if domestic legality of persecution could serve as a defence against international prosecution, it would 'undermine the protections international criminal law is seeking to instill'.[118] Scheinert's argument for the inclusion of sexual minorities under the ground of "other grounds that are universally recognized as impermissible under international law" is based on the strong international consensus that sexual orientation is a prohibited ground for discrimination. Scheinert supports this with references to jurisprudence by international and domestic human rights courts, UN resolutions and treaty bodies, works by scholars, and the Yogyakarta Principles. According to Scheinert, cultural arguments claiming the opposite, are not valid. Scheinert's final argument, for why targeting LGBT+ people is universally recognized as impermissible under international law, is the lack of enforcement of anti-LGBT+ laws in the states that criminalize LGBT+ people.[119]

Sumner Hagopian disagrees with the assertion presented by Scheinert, arguing that Scheinert is 'omitting an analysis of the standard itself'. Sumner Hagopian underpins his argument by claiming that there is a lack of consensus around LGBT+ protection in state practice and that this practice should not be neglected. Additionally, Sumner Hagopian points at the fact that the Human Rights Council in 2011 only narrowly approved the Resolution 17/19 on 'Human Rights, Sexual Orientation and Gender

[117] Schabas (n 56) 198.

[118] Scheinert (n 14) 131.

[119] ibid 131-133.

Identity' which confirmed that international human rights law affords protection based on sexual orientation.[120] This resolution is referenced by Scheinert as evidence for the international recognition of LGBT+ people's right to non-discrimination.[121] Sumner Hagopian concludes by stating that lack of consensus within customary law combined with the persistent state practice makes it difficult to argue that LGBT+ people constitute a protected group of universal recognition.[122]

Barrera Moore also presents counterarguments for including LGBT+ people under the ground of "other grounds that are universally recognized as impermissible under international law" based on an overview the wording in the Rome Statue. Article 7(1)(h) contains the only occurrence of the wording "universally recognized" in the treaty. Other articles, such as Article 21(1)(c) and Article 21(3) acknowledge 'internationally recognized human rights' and 'internationally recognized norms and standards'. Barrera Moore claims that this specific wording creates a 'higher threshold' and that "universally recognized" equals *jus cogens* [123] norms.[124] According to Barrera Moore, the protection of LGBT+ rights should therefore be a *jus cogens* norm in order for the Court to include LGBT+ people under the ground of "other grounds that are universally recognized as impermissible under international law", which he concludes is 'highly unlikely'.[125] He contrasts the argument made my Scheinert claiming that 'the mere fact that several states still criminalize homosexual conduct in and of itself' indicates

[120] Sumner Hagopian (n 5) 68.

[121] Scheinert (n 14) 132.

[122] Sumner Hagopian (n 5) 68.

[123] *Jus cogens* 'is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character' United Nations, 'Vienna Convention on the Law of Treaties' (23 May 1969) 1155 United Nations Treaty Series 331, Article 53.

[124] Barrera Moore (n 11) 1306.

[125] ibid.

that LGBT+ protection is not a universal norm.[126] This counterargument can be supported by Bohlander's claim that 'the international community still do not speak with one voice' in regard to LGBT+ rights.[127]

From a queer critical perspective of inclusivity, the recognition of transgender and intersex rights in international law is of importance. In his article 'The Global Transgender Population and the International Criminal Court' Kritz claims that although the recognition of lesbian, gay, and bisexual rights has received considerable global attention in recent years, 'the international call for increased prevention of rights abuses against transgender persons, promotion of transgender rights, and protection of transgender communities' remains pale in comparison.[128] Therefore, I argue that Scheinert's argument for the inclusion of LGBT+ under the ground of "other grounds that are universally recognized as impermissible under international law" is weak concerning two premises. One, Scheinert only discusses the inclusion of sexual orientation, omitting an analyse about the recognition of the rights of transgender and intersex people. Two, as described above, it remains debatable whether lesbian, gay and bisexual people constitute a protected group of universal recognition. The ground remains too ambiguous for Scheinert's argument to be viable for the protection of all LGBT+ people from legal persecution.

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[126] ibid.

[127] Bohlander (n 13) 412.

[128] Kritz (n 16) 2.

4 Conclusions

The thesis has aimed at answering the research question of: ‘Can LGBT+ people be considered a protected group under Article 7(1)(h) of the Rome Statute and thus protected from legal persecution?’ with the subsequent research questions of: ‘Under the ground of “gender”?’, ‘Under the ground “political”?’, and’ Under the ground of “other grounds that are universally recognized as impermissible under international law”?’. In general, the thesis has argued that the main research question and the subsequent questions should all be answered partly in the affirmative because, as presented in part 3.1-3, there are valid arguments for the inclusion of some LGBT+ people under all the examined protected grounds. However, concerning the purpose of the thesis, to assess and further the rights of all LGBT+ people in international criminal law, the outcome of the research is more complex.

The inclusion of LGBT+ people under Article 7(1)(h) of the Rome Statute will remain a highly topical and debated issue. However, the OTP has made an apparent and definite step, through the Policy Paper on Sexual and Gender-Based Crimes, towards the recognition of some LGBT+ rights in the ICC. What is needed now is an actual international criminal investigation and prosecution of legal persecution towards LGBT+ people. Ultimately, according to Article 15 of the Rome Statute, it is the OTP who has the power to conduct preliminary examinations and decide whether there is a reasonable basis to proceed with investigations. There have been movements towards the prosecution of legal persecution of LGBT+ people. In 2017, the OTP received a communication urging the Prosecutor to ‘launch an investigation into gender-based crimes committed by foreign fighters in the Islamic State of Iraq and al-Sham/Greater Syria against

civilians in Iraq'.[129] Even though the communication does not concern legal persecution in the traditional sense, it is still relevant since in refers to ISIS' rules for men and boys 'which require them to adhere to the organization's prescribed gender roles'.[130]

Due to the OTP Policy Paper and the academic support for the inclusion of some LGBT+ people under the ground of "gender", I consider it the most feasible and viable avenue for the protection of LGBT+ rights in international criminal law. Oosterveld's argument, based on the constructive ambiguity of Article 7(3), the recognition of LGBT+ rights in international human rights law, and the interconnectedness of the conceptions of "gender" and "sexual orientation", is compelling. However, Sumner Hagopian's argument for the inclusion under the ground of "political" presents a strong alternative in cases of "anti-gay propaganda" laws. Such laws, although not directly criminalizing the existence of LGBT+ people, still have severe consequences for the human rights of LGBT+ people.[131] The ground of "other grounds that are universally recognized as impermissible under international law", although seemingly flexible and adaptable to development in other field of international law, remains too ambiguous for the protection of all LGBT+ people.

[129] The Human Rights and Gender Justice Clinic of the City University of New York School of Law, MADRE, and The Organization of Women's Freedom in Iraq, 'Communication of the ICC Prosecutor Pursuant to Article 15 of the Rome Statute' (*Madre,* 8 November 2017) <https://www.madre.org/sites/default/files/PDFs/CUNY%20MADRE%20OWFI%20Article%2015%20Communication%20Submission%20Gender%20Crimes%20in%20Iraq.pdf> accessed 26 May 2020, 1.

[130] ibid 13.

[131] The UN Human Rights Committee has stated that the Russian "anti-gay propaganda" law constitutes an unjustifiable violation of Article 26 of the ICCPR. UN Human Rights Committee, 'Views adopted by the Committee under article 5 (4) of the Optional Protocol concerning communication NO.2318/2013' (23 August 2018) CCPR/C/123/D/2318/2013, para 7,5.

A queer critical analysis of the arguments under all grounds illuminates the lack of research and analysis done on the issues of the rights of non-binary transgender people and intersex people. The examined arguments mainly focus on the protection of sexual minorities and the term “antigay” is frequently used. However, many of the arguments can be used for LGBT+ normative inclusion and validate the protection of both sexual and gender minorities. Although, the fact that the current wording of Article 7(3) clearly and undeniably excludes non-binary gender minorities and intersex people will continue to be a legal obstacle. Even though the Policy Paper explicitly acknowledges that gender is a social construction, it cannot change the wording of the article restricting the ICC to a binary gender system. However, if one disregards the problematic aspects, the perception of the perpetrator might provide the sole pathway to protection these groups. Since the global legal recognition of non-binary genders is sparse, these groups will probably continue to be perceived as male or female for an unforeseeable future. The same could be argued for intersex people, since few countries legally recognize their status and rights.

It is evident that Article 7(3), as proponents of critical legal theory and queer legal theory believe, reflects and supports the interest of those who created the Rome Statute. The definition of the term “gender” was contested and ultimately resulted in constructive ambiguity. To some extent the definition reflects both the interest of the conservative states and the progressive states. It can also be argued that none of the contending sides reflect the interests of non-binary transgender people and intersex people, since these two groups are expressively excluded from being directly encompassed by the definition. Even in progressive states that generally respect and protect the rights of sexual minorities, the protection and recognition of gender minorities and intersex people are insufficient.

In conclusion, the protection LGBT+ rights in international criminal law is limited but not cemented. It is ignorant to believe that the increased recognition and protection of LGBT+ rights in other fields of international

law will not have an impact on international criminal law. However, the fight for the rights of all LGBT+ people will continue to struggle. Hopefully the OTP and the ICC will take steps in the right direction that will lead to further advances for the human rights of all LGBT+ people.

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