



FACULTY OF LAW  
Lund University

Ebba Torgersson

# Persecution based on sexual orientation or gender identity

- A crime under international law?

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Supervisor: Marja-Liisa Öberg

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# Summary

People of sexual and gender minorities have for decades been discriminated, harassed and prosecuted in large parts of the world due to their sexual orientation or gender identity. Although the acceptance for these groups has increased over the past couple years, the problems still persists. Today, nearly 70 United Nation member states criminalize consensual same-sex sexual acts between adults, and at least six states implement death penalty for the same acts. Ever since the Rome Statute entered into force there has been a continuous debate on whether or not the LGBT+ community is protected from persecution under international criminal law. The paper aims to analyse in what ways the LGBT+ community can find protection from persecution under the Rome Statute, by looking at article 7(1)(h) of the Rome Statute, as well as other international courts and organs.

The study examines the most relevant arguments for including the LGBT+ community under article 7(1)(h) of the Rome Statute. The term “gender” and “other grounds that are universally recognized as impermissible under international law” will be studied to determine if the community could successfully find protection within one of these groups. Additionally, the paper will investigate how other international courts view the question of protecting the LBGT+ community under international law. It will further be examined to what extent the International Criminal Court can take lead from the judgements made by these courts.

The study concludes that the topic will continue to be highly topical until the International Criminal Court rules in the matter. While considering the uncertainty, several arguments point to the fact that people of sexual minorities are likely to find protection from persecution under article 7(1)(h) of the Rome Statute, whereas people of gender minorities are not as likely to find the same protection.

# Sammanfattning

Människor tillhörande sexuella minoriteter och könsminoriteter har i årtionden blivit diskriminerade, trakasserade och åtalade i stora delar av världen till följd av sin sexuella läggning eller könsidentitet. Även om acceptansen för dessa grupper har ökat under de senaste åren är problemen fortfarande närvarande. Idag är det kriminaliserat att ingå samtyckliga sexuella handlingar mellan två personer av samma kön i nästan 70 av FN:s medlemsländer, och i minst sex länder straffas dessa handlingar med döden. Frågan huruvida HBTQ+ personer är skyddade från förföljelse inom den internationella straffrätten är något som kontinuerligt har diskuterats sedan Romstadgan trädde ikraft. Uppsatsen undersöker vilka möjligheter HBTQ+ personer har att finna skydd från förföljelse under Romstadgan genom att dels analysera artikel 7(1)(h) i Romstadgan, dels titta på andra internationella domstolar och organ.

Studien examinerar de mest relevanta argumenten för att inkludera HBTQ+ personer under artikel 7(1)(h) i Romstadgan, och kollar därav närmare på i vilken utsträckning som gruppen kan finna skydd under grunderna: ”kön” och ”andra skäl som är universellt erkända som otillåtna enligt internationell rätt”. Utöver detta undersöker studien hur andra internationella domstolar ser på frågan om HBTQ+ personers rätt till skydd i den internationella rätten, samt även i vilken utsträckning den Internationella brottsmålsdomstolen kan ta ledning från dessa domar.

I uppsatsen dras slutsatsen att ämnet kommer fortsätta vara mycket aktuellt tills den Internationella brottsmålsdomstolen avgör frågan. Trots de osäkerheter som föreligger, pekar flera argument på det faktum att människor tillhörande sexuella minoriteter har stora möjligheter att finna skydd från förföljelse under artikel 7(1)(h) i Romstadgan, medan människor tillhörande könsminoriteter inte är lika troliga att finna samma skydd.

# Abbreviations

ACHR	American Convention on Human Rights
ECHR	European Court of Human Rights
HRW	Human Rights Watch
IACHR	Inter-American Commission on Human Rights
IACrtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILGA	The International Lesbian, Gay, Bisexual, Trans and Intersex Association
LGBT+	Lesbian, gay, bisexual and transgender plus. The plus stands to include other marginalized groups such as intersex, queer, asexual etc.
OTP	The Office of the Prosecutor
Rome Statute	Rome Statute of the International Criminal Court
UDHR	Universal Declaration of Human Rights
UN	United Nations

# 1 Introduction

“Everyone has the right to be free from criminalisation and any form of sanction arising directly or indirectly from that person’s actual or perceived sexual orientation, gender identity, gender expression or sex characteristics.”

- Yogyakarta Principle 33.

## 1.1 Background

The discussion on the rights of sexual and gender minorities has increased over the past decades.<sup>1</sup> It has erupted out of multiple global events, especially due to the fact that 120 states adopted the Rome Statute of the International Criminal Court (Rome Statute) in 1998.<sup>2</sup> The Rome Statute is the first international treaty that regulates an extensive list of sexual and gender-based crimes that are applicable in both international and non-international armed conflicts.<sup>3</sup> The list of crimes against humanity is extensive and comprises, inter alia, rape, sexual slavery and persecution on the ground of gender.<sup>4</sup>

The lesbian, gay, bisexual and transgender+<sup>5</sup> (LGBT+) community has historically been exposed and vulnerable to many forms of discriminatory acts. Although, the acceptance for the LGBT+ community has increased globally over the past two decades,<sup>6</sup> statistics show that today still 68 United Nation (UN) member states criminalize consensual same-sex sexual acts

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<sup>1</sup> CNN Editorial Research, “LGBTQ Rights Milestones Fast Facts”, <<https://edition.cnn.com/2015/06/19/us/lgbt-rights-milestones-fast-facts/index.html>>, visited 2020-11-24; Pew Research Center, “How LGBT adults see society and how the public sees them”, <<https://www.pewresearch.org/fact-tank/2013/06/25/how-lgbt-adults-see-society-and-how-the-public-sees-them/>>, visited 2020-11-24.

<sup>2</sup> The International Criminal Court, “Joining Rome Statute Matters”, <<https://www.icc-cpi.int/Publications/Joining-Rome-Statute-Matters.pdf>>, visited 2020-11-23.

<sup>3</sup> Office of the Prosecutor, “Policy Paper on Sexual and Gender-based Crimes”, <<https://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexual-and-gender-based-crimes-june-2014.pdf>>, visited 2020-11-23.

<sup>4</sup> Rome Statute art. 7.

<sup>5</sup> The ‘+’ stands to include other groups such as intersex, queer, asexual etc.

<sup>6</sup> Poushter and Kent (2020).

between adults,<sup>7</sup> and at least six countries enforce death penalty for these acts.<sup>8</sup> In many instances, countries use vague terms when defining the legality of same-sex sexual conducts such as “acts against nature”, “indecency” and “immoral acts”.<sup>9</sup> This opens up for interpretation, and misinterpretation, when it comes to prosecution and leads to millions of people living in fear of being arrested and punished based on their identity or sexual preference. Even if some of the countries included in the numbers above are not enforcing the strict laws, the laws themselves contribute to an acceptance of harassments, blackmail and violence, leaving the exposed group feeling like they have no protection.<sup>10</sup>

The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) shows in a report from 2019 that there are many cases in for example Iran, Morocco and Egypt where people have been charged with “homosexuality”, “spreading corruption on earth” and “homosexual acts”.<sup>11</sup> This shows that even if the discussion of LGBT+ rights has increased drastically during the 21<sup>st</sup> century, there is still a long way to go before people of the LGBT+ community can enjoy the same rights and legal protection as a heterosexual cisgender<sup>12</sup> person.

It is a continuous debate whether or not the LGBT+ community is protected under international law. The community was consciously left out when wording article 7(1)(h) of the Rome Statute, something that has been discussed widely ever since.<sup>13</sup> A recent study made in May 2020 by the Thomas Reuters Foundation, in collaboration with the gay dating app Hornet,

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<sup>7</sup> Mendos (2019) p. 47.

<sup>8</sup> Human Dignity Trust, “Map of Countries that Criminalise LGBT People”, <[https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/?type\\_filter=death\\_pen\\_applies](https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/?type_filter=death_pen_applies)>, visited 2020-11-23.

<sup>9</sup> Mendos (2019) p. 47.

<sup>10</sup> Amnesty International, “LGBTI Rights”, <<https://www.amnesty.org/en/what-we-do/discrimination/lgbt-rights/>>, visited 2020-11-24..

<sup>11</sup> Mendos (2019) p. 13.

<sup>12</sup> “Of, relating to, or being a person whose gender identity corresponds with the sex the person had or was identified as having at birth”, see Merriam-Webster, “Cisgender”, <<https://www.merriam-webster.com/dictionary/cisgender>>, visited 2020-12-07.

<sup>13</sup> Bohlander (2014) p. 401.



found that almost a third of gay and bisexual men feel either physically or mentally unsafe in their homes. Many of the participants in the survey came from countries where homosexuality is legal, for example Brazil which has one of the most progressive LGBT+ rights in Latin America and the world.<sup>14</sup> Reports from Human Rights Watch show that many people from El Salvador, Honduras and Guatemala are seeking asylum in the United States of America due to violence and discrimination directed at the LGBT+ community in their home countries. Human Rights Watch interviewed over 100 people where some told stories of having to flee from home at the age of 8 due to violence from family members. Others told stories of having been shot and threatened to be killed, but not reporting the incident to the authorities due to fear of or previous history of police harassment and misconduct.<sup>15</sup> Given the persecution that many LGBT+ people face, it triggers the need to investigate whether or not the Rome Statute should include to protect the LGBT+ community.

## **1.2 Purpose, research questions and delimitation**

With regards to the large amount of people who are living under oppression due to their sexual preference or gender identity, and the uncertainty of their protection under international law, the purpose of this paper is to examine to what extent the LGBT+ community is protected from persecution under international law. To fulfil the purpose of this paper the research question that will be examined is:

*To what extent can the LGBT+ community enjoy protection from persecution under the Rome Statute?*

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<sup>14</sup> Thomas Reuters Foundation, “One in three gay men feel unsafe at home during coronavirus”, <<https://uk.reuters.com/article/health-coronavirus-lgbt-idUKL8N2CU4VL>>, visited 2020-11-24.

<sup>15</sup> Human Rights Watch, “Anti-LGBT persecution in El Salvador, Guatemala, Honduras”, (2020), <<https://www.hrw.org/news/2020/10/07/anti-lgbt-persecution-el-salvador-guatemala-honduras>>, visited 2020-12-09.

In light of the width that the question implies, it is necessary to divide the study into the following sub-questions:

1. What is the scope of article 7(1)(h) in the Rome Statute?
2. To what degree can the LGBT+ community be included within definitions, such as:
  - a. “Other grounds that are universally recognized as impermissible under international law”
  - b. “Gender”
3. How have other international courts and organs acted to include the rights of the LGBT+ community?

The study has chosen to bring light to the most relevant articles, paragraphs and terms where the LGBT+ community could possibly be considered a protected group from persecution. “Other grounds” and “gender” are the only terms out of the eight different groups that are listed in article 7(1)(h) of the Rome Statute that has been chosen to be further examined. It would be possible to look at, for example, the extent that the term “political” covers, however due to the fact that many scholars see the greatest opportunities for the LGBT+ group to fall under “gender” or “other grounds”, this is where the focus has been submitted. Another interesting question related to the subject that has not been further examined is the necessary conditions that needs to be fulfilled for a crime against humanity of persecution to be realized.

### **1.3 Method and material**

To fulfil the purpose, the study will implement both a legal dogmatic method as well as a comparative method. Through the use of the legal dogmatic method it will be possible to determine the possibilities for protection against persecution for the LGBT+ community in current international law. The method implies that legal documents, preparatory work and doctrine will be examined. Considering there is no precedent on the subject matter within the International Criminal Court (ICC), a comparative method will be used to

complement the legal dogmatic method. Comparing how the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (IACrHR) have dealt with the issue will contribute to the study's complexity and importance.

Given that no official records were kept from the many informal meetings throughout the preparatory stage to the Rome Conference itself,<sup>16</sup> it has been very useful to read from the ones who participated in the negotiations. This has informed of the many discussions held throughout the conference and has played an important role in distinguishing why the established law looks like it does.

## **1.4 Perspective**

The study will be made from both an international perspective, as well as a LGBT+ perspective. This proposes that the questions will partly be examined from a global context, which indicates that for example cultural, religious and social aspects will be taken into consideration.<sup>17</sup> The questions will also partly be looked at from a perspective taking into consideration the vulnerability of certain groups. The perspectives aim to shed light to, in what ways the LGBT+ questions can be addressed from a global dimension.

## **1.5 Existing research**

When drafting the final version and implementing the Rome Statute as international law, the analysis of the possibilities to protect the LGBT+ community based on the wording of article 7(1)(h) took off. Scholars and professors have written reports on how certain terms in the statute should or could be interpreted. These include, to some extent, the possibilities that

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<sup>16</sup> Roy S. Lee (1999) p. vii.

<sup>17</sup> University of Colorado Denver, "International Perspectives", <[https://www.ucdenver.edu/docs/librariesprovider8/default-document-library/international-perspectives-outcomes-and-rubrics.pdf?sfvrsn=6e6bbbb8\\_2](https://www.ucdenver.edu/docs/librariesprovider8/default-document-library/international-perspectives-outcomes-and-rubrics.pdf?sfvrsn=6e6bbbb8_2)>, visited 2020-11-24..

the LGBT+ group have of receiving protection under the statute. However, as of early 2021 the ICC has not yet tried if a person of the LGBT+ community can receive protection from persecution under the Rome Statute.

Considering the lack of precedent from the ICC, the questions that will be discussed throughout the paper are crucial for the LGBT+ community, since it is the only way to determine if persecuting a group based on their sexual orientation or gender identity is considered to be an international crime under the Rome Statute or not. This paper will continue the ongoing discussion around the rights for LGBT+ people in current international law.

## **1.6 Outline**

The study will start by looking at what international criminal law is and then examine the scope and preparatory work of the Rome Statute (2.1). The paper will later go on to examine under what grounds the LGBT+ community could be included in (3.1-2). Furthermore, other international courts will be looked at to grasp how the question is viewed upon in the international arena, and to see if and in what ways the ICC might be able to take lead from their judgements (4.1). Subsequently, an analysis and conclusion will work to summarize the arguments put forward and finally answer the general research question (5.1-4).

## 2 International criminal law

Criminal law in an international scene works to hold individuals responsible for the most serious violations of crimes. There are four types of crimes covered by the ICC that are considered to be the core offences of human rights,<sup>18</sup> and these are: genocide, crimes against humanity, war crimes and crimes of aggression.<sup>19</sup> The idea that not only states should be held responsible, but also individuals came as an aftermath from World War II, when two tribunals<sup>20</sup> were established to prosecute perpetrators for the atrocious crimes committed.<sup>21</sup> The ICC works to complement the national courts in reaching the goal of ending impunity and creating justice for victims.<sup>22</sup>

### 2.1 The Rome Statute

#### 2.1.1 The scope of article 21

The applicable law in the ICC is regulated under article 21 of the Rome Statute, where it lists three sources in an evident order of hierarchy.<sup>23</sup> The court shall primarily apply the rules stated in the statute, secondly they shall resort to applicable treaties and principles of international law, and if none of these give any result, the court shall turn to general principles of law. The ICC made it clear in a Pre-Trial Chamber that the court will not automatically

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<sup>18</sup> Diakonia International Humanitarian Law Centre, “International Criminal Law”, <<https://www.diakonia.se/en/IHL/The-Law/International-Criminal-Law1/#:~:text=International%20criminal%20law%20deals%20with,and%20the%20crime%20of%20aggression.>>, visited 2020-11-25.

<sup>19</sup> See Rome Statute articles 6-8 bis.

<sup>20</sup> Nuremberg trials and Tokyo War Crimes Tribunal.

<sup>21</sup> International Committee of the Red Cross, “International criminal law”, <<https://casebook.icrc.org/glossary/international-criminal-law>>, visited 2020-11-25.

<sup>22</sup> International Criminal Court, “About”, <<https://www.icc-cpi.int/about>>, visited 2020-11-25.

<sup>23</sup> Schabas (2016) p. 514.

import principles and case law from the ad hoc tribunals<sup>24</sup>. The Pre-Trial Chamber argued that the Rome Statute is the applicable law, and only in second place, where found appropriate, the court should consider looking at applicable treaties and principles.<sup>25</sup> The Chamber continued by stating: “Accordingly, the rules and practice of other jurisdictions, whether national or international, are not as such ‘applicable law’ before the Court beyond the scope of article 21 of the Statute.”<sup>26</sup> Another Pre-Trial Chamber argued that the ad hoc tribunals could be used solely as a sort of persuasive authority, given that the principles were not considered a principle or rule of international law. This reasoning has however been overlooked by the ICC when the court has ratified “the general approach taken in the ICTY and ICTR jurisprudence”.<sup>27</sup>

In article 21(3) it states that “The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights.”<sup>28</sup> The International Bill of Human Rights<sup>29</sup> is seen as the cornerstone of international humanitarian law,<sup>30</sup> and the ICC has accordingly turned to this type of authority when referencing to sources of international recognized human rights.<sup>31</sup> The ICC has as a result of this, referred to case law of the ECHR and provisions of the European Convention of Human Rights. A judge of the ICC has commented on this particular paragraph and noted that the wording “internationally recognized human rights” makes the paragraph more applicable and does therefore not limit it in its application to only *jus cogens*<sup>32</sup> norms.<sup>33</sup>

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<sup>24</sup> There are two ad hoc tribunals established by the Security Council called the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

<sup>25</sup> Schabas (2016) p. 529.

<sup>26</sup> Ibid. p. 529, fn. 152.

<sup>27</sup> Ibid. p. 529, fn. 155.

<sup>28</sup> Rome Statute article 21(3).

<sup>29</sup> Consisting of the UDHR, the ICESCR, and the ICCPR and its two Optional Protocols.

<sup>30</sup> Schabas (2016) p. 195.

<sup>31</sup> Ibid. p. 530.

<sup>32</sup> “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”, see Vienna Convention on the Law of Treaties art. 53.

<sup>33</sup> Schabas (2016) p. 531.

## **2.1.2 Preperatory work to article 7**

When drafting the Rome Statute, there was an extensive debate on how crimes against humanity should be formulated.<sup>34</sup> Looking at the ad hoc tribunals one can see that crimes against humanity is one of the most prosecuted types of crimes, which indicates that it plays an immense role in the system of the international criminal justice.

When negotiating the gender provisions of the Rome Statute, inspiration was taken from previous cases from the ICTY as well as the ICTR. Furthermore, the advances on gender violence issues in several UN states during the early 90s contributed to highlight the importance of having a gender perspective throughout the entire Rome Statute.<sup>35</sup> Resolutions of the UN Commission on Human Rights made it clear that the need to integrate a gender perspective in the Rome Statute was great.<sup>36</sup>

## **2.1.3 The scope of article 7(1)(h)**

Article 7 of the Rome Statute regulates crimes against humanity, and the article is built on 11 different types of acts that are considered to be covered by the offense. Article 7(1)(h) regulates persecution against an identifiable group or collectivity, and in accordance with article 7(2)(g), the term “persecution” means “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”.<sup>37</sup> Article 7(1)(h) reads as follows:

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

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<sup>34</sup> Ibid. pp. 146-152.

<sup>35</sup> Steains (1999) pp. 359-360.

<sup>36</sup> Operative para. 5 of Resolution 1997/44 of the Commission on Human Rights reads: “Encourages those States participating in the drafting of the statute of the International Criminal Court to give full consideration to integrating a gender perspective.”

<sup>37</sup> Rome Statute art. 7(2)(g).

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.

According to William A. Schabas the provision can be viewed as the core of article 7, considering that most of the other violations listed as crimes against humanity are also regulated as war crimes, given they are committed during an armed conflict. In addition to this, what makes persecution stand out in comparison to the other acts is that even if a majority of the crimes are regulated under domestic justice systems, persecution challenges discriminatory policies and acts by states that have been authorized by the legal regime.<sup>38</sup>

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<sup>38</sup> Schabas (2016) p. 194.



# **3 LGBT+ community’s protection under Article 7(1)(h) of the Rome Statute**

## **3.1 “Other grounds” and “universally recognized”**

The groups listed as protected under article 7(1)(h) is not extensive, given that the paragraph also indicates that other groups can be included, granted that they are “universally recognized as impermissible under international law”. When comparing the grounds that the article explicitly lists to usual grounds of discrimination, the article misses to include for example, age, sexual orientation, transgender identity or expressions and disabilities.<sup>39</sup> According to Schabas, “persecution” is “much more severe in its nature and scale” in comparison to “discrimination”, which needs to be taken into consideration when seeking guidance from case law and international human rights law texts regarding discrimination.<sup>40</sup>

A footnote made to the term “grounds” in the Preparatory Committee draft reads: “This also includes, for example, social, economic and mental or physical disability grounds.”<sup>41</sup> When trying to distinguish what groups could possibly be protected under “other grounds”, looking at the grounds of discrimination would be a good start. However, for a group to be protected under this necessary condition the group needs to be “universally recognized”, which according to some scholars is considered to be a narrow category, that in turn implies a high burden for the group to reach up to the standards.<sup>42</sup> On the other hand, according to Machteld Boot and Christopher

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<sup>39</sup> Compare the Swedish Discrimination Act 5 §.

<sup>40</sup> Schabas (2016) p. 198.

<sup>41</sup> Preparatory Committee Draft Statute, p. 26, fn. 15.

<sup>42</sup> Moore (2017), pp. 1305-1306.

K. Hall, the words “universally recognized” should be read as “widely recognized”, that is to say that they argue all states do not need to recognize a ground as impermissible. They claim that numerous rights brought up in both the UDHR and the ICCPR can be considered part of customary international law. In light of this, Boot and Hall suggests that large parts of these two treaties fall within the scope of “other grounds that are universally recognized as impermissible under international law”.<sup>43</sup>

It is worth mentioning that the expression “universally recognized” is only used once in the statute, whereas in other parts “internationally recognized”<sup>44</sup> is applied instead. Charles Barrera Moore suggests that the language chosen for article 7(1)(h) holds a higher threshold than for other articles throughout the statute. Considering this, some argue that the Rome Statute requires a group to have received recognition to the level that their protection can be considered a *jus cogens* norm in order for them to be covered on this ground. In other words, this is a norm acknowledged by all states, as well as a norm that everyone is obliged to follow.<sup>45</sup>

## 3.2 “Gender”

When drafting the Rome Statute, negotiations were held between two sides with differing opinions on whether or not “gender” should be included as a protected ground from persecution. In the end both sides agreed upon including “gender” as a protected ground, but with the limitation of defining what it should aim to cover. How “gender” should be interpreted is regulated in article 7(3) of the Rome Statute, where it states that “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.” This paragraph has been

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<sup>43</sup> Boot and Hall (1999) p. 150.

<sup>44</sup> See e.g. Rome Statute art. 21(1)(c), art. 21(3) and art. 69(7).

<sup>45</sup> Moore (2017) p. 1306.

exposed to wide criticism where some have called it “stunningly narrow”<sup>46</sup> and others have stated that the use of the term “gender” in the Statute is “the most puzzling and bizarre language ever included in an international treaty.”<sup>47</sup> Many agree on the fact that the framers of the statute failed to separate “gender” and “sex”, where “sex” refers to the biological differences between men and women, whereas “gender” has a wider reach and acknowledges the social constructions and roles each gender plays in the society.<sup>48</sup> “Gender” is the only term in the Rome Statute with a clear definition, something that can be compared to the many undefined terms that leaves judges with great room for interpretation.

For example, one could look at the remaining grounds of persecution<sup>49</sup> where no further explanation as to what is implied is given. The reason for why “gender” stands out in comparison to other terms in the Statute is because of the debate between the two differing sides, where one wanted “gender” to be a ground for persecution and the other did not. The Vatican, Islamic states and some conservative North American organizations wanted to remove the term “gender” altogether in the Rome Statute, since it according to them, was a “backdoor point of entry for sexual orientation.”<sup>50</sup> The opposing group also argued that the term could imply more extensive rights, especially regarding sexual orientation and rights for a third sex, than were currently recognized in many states.<sup>51</sup> Additionally, the group indicated that it would go against many of their religious beliefs to endorse rights based on a person’s sexual orientation.<sup>52</sup> At one point the group that earlier had wanted to delete “gender” as a protected ground from persecution,<sup>53</sup> instead wanted to replace “gender”

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<sup>46</sup> Cossman (2002) p. 283.

<sup>47</sup> Oosterveld (2005) p. 56, footnote 4.

<sup>48</sup> Centre for Policy Analysis, “The development of gender through the Rome Statute of the International Criminal Court”, <<http://cpadelhi.com/gender.php?Id=53&CI=1>>, visited 2020-12-15.

<sup>49</sup> Article 7(1)(h): “political,” “racial,” “national,” “ethnic,” “cultural,” and “religious”.

<sup>50</sup> The Gay and Lesbian Review worldwide, “How the UN can advance Gay Rights”, <<https://glreview.org/article/how-the-un-can-advance-gay-rights/>>, visited 2020-12-15.

<sup>51</sup> Oosterveld (2005) p. 63.

<sup>52</sup> Oosterveld (2014) p. 566.

<sup>53</sup> This group included Guatemala, Venezuela, Syria and Qatar, see Steains (1999), p. 373.

with the term “sex”, since “sex” could be strictly defined to the biological differences between men and women, whereas “gender” did not have any such clear definition.

In the end, including the definition of “gender” in article 7(3) was the only way to please both sides. According to Valerie Oosterveld, both positions would however have liked a clearer definition of the term, but as it often happens in international negotiations the parties seek to find an ambiguous solution, which leads to more room for interpretation to the courts.<sup>54</sup> The agreement on the definition of “gender” played a vast role in how the term was incorporated and adopted in the remaining parts of the Statute.<sup>55</sup> Professor Rhonda Copelon of the Women’s Caucus for Gender Justice wrote in the McGill Law Journal:

[The opposition] had several goals in seeking to eliminate the word gender from the *Rome Statute*. It wanted to eliminate recognition of the social construction of gender roles and hierarchy, since such recognition is inconsistent with the view that males and females are essentially different and have, therefore, different roles, status and rights. It also sought to preclude consideration of persecution or discrimination based on sexual orientation or gender identity.

She also states that choosing the word “gender” instead of “sex” “is one of the most important protections of gender justice.”<sup>56</sup> Additionally this has a great meaning in the context of to what extent the LGBT+ community can be considered a protected group under the ground of “gender”.<sup>57</sup> The ICC has not yet been given the opportunity to take a stand on how far the term “gender” stretches and the legal matter is therefore uncertain. According to Oosterveld, the way the ICC decides to interpret the term “gender” could affect the legal construction of the term under international law.<sup>58</sup>

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<sup>54</sup> Oosterveld (2005) pp. 81-82.

<sup>55</sup> Steains (1999) p. 375.

<sup>56</sup> Copelon (2000) p. 236.

<sup>57</sup> Ibid.

<sup>58</sup> Oosterveld (2005) p. 57.

The greatest possibility for the LGBT+ community to be represented under the ground of “gender” is within article 7(3) where gender is defined. The definition leaves a small window open for interpretation in the last part of the first sentence that reads: “within the context of society”. This indicates that the social norms society puts on each gender needs to be taken into consideration when adopting the statute. According to Cate Steains the language that was settled upon leaves the court with the possibility to interpret and apply the circumstances of the case in a way they find appropriate.<sup>59</sup> Margaret McAuliffe deGuzman states that the court should when applying and interpreting the law in accordance with article 21, not forget to consider the discrimination related to social constructed roles and power differentials.<sup>60</sup>

The Office of the Prosecutor (OTP) issued a Policy Paper on Sexual and Gender-Based Crimes in 2014, which aimed to evolve their work within sexual and gender-based crimes.<sup>61</sup> In the paper it is clarified how the definition of gender should be interpreted, which according to Oosterveld has been an important step in separating “gender” from various other terms such as “women”, “sex” and “female”.<sup>62</sup> The way the OTP defines “gender” makes it clear that the definition in article 7(3) should be interpreted with the acknowledgement of “the social construction of gender and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and girls and boys.”<sup>63</sup> The Policy Paper states that the OTP will in accordance with article 21(3) understand the intersection of several factors, for instance gender and sexual orientation.<sup>64</sup> Oosterveld means that the Policy

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<sup>59</sup> Steains (1999) p. 374.

<sup>60</sup> McAuliffe deGuzman (1999) p. 446.

<sup>61</sup> Office of the Prosecutor, “Policy Paper on Sexual and Gender-based Crimes”, p. 5, <<https://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexual-and-gender-based-crimes-june-2014.pdf>>, visited 2020-11-23.

<sup>62</sup> Oosterveld (2018) p. 447.

<sup>63</sup> Office of the Prosecutor, “Policy Paper on Sexual and Gender-based Crimes”, p. 12, <<https://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexual-and-gender-based-crimes-june-2014.pdf>>, visited 2020-11-23.

<sup>64</sup> Ibid. p. 16.

Paper has brought some clarity to how “gender” in article 7(3) should be read, and additionally encouraged the prosecutors to mention gender in a wider sense.<sup>65</sup>

In a paper by Valerie Oosterveld, she argues that sexual orientation should be a protected ground from persecution. Oosterveld turns to the UN definitions of the term “gender” and states that they emphasize that the term is a social construct that changes over time, and is learned rather than something static or innate.<sup>66</sup> She points out that many of the UN definitions are strongly acknowledging the cultural aspects that influenced the construction of the term, which in turn affects the roles that both women and men are expected to play as well as the value society places on the two roles.<sup>67</sup> Some have argued that the term needs to be understood in unity with sexual orientation among other grounds such as poverty level and age.<sup>68</sup> Further Oosterveld argues that the ICC will most likely study other principles and rules of international law when deciding how to interpret “gender”, which would lead to the understanding that “gender” and “sex” are to be held apart and not confused with one another.<sup>69</sup> Oosterveld comes to the conclusion that “context of society” in many ways suggests the same factors as “socially constructed”, which in turn leads the ICC to be able to consider a wide scope of different factors when determining “gender” within the society.<sup>70</sup>

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<sup>65</sup> Oosterveld (2018) p. 456.

<sup>66</sup> Oosterveld (2005) p. 67.

<sup>67</sup> Ibid. p. 69.

<sup>68</sup> Ibid. p. 70, fn. 86.

<sup>69</sup> Ibid. p. 73.

<sup>70</sup> Ibid. p. 75.

## 4 LGBT+ rights in other international law

In the first article of the Universal Declaration of Human Rights (UDHR) it is stated that “All human beings are born free and equal in dignity and rights”.<sup>71</sup> This core principle of human rights is applicable to all people, regardless of their sex, sexual orientation or gender identity.<sup>72</sup> However, as mentioned in the introduction, this principle is continuously violated due to a combination of homophobic attitudes and the lack of recognizing the LGBT+ community in legal instruments.<sup>73</sup> The UDHR, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) all guarantee that their treaties are to be exercised without discrimination on several listed grounds.<sup>74</sup> These lists do however not explicitly mention people of the LGBT+ community, but they all finish with the open-ended words “or other status”.

In *Toonen v. Australia*, the Human Rights Committee stated that “the reference to ‘sex’ in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.”<sup>75</sup> In several other cases, such as in *Young v. Australia* and *X v. Colombia*, the committee has continued to take a stand for the inclusion of the LGBT+ community when discussing grounds of discrimination.<sup>76</sup> Additionally, the Committee on Economic, Social and Cultural Rights has guaranteed that sexual orientation and gender identity are included in the non-

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<sup>71</sup> UDHR art. 1.

<sup>72</sup> United Nations Fact Sheet, “International Human Rights Law and Sexual Orientation & Gender Identity”, <<https://www.unfe.org/wp-content/uploads/2017/05/International-Human-Rights-Law.pdf>>, visited 2020-11-30.

<sup>73</sup> OHCHR, ‘Born Free and Equal – Sexual Orientation and Gender Identity in International Human Rights law’, p. 7, <<https://www.ohchr.org/documents/publications/bornfreeandequalowres.pdf>>, visited 2020-12-15.

<sup>74</sup> See UDHR art. 2 and 7, ICCPR art. 2(1) and 26, ICESCR art. 2.

<sup>75</sup> *Toonen v. Australia*, para. 8.7.

<sup>76</sup> See *Young v. Australia* para 10.4, and *X v. Colombia* para. 9, where the committee concluded that discrimination had occurred on the grounds of sex or sexual orientation.

discrimination articles of the ICESCR. The committee has shown this in general comments regarding everyone's equal right to work, water, social security etc.<sup>77</sup> The committee stated that “persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace”, which the committee argued should give reason for why gender identity should be recognized as a prohibited ground of discrimination.<sup>78</sup>

## 4.1 Other international courts

### 4.1.1 European Court of Human Rights

Article 14 of the European Convention on Human Rights regulates the prohibition of discrimination, where several grounds of discrimination are listed. This article, like article 7(1)(h) in the Rome Statute, misses to identify people of the LGBT+ community as a ground of discrimination. However, article 14 mentions “sex” as a prohibited ground of discrimination, and the ECHR has in several judgements chosen to interpret this term to include gender and sexual minorities.<sup>79</sup> In 1999 the ECHR found for the first time that a violation against article 14 on the ground of sexual orientation had occurred.<sup>80</sup> Since then the court has continued to work to include sexual orientation as a ground of discrimination and examined the issue in several cases.

In the case of *Beizaras and Levickas v. Lithuania*, one of the applicants had shared a photo of him kissing the other applicant on Facebook, and afterwards

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<sup>77</sup> Committee on Economic, Social and Cultural Rights, “General comment”, No. 20, para. 32; No. 19, para. 29; No. 15, para. 13, <<https://www.refworld.org/docid/4a60961f2.html>>, visited 2020-12-15.

<sup>78</sup> Ibid. para. 32.

<sup>79</sup> European Court of Human Rights, “Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention”, <[https://www.echr.coe.int/Documents/Guide\\_Art\\_14\\_Art\\_1\\_Protocol\\_12\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf)>, visited 2020-01-02.

<sup>80</sup> *Salguero Da Silva Mouta v. Portugal*, no. 33290/96, ECHR 1999.



received numerous of hateful and aggressive comments.<sup>81</sup> The domestic court in Lithuania decided not to prosecute the homophobic commentators, due to the fact that the “eccentric behavior really did not contribute to the cohesion of those within society who had different views or to the promotion of tolerance”.<sup>82</sup> According to the domestic court many Lithuanians appreciated “traditional family values”,<sup>83</sup> which the court argued that the applicant had not taken into consideration when posting the photo. The ECHR found that the applicants had been exposed to discrimination due to their sexual orientation, without valid reason, considering that the comments had been instigated by an intolerant attitude towards the homosexual community. The ECHR also found that the public authorities had followed the “discriminatory state of mind” when they failed to investigate if the comments towards the applicants constituted incitement to hatred and violence, which proved that the authorities at least accepted such comments.<sup>84</sup>

#### **4.1.2 Inter-American Court of Human Rights**

Article 1 of The American Convention on Human Rights (ACHR) regulates the obligation to respect rights, and like the European Convention on Human Rights the term “sex” is used among others when listing grounds of discrimination. Since this term, like mentioned above, only refers to the biological differences between men and women, the question regarding rights for the LGBT+ community rises once again. The article ends by stating that “any other social condition” should be considered as a ground of discrimination, which opens up for other exposed groups to be covered under article 1 of the ACHR.

In an advisory opinion by the IACrHR regarding gender identity, equality, and non-discrimination of same-sex couples, the court settled that sexual

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<sup>81</sup> *Beizaras and Levickas v. Lithuania*, no. 41288/15, ECHR 2020, para. 6-10.

<sup>82</sup> *Ibid* para. 21.

<sup>83</sup> *Ibid* para. 21.

<sup>84</sup> *Ibid* para. 129.

orientation and gender identity are groups protected by the ACHR.<sup>85</sup> The IACrHR stated that in regard to current international law, the crucial principles of non-discrimination and equality are to be considered *jus cogens* norms.<sup>86</sup> The court recognized these principles in several international sources, such as reports from the UN, resolutions from the General Assembly of the Organization of American States, comments from the Human Rights Committee, among others.<sup>87</sup> The court emphasized that human rights treaties are living instruments that needs to be interpreted and read in accordance with time.<sup>88</sup>

In the advisory opinion the court takes a clear stand in the question regarding the unconditional rights of LGBT+ people. It states that the lack of consensus in some countries regarding LGBT+ rights is not a solid argument for denying or restricting the group of their fundamental human rights.<sup>89</sup> This decision has been called a landmark on the rights of sexual and gender minorities, when establishing that everyone, regardless of gender identity or sexual preferences, are protected by the ACHR.<sup>90</sup> The ruling was issued in January 2018, and since then several countries have applied the advisory opinion in for instance cases regarding a trans individuals right to a name change without surgery or hormonal treatment,<sup>91</sup> and in Costa Rica the Attorney General's Office has declared that the advisory opinion is binding upon Costa Rican judges.<sup>92</sup>

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<sup>85</sup> Advisory Opinion OC-24/17, "Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples", para. 68.

<sup>86</sup> Ibid. para. 61.

<sup>87</sup> Ibid. para. 72-80.

<sup>88</sup> Ibid. para. 69.

<sup>89</sup> Ibid. para. 83.

<sup>90</sup> Contesse (2018).

<sup>91</sup> Ibid. fn. 31.

<sup>92</sup> The Costa Rica Star, "Costa Rica's Attorney General Confirms Ruling of Inter-American Court Regarding Same Sex Marriage is Binding", <<https://news.co.cr/costa-rica-lgbti-rights-gay-rights-costa-rica-marriage/73000/>>, visited 2020-12-14.

## 5 Analysis

The paper has aimed at answering the question of: ‘To what extent can the LGBT+ community enjoy protection from persecution under the Rome Statute?’. The study has partly looked at how one can interpret article 7(1)(h) of the Rome Statute, partly on how international law today views the question of LGBT+ rights.

### 5.1 Finding protection under “other grounds”

When examining the possibilities given under the sentence “other grounds that are universally recognized as impermissible under international law”, what needs to be settled is how to interpret the terms “universally recognized”. As shown above, some scholars argue for a wider reading of the two words, whereas others argue that the wording implies a high burden for a group to be considered covered on this ground. When looking at the preparatory work for article 7, as well as the conscious choice of using “universally” instead of “internationally”, one could argue that the framers of the Rome Statute intended of having a high threshold for other groups, not exclusively listed in the first part of the article. If the threshold is high, one might assume that the likelihood for the LGBT+ community of finding protection under “other grounds” would seem unlikely, due to the fact that more than 65 UN member states criminalize non-heteronormative sexual orientations and gender identities. On this basis, building an argument based on the fact that the community should be viewed as “universally recognized” would probably not go very far.

One could however make an attempt in rereading the article as on what grounds it is permissible to persecute a group under international law, rather than on what grounds it is universally forbidden. This approach should lead the ICC to look at other international law, and examine if there are cases

where other courts or instruments have accepted discrimination based on grounds such as age, sexual orientation, gender identity etc. Unless evidence shows that discriminating or persecuting these groups is accepted, the ICC should include the LGBT+ community within the scope of article 7(1)(h).

Although this is an alternative way of looking at the problem, I would argue that considering the preparatory work and the general discussion around the words “other grounds”, it appears clear that the words hold a high threshold. Including a group of which is widely unrecognized and has a long way to go before reaching the equal rights of heterosexual cisgender people, would according to me be an uphill battle that would most likely not end with all states accepting that the LGBT+ community is universally recognized as impermissible under international law.

## **5.2 Defining “gender”**

When looking at the term today it is possible to argue that even considering the definition available in article 7(3), the term “gender” opens up for including sexual orientation and gender identities. When defining “gender” one is constantly reminded about the importance of including the social aspects that are put on each gender. As discussed in section 3.2 many scholars point to the fact that having “gender” as a ground in the Rome Statute is immensely important for the inclusion of the LGBT+ community. The Policy Paper published by the OTP takes a step in the direction of recognizing the LGBT+ community as a vulnerable group that the ICC should protect. By explicitly acknowledging that “gender” is a social construction, article 7(3) is put in a new light. Due to the ambiguous language chosen in article 7(3), “gender” can be read as different things to different people. What however needs to be remembered is that article 7(3) in many ways limits the court to a binary gender system, which in turn leaves people of non-binary gender minorities and intersex people more vulnerable than people of sexual minorities. In light of the fact that the OTP, as well as the judges of the ICC,

are the ones interoperating the term in the end, one could say that, as a result of the OTP's Policy Paper on Sexual and Gender-Based Crimes, there is a great possibility for parts the LGBT+ community to be included within the term "gender".

### **5.3 The significance of other international organs**

The Rome Statute is leaving out using the word "discrimination", however, persecution is in many cases seen as a form of harsher discrimination. When looking at other human rights courts it becomes clear that they take the LGBT+ rights very seriously, and one could argue that there are therefore no arguments as to why the ICC should not. The ECHR and IACrHR have sought to protect the LGBT+ community and has in many ways extended their field of applicability even though in their treaties the term "sex" is used instead of the term "gender". As explained under chapter 3.2, the term "sex" implies a narrower field of application, which indicates that when having used "gender" in the Rome Statute, the ICC should not have a problem with including LGBT+ people. One could even argue that the ICC should be very eager to prosecute these cases, considering that the Rome Statute firstly regulates a more serious crime than in many other international organs,<sup>93</sup> and secondly uses a term which leaves room for interpretation. When turning to other international organs such as the Human Rights Committee and analyzing how these committees have tackled the question of including sexual and gender minorities as a ground of discrimination, it indicates that these grounds are impermissible bases of discrimination under international law.

Article 21 of the Rome Statute states that the ICC should look to other international sources of law for guidance. The laws applicable in the ICC should be in conformity with human rights law and that no law should be applied that is to a disadvantage to any specific group. This can be interpreted

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<sup>93</sup> Persecution instead of discrimination.

as an encouragement to look to other international courts such as the ECHR and IACrHR for guidance. It also entails that no group, in this case the LGBT+ community, should be deprived of the right of protection that other groups have. Considering that the IACrHR has stated that the principles of non-discrimination and equality are to be treated as *jus cogens* norms, as well as that human right treaties should be interpreted over time, it could be argued that the ICC would be of the same opinion. This would once again suggest that parts of the LGBT+ community could find protection under article 7(1)(h) of the Rome Statute.

## **5.4 Conclusion**

To conclude, one could say that the possibilities for the LGBT+ community of finding protection under article 7(1)(h) of the Rome Statute are varied. It would in my opinion be a mistake to answer the research question as a whole, without separating the LGBT+ community into two independent groups. Given the OTP Policy Paper in combination with the many scholarly articles dealing with defining the term “gender”, I would argue that sexual minorities are likely to find protection from persecution under the Rome Statute. It would however be naive to assume that people of gender minorities have the same protection as people of sexual minorities, considering partly the focus submitted by researchers, partly the wording in article 7(3) of the Rome Statute. The lack of recognition that people of non-binary gender minorities have received from even the liberal states in the discussions around the Rome Statute, indicates that the increased recognition of the LGBT+ community does not necessarily translate into increased rights in the international scene.

The research question will most likely continue to be highly topical and relevant until the ICC takes a stand on how “gender” in the statute should be interpreted. Although sexual minorities have greater possibilities of receiving protection, I believe that there is an advancement of human rights to all

LGBT+ people which in the future hopefully will lead to more progressive legal instruments.

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