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Note

Embracing Ambiguity and Adopting Propriety: Using Comparative Law To Explore Avenues for Protecting the LGBT Population Under Article 7 of the Rome Statute of the International Criminal Court

*Charles Barrera Moore**

In recent years, there has been a dramatic increase in the attention afforded to persecution of identity-based groups within the international human rights context. Most notably, perhaps, the Rome Statute of the International Criminal Court¹ (“Rome Statute”) was seen as a crucial step by the international community in creating a mechanism by which offenders of human rights would be punished.² The Rome Statute was consid-

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1. Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 1002, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

2. See, e.g., Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT’L L. 144, 145 (1999) (“[T]he ICC could mark a real turning point in the world community . . . [and] the ICC [is] a significant building block in the construction of a truly international legal community.”); Marlies Glasius, *Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Criminal Court*, in GLOBAL CIVIL SOCIETY 2002, at 137 (Marlies Glasius et al. eds., 2002) (“[T]he International Criminal Court . . . will be an important step in the ongoing transition towards an international legal order that is less based on state sovereignty and more oriented towards the protection of all citizens of the world from abuse of power.”); Philippe Kirsch, *The Role of the International Criminal Court in Enforcing International Criminal Law*, 22 AM. U. INT’L L. REV. 539, 540–41 (2007) (“For experts on human rights it is clear that the protection of individuals from violations of human rights and humanitarian law requires appropriate mechanisms to enforce the law. . . . Eventually, a perma-

ered especially progressive in its treatment of gender-based crimes, both in recognizing that they could be committed in times of peace as crimes against humanity and by expanding the list of gender-based acts that would constitute a crime against humanity.³ Aside from serving merely as evidence of international recognition of human rights, the establishment of the International Criminal Court (ICC) demonstrated a willingness by the international community as a whole to protect those whose rights had been violated.⁴

To date, however, this growing recognition of the need to hold human rights violators criminally liable in the ICC has not yet extended to those that persecute on the basis of sexual orientation. Article 7(1)(h) of the Rome Statute provides the criteria for crimes against humanity and seems to offer the most logical avenue towards prosecuting those who persecute members of the lesbian, gay, bisexual, and transgender (LGBT) community.⁵ It states that 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” can be prosecuted.⁶ Yet, “gender” is defined in the following way: “the two sexes, male and female, within the context of society. The term ‘gender’ does not

ment truly international court was necessary to respond to the most serious international crimes and to overcome the limitations of the ad hoc tribunals.”).

3. See THE OFFICE OF THE PROSECUTOR, INT’L CRIMINAL COURT, POLICY PAPER ON SEXUAL AND GENDER-BASED CRIMES 9 (2014), <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> (“Over the past few decades, the international community has taken many concrete steps in response to increasing calls to recognise sexual and gender-based crimes as serious crimes nationally and internationally. . . . At the Rome Conference, States agreed upon explicit provisions in the Statute of the ICC, recognising various forms of sexual and gender-based crimes as amongst the most serious crimes of concern to the international community. The Statute is the first instrument in international law to include an expansive list of sexual and gender-based crimes as war crimes relating to both international and non-international armed conflict.” (citations omitted)).

4. The Preamble of the Rome Statute acknowledges as much, stating that parties to the treaty were “[m]indful that . . . millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity” and were “[d]etermine[d] to put an end to impunity for the perpetrators of these crimes.” Rome Statute, *supra* note 1, pmbl.

5. Classifying widespread attacks against homosexuals as acts of genocide could certainly serve as a route towards prosecution; however, it has been made clear that the LGBT community is not a group against which genocide can be committed. See *infra* note 64 and accompanying text.

6. Rome Statute, *supra* note 1, art. 7(1)(h) (emphasis added).

indicate any meaning different from the above.”⁷ This confounding definition has been criticized at length⁸ and as long as it remains unaddressed, the uncertainty about whether or not persecution on the basis of sexual orientation can be brought in front of the ICC will remain. Without action from the Office of the Prosecutor (OTP) clarifying the definition, it is unlikely that any case will be brought in front of the ICC seeking to prosecute persecutors of the LGBT community and those criminals will continue to act outside of the law. This result is entirely unacceptable not only for the body of international human rights law as a whole but also for the ICC, which has made a commitment to “put an end to impunity for the perpetrators of these crimes” and “guarantee lasting respect for and the enforcement of international justice.”⁹

This is a current reality that the international community must confront. In Kenya, private mobs have attacked the LGBT community, and in Egypt, the government has likewise targeted its LGBT citizens in a series of arrests and police raids.¹⁰ Further, as of 2014, there were thirty-seven signatories to the Rome Statute that criminalize homosexuality.¹¹

The ICC has a unique ability to bring in many states that are situated in regions where domestic courts are either unable to or reluctant to prosecute.¹² Therefore, the ICC needs to act in situations where there have been direct, persecutory actions against members of the LGBT community by the government or by private parties.¹³ While some countries, when adopting

7. *Id.* art. 7(3).

8. *See infra* Part I.C.2.

9. Rome Statute, *supra* note 1, pmb1.

10. *See infra* Part I.A.

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

12. *See* Rome Statute, *supra* note 1, art. 17(1)(a).

13. Additionally, the time is ripe for discussing expanding the scope of criminals the ICC is willing to prosecute. The ICC opened its first case in September 2009 and is thus still formulating its precedents. *See* Daniel Donovan, *International Criminal Court: Successes and Failures*, INT’L POL’Y DIG. (Mar. 23, 2012), <http://www.intpolicydigest.org/2012/03/23/international-criminal-court-successes-and-failures> (discussing early operations of the ICC). Also, the ICC has had a limited scope geographically as it has only addressed situations on the continent of Africa. *Situations Under Investigation*, INT’L CRIM. CT., <https://www.icc-cpi.int/pages/situations.aspx> (last visited Nov. 28, 2016) (indicating that formal investigations have been opened against individuals in the following states: Uganda, the Democratic Republic of the Congo, the Central African Republic, Georgia, Mali, Sudan, Libya, Kenya, and Côte d’Ivoire).

the provisions of the Rome Statute, have explicitly included sexual orientation as a protected ground,¹⁴ many need international intervention and pressure to bring these criminals to justice. The interpretation of “gender” is left to the ICC¹⁵ and, as OTP brings cases in front of the ICC, it has a great deal of power and discretion in framing and guiding which offenses are investigated and prosecuted.¹⁶ Yet, without action from either the ICC or domestic jurisdictions that have so far failed to act, those actors who have enjoyed impunity for crimes will likely continue to do so.

This Note argues that, in its current construction, the definition of “gender” found in Article 7 of the Rome Statute should include protection of the LGBT community. The debate that surrounded this contentious definition during the negotiations of the Rome Statute has followed it through the early years of the ICC,¹⁷ but that ambiguity does not preclude protection of this vulnerable group. Because of the infant nature of the ICC,¹⁸ it is appropriate that, in developing its jurisprudence, the ICC look to human rights courts that have encountered

The Office of the Prosecutor has begun preliminary investigations in many countries outside of the African continent, but has not moved those cases to a formal investigation or prosecution stage. See *Preliminary Examinations*, INT’L CRIM. CT., <https://www.icc-cpi.int/pages/preliminary-examinations.aspx> (last visited Nov. 28, 2016). Therefore, if ever there were a time to expand the scope of the prosecutors’ reach, a time when the ICC is still in its infancy and has yet to reach other parts of the world would seem to be ideal.

14. See, e.g., An Act Defining and Penalizing Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity, Organizing Jurisdiction, Designating Special Courts, and for Related Purposes, Rep. Act No. 9851, § 6(h), 106:9 O.G. 1120 (July 27, 2009) (Phil.) (“For the purpose of this act, ‘other crimes against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: . . . Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, *sexual orientation* or other grounds” (emphasis added)).

15. See Valerie Oosterveld, *The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 HARV. HUM. RTS. J. 55, 82 (2005) (“Since the interpretation of ‘gender’ is left with the ICC itself, there are very real concerns by many commentators that the ICC will choose a narrow and regressive reading of the ‘gender’ definition.”).

16. See, e.g., Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT’L L. 510, 510 (2003) (identifying the important political and legal role of OTP in its ability to determine what cases are brought to the ICC).

17. See *infra* Part I.C.

18. See *infra* Part I.B.2.

cases involving members of the LGBT community.¹⁹ Of particular importance, this Note explores the ways human rights courts, namely the European Court of Human Rights (ECHR) and the Inter-American Commission on Human Rights (IACHR), have protected the rights of the LGBT community and discusses how those approaches could be utilized by the ICC. OTP has made signals that it is moving in this direction, but it needs to act decisively to end the debate altogether. While several other authors have identified the shortcomings of the Rome Statute's definition of "gender," this Note analyzes decisions by human rights courts and imports those teachings in the context of the ICC. By looking at these decisions, the ICC can utilize the tools it already has in place to prosecute offenders of LGBT rights. In order to solidify such an understanding of the Rome Statute's definition of "gender," the OTP, as the body that brings cases in front of the ICC, should clarify the definition to cover cases involving persecution of LGBT individuals. An exploration of the legislative history, the flexibility maintained by the statutory language, and the practice of human rights courts all suggest this is the proper conclusion.

Part I begins by establishing that the Rome Statute has failed to protect the LGBT community and details the legislative history that led to the current definition. This discussion is crucial in demonstrating that the definition of "gender" maintains flexibility while other provisions of the treaty are likely unable to protect the LGBT community from persecution. Part I concludes by discussing the work done by international human rights courts to protect the rights of the LGBT population and developments in the international community. Part II addresses the flexibility of the term "gender" under the Rome Statute, rejecting the arguments some have proffered that the definition denies protection of the LGBT community, and discusses the opportunity for embracing the openness of such a formulation. Finally, Part II establishes that, even though the roles of human rights courts and criminal courts may differ slightly, lessons from human rights courts can be applied directly in the context of the ICC. Last, Part III applies lessons from the ECHR and the IACHR to demonstrate how the ICC could act similarly to bring to justice criminals who have persecuted the LGBT community. This Part also explores developments in the international legal community and in human

19. See *infra* Part II.C.

rights courts to establish that OTP should promulgate a policy that explicitly states that the LGBT community is considered part of the Rome Statute's definition of "gender." The Note concludes by proposing specific language that could be adopted by OTP to support the ICC's obligations to uphold international human rights and protect those who have been systematically targeted by criminals.

I. THE CONSTRUCTION OF THE ROME STATUTE, THE DEFINITION OF "GENDER," AND THE PRACTICES OF HUMAN RIGHTS COURTS

In order to proceed, it is crucial to understand that the LGBT community is in fact a group that is currently persecuted, that the ICC has the tools to bring such criminals under its jurisdiction, and that using Article 7's utilization of "gender" as the basis for protection provides the best avenue towards prosecution. Section A shows that the LGBT community is one that is in need of protection from the ICC. Section B lays out the language employed by the Rome Statute and describes how that language has been utilized. By analyzing the language found within the Rome Statute and how that language came to be, Section C discusses the ongoing debate over the definition's protection of the LGBT community. Next, Section D analyzes the elements needed to prosecute under Article 7 of the Rome Statute in order to demonstrate that the only element missing from prosecuting these crimes is whether or not the LGBT community fits under one of the protected grounds. Although at first glance it may appear the LGBT community would be protected as a "universally recognized" group, Section E explores why that may not be so, leaving gender as the only means under which these crimes can be prosecuted. Last, Section F analyzes how international human rights courts specifically and the international community generally have understood the rights of members of the LGBT community.

A. PERSECUTION OF THE LGBT COMMUNITY BY SIGNATORIES TO THE ROME STATUTE

There are currently groups of individuals who are persecuted because of their membership in the LGBT community and their respective countries' views of that group. These attacks often come from private individuals who the government has been unwilling or unable to control; yet, some of the persecution originates from governments themselves. The ICC was

designed to protect human rights in both instances.²⁰ The following situations are recent examples of persecutory treatment in countries who have signed the Rome Statute.

In Kenya, mobs have directed attacks at individuals “based on their sexual orientation and gender identity.”²¹ Although private individuals, and not the state, committed these acts, the government of Kenya is complicit in that it has refused to take action to prosecute these individuals.²² One notable instance in Kenya involved a group of approximately 200 people attacking gay and bisexual men and transgendered women who worked as peer educators at an HIV clinic after rumors of a gay wedding circulated in February 2010.²³ The victims of these attacks recounted being burned and beaten by the mob and later, once in the safety of the police station, the mob threatened to burn down the building.²⁴ These victims are not only subjected to these attacks but must continue to live in countries where groups, which at times take the form of mobs, harbor these feelings towards the LGBT community. Attacks such as these are prime examples of cases in which the ICC has jurisdiction to prosecute under its Article 17 powers as the local government is either “unwilling or unable genuinely to carry out the investigation or prosecution.”²⁵

There have also been instances in which the government of a specific signatory state has been an active participant in the persecution of the local LGBT population. For example, the Egyptian government has arrested members of the LGBT community as a way to distract its citizens from other domestic problems.²⁶ It is not illegal to be either gay or transgendered in

20. See Rome Statute, *supra* note 1, art. 17(1)(a) (“[T]he [ICC] shall determine that a case is inadmissible where . . . [t]he case is being investigated or prosecuted by a State which has jurisdiction over it, *unless the State is unwilling or unable to genuinely carry out the investigation or prosecution . . .*” (emphasis added)).

21. *Kenya: Pervasive Homophobic Violence in Coastal Region*, HUM. RTS. WATCH (Sept. 28, 2015), <https://www.hrw.org/news/2015/09/28/kenya-pervasive-homophobic-violence-coastal-region>.

22. *Id.*

23. *The Issue Is Violence: Attacks on LGBT People on Kenya’s Coast*, HUM. RTS. WATCH (Sept. 28, 2015), <https://www.hrw.org/report/2015/09/28/issue-violence/attacks-lgbt-people-kenyas-coast>.

24. *Id.*

25. Rome Statute, *supra* note 1, art. 17.

26. Peter Montgomery, *The Politics of Anti-Gay Persecution*, POL. RES. ASSOCIATES (Dec. 19, 2014), <http://www.politicalresearch.org/2014/12/19/the-politics-of-anti-gay-persecution>.

Egypt, yet approximately 150 members of the LGBT community have been arrested and, as of May 2015, about 100 of those individuals remained imprisoned.²⁷ Recently, the government of Egypt arrested seven transgendered men for meeting and allegedly engaging in “debauchery.”²⁸ Officials have even conducted raids targeted at gay men; notably, twenty-five men were arrested in December 2014 during a police raid at a bathhouse in what has been characterized as a crackdown on the gay community.²⁹ Although these men were ultimately acquitted,³⁰ there are still others who are convicted under similarly dubious charges. Judges have reportedly handed down sentences as long as seven years in such cases.³¹ Despite the fact that there is no law banning homosexual activity of any nature in Egypt,³² “people are usually charged with ‘debauchery’ under an old law originally intended to combat prostitution. A law against ‘immoral advertising’ has also been used to entrap men seeking gay partners on the internet.”³³ The government has engaged in a systematic, widespread, and targeted attack against these individuals, a situation that seems ripe for ICC investigation and prosecution.³⁴ Yet, despite this ongoing reality, the ICC has yet to investigate a situation involving the persecution of LGBT individuals.

27. Bel Trew, *How Distaste of LGBT People in Egypt Has Turned into State-Sponsored Persecution*, INDEPENDENT (May 17, 2015), <http://www.independent.co.uk/news/world/middle-east/how-distaste-of-lgbt-people-in-egypt-has-turned-into-state-sponsored-persecution-10256869.html>.

28. *Id.*

29. Patrick Kingsley, *Egyptian TV Crew Criticised over Police Raid on Cairo Bath House*, THE GUARDIAN (Dec. 9, 2014), <https://www.theguardian.com/world/2014/dec/09/egypt-police-raid-cairo-bath-house>.

30. *Egypt Court Clears 26 Men Held in Raid on ‘Gay Bathhouse,’* INDEPENDENT (Jan. 12, 2015), <http://www.independent.co.uk/news/world/africa/egypt-court-clears-26-men-held-in-raid-on-gay-bathhouse-9973769.html>.

31. Trew, *supra* note 27.

32. *Id.*

33. Brian Whitaker, *If Homosexuality Isn’t Illegal, Why Is There a Gay Crackdown in Egypt?*, THE GUARDIAN (Dec. 10, 2014), https://www.theguardian.com/commentisfree/2014/dec/10/homosexuality-gay-crackdown-egypt-economic-political-issues?CMP=share_btn_tw.

34. This Note focuses only on the definition of “gender” under the Rome Statute, but it is important to keep in mind that in order to prosecute the ICC would have to meet other threshold qualifications. See Part I.D for a short description of those other elements.

B. THE INSTITUTIONAL FRAMEWORK OF THE ICC AND THE ROME STATUTE HAVE BOTH FAILED TO PROTECT THE LGBT COMMUNITY

This Section elucidates why there is a question over the definition's applicability to the LGBT community through an examination of the language of the Rome Statute in form and in practice. Subsection 1 describes the functions and operations of the ICC; Subsection 2 briefly examines the jurisprudence of this infant court; Subsection 3 explores the language of the Rome Statute at issue; and Subsection 4 establishes that this language has not yet been completely understood to protect members of the LGBT community.

1. Structure of the Rome Statute and the ICC

Drawing on the atrocities that occurred during the twentieth century, namely in Yugoslavia and Rwanda,³⁵ the ICC was organized with the purpose of prosecuting “the most serious crimes of international concern” while being solely a “complementary [entity] to national criminal jurisdictions.”³⁶ Its structure consists of the court itself and other independent organs which assist in the functioning of the ICC in general. Of particular importance for this Note, OTP is responsible for reviewing referrals to the ICC, investigating potential cases, and bringing any appropriate cases in front of the ICC for prosecution.³⁷

The ICC functions under certain guidelines, including several “general principles of criminal law,”³⁸ its own rules on jurisdiction,³⁹ and “complementarity.”⁴⁰ The ICC has the ability to

35. INT'L CRIMINAL COURT, UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT 3, <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> (last visited Nov. 28, 2016) (“Some of the most heinous crimes were committed during the conflicts which marked the twentieth century. Unfortunately, many of these violations of international law have remained unpunished. . . . The idea of a system of international criminal justice re-emerged after the end of the Cold War. However, while negotiations on the ICC Statute were underway at the United Nations, the world was witnessing the commission of heinous crimes in the territory of the former Yugoslavia and in Rwanda. . . . These events undoubtedly had a most significant impact on the decision to convene the conference which established the ICC in Rome in the summer of 1998.”).

36. Rome Statute, *supra* note 1, art. 1.

37. *Id.* art. 42(1).

38. *Id.* pt. 3.

39. *Id.* pt. 2.

40. *Id.* art. 1.

hear cases in which the defendants are accused of violating one of three crimes: genocide,⁴¹ crimes against humanity, and war crimes.⁴² The principle of complementarity governs the ICC's jurisdiction and its ability to prosecute. Under this doctrine, "national justice systems have the primary responsibility for investigating, prosecuting and punishing individuals, in accordance with their national laws, for crimes falling under the jurisdiction of the [ICC]."⁴³ Only if a state is unwilling or unable to investigate and/or prosecute should the ICC intervene.⁴⁴ In determining whether or not the state has failed to investigate or prosecute, the ICC ought to consider whether a proceeding in the country was pursued simply in order to protect the party rather than prosecute, whether there has been "unjustified delay" in the prosecution that shows there is not a genuine will to prosecute, and whether the proceedings were conducted "independently [and] impartially."⁴⁵ If a country fails to act on a domestic level, the ICC is permitted to take a case without conducting the analysis in Article 17(1)(a)–(c); this analysis need only be undertaken if the country has taken steps to investigate but has not fully followed through to prosecution.⁴⁶ Additionally, if the individual has already been tried or the case does not present the requisite level of "gravity" of harm, then the ICC ought not investigate and prosecute.⁴⁷

2. Jurisprudential History of the ICC

During the years of operation of the ICC, there have been five cases that have come to a resolution.⁴⁸ All five cases involve

41. For a discussion on the crime of genocide, see *infra* note 64 and accompanying text.

42. "War crimes" is defined by an extensive list of offenses that may be committed during times of war. Rome Statute, *supra* note 1, art. 8(2).

43. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Criminal Court, 9th plen. mtg. at 7, ¶ 53, U.N. Doc. A/CONF.183/SR.9 (July 17, 1998).

44. See Rome Statute, *supra* note 1, art. 17(1)(a).

45. *Id.* art. 17(2)(a)–(c).

46. JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 105 (Ruth Mackenzie et al. eds., 2008) ("In sum, complete inaction on the national level would thus allow the ICC to take up a case without having to enter into an assessment of the admissibility criteria in Article 17 (1)(a) to (c). The provisions on complementarity only apply once a State takes, at a minimum, initial investigative steps.").

47. Rome Statute, *supra* note 1, art. 17(1)(c)–(d).

48. *Closed Stage*, INT'L CRIM. CT., <https://www.icc-cpi.int/Pages/closed.aspx> (last visited Nov. 28, 2016).

African men accused of war crimes and crimes against humanity committed during armed, political conflict; none have led to prosecution as each has been cleared of charges, many due to a lack of evidence.⁴⁹ Callixte Mbarushimana, Mathieu Ngudjolo Chui, and Uhuru Muigai Kenyatta were all charged with the crime against humanity of rape under Article 7(1)(g) of the Rome Statute.⁵⁰ Chui was also charged with the crime of sexual slavery.⁵¹

There are currently three cases that are at the trial stage at the ICC, all involving men from Africa and one of which involving witness tampering in a case at the ICC. Bosco Ntaganda has been accused of war crimes and crimes against humanity directed at the non-Hema civilian population in the Democratic Republic of the Congo.⁵² Laurent Gbagbo and Charles Blé Goudé have been charged with murder, rape, attempted murder, and persecution for actions taken in Côte d'Ivoire.⁵³ Importantly, the ICC has taken up two cases involving individuals charged with gendered crimes committed

49. INT'L CRIMINAL COURT, CASE INFORMATION SHEET: SITUATION IN DARFUR, SUDAN, THE PROSECUTOR V. BAHAR IDRIS ABU GARDA, ICC-02/05-02/09 (2012), <https://www.icc-cpi.int/darfur/abugarda/Documents/AbuGardaEng.pdf>; INT'L CRIMINAL COURT, CASE INFORMATION SHEET: SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO, THE PROSECUTOR V. CALLIXTE MBARUSHIMANA, ICC-01/04-01/10 (2012) [hereinafter MBARUSHIMANA], <https://www.icc-cpi.int/drc/mbarushimana/Documents/MbarushimanaEng.pdf>; INT'L CRIMINAL COURT, CASE INFORMATION SHEET: SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO, THE PROSECUTOR V. MATHIEU NGUDJOLO CHUI, ICC-01/04-02/12 (2015) [hereinafter CHUI], <https://www.icc-cpi.int/drc/ngudjolo/Documents/ChuiEng.pdf>; INT'L CRIMINAL COURT, CASE INFORMATION SHEET: SITUATION IN THE REPUBLIC OF KENYA, THE PROSECUTOR V. UHURU MUIGAI KENYATTA, ICC-01/09-02/11 (2015) [hereinafter KENYATTA], <https://www.icc-cpi.int/kenya/kenyatta/Documents/KenyattaEng.pdf>; INT'L CRIMINAL COURT, CASE INFORMATION SHEET: SITUATION IN THE REPUBLIC OF KENYA, THE PROSECUTOR V. WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG, ICC-01/09-01/11 (2016), <https://www.icc-cpi.int/kenya/rutosang/Documents/RutoSangEng.pdf>.

50. CHUI, *supra* note 49, at 1; KENYATTA, *supra* note 49, at 1; MBARUSHIMANA, *supra* note 49, at 1.

51. CHUI, *supra* note 49, at 1.

52. INT'L CRIMINAL COURT, CASE INFORMATION SHEET: SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO, THE PROSECUTOR V. BOSCO NTAGANDA, ICC-01/04-02/06 1 (2015), <https://www.icc-cpi.int/drc/ntaganda/Documents/NtagandaEng.pdf>.

53. INT'L CRIMINAL COURT, CASE INFORMATION SHEET: SITUATION IN CÔTE D'IVOIRE, THE PROSECUTOR V. LAURENT GBAGBO AND CHARLES BLÉ GOUDÉ, ICC-02/11-01/15 1-2 (2015), <https://www.icc-cpi.int/cdi/gbagbo-goude/Documents/LaurentGbagboandBleGoudeEng.pdf>.

against women belonging to specific ethnic groups.⁵⁴ Both cases are at the pre-trial stage while the subjects of the cases remain at large.⁵⁵

As can be seen by the above, the ICC has had limited opportunities to explore the Rome Statute's definition of "gender" and certainly has not had occasion to consider whether the LGBT community falls within that definition. As will be discussed below, because of the lack of precedents from the ICC and the uncertainty surrounding the definition of "gender," it is appropriate that the ICC consult the practices of international human rights courts.⁵⁶

3. The Pertinent Language of the Rome Statute

The Rome Statute of the International Criminal Court was completed when negotiations finished on July 17, 1998⁵⁷ and was designed to "establish an independent permanent International Criminal Court in relationship with the [U]nited Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole."⁵⁸ Currently, there are 124 countries that are parties to the Rome Statute and thus subject to its provisions.⁵⁹ Article 7 of the Rome Statute states that persecution on account of one's religion, ethnicity, or membership in another "universally recognized" group can be prosecuted.⁶⁰ Gender is one of the groups that is protect-

54. INT'L CRIMINAL COURT, CASE INFORMATION SHEET: SITUATION IN DARFUR, SUDAN, THE PROSECUTOR V. AHMAD MUHAMMAD HARUN ("AHMAD HARUN") AND ALI MUHAMMAD ALI ABD-AL-RAHMAN ("ALI KUSHAYB"), ICC-02/05-01/07 (2015) [hereinafter HARUN & KUSHAYB], <https://www.icc-cpi.int/darfur/harunkushayb/Documents/HarunKushaybEng.pdf>; INT'L CRIMINAL COURT, CASE INFORMATION SHEET: SITUATION IN DARFUR, SUDAN, THE PROSECUTOR V. OMAR HASSAN AHMAD AL BASHIR, ICC-02/05-01/09 (2015) [hereinafter AL BASHIR], <https://www.icc-cpi.int/darfur/albashir/Documents/AlBashirEng.pdf>.

55. AL BASHIR, *supra* note 54, at 1; HARUN & KUSHAYB, *supra* note 54, at 1.

56. *See infra* Part II.C.

57. Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 22 (1999).

58. Rome Statute, *supra* note 1, pmb1.

59. *The States Parties to the Rome Statute*, INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Nov. 28, 2016). Of the 124 signatories, 34 are from Africa, 19 from Asia, 43 from Europe, and 28 from Latin America and the Caribbean. *Id.* Notably missing from the list of signatories are the United States, China, India, and Turkey. *Id.*

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

ed by this provision, but the Rome Statute refers to Article 7(3), which defines gender in the following manner: “the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.”⁶¹ The “universally recognized” designation indicates that there is a high standard that must be met in order to even determine that a social group exists and is thus worthy of protection under the Rome Statute, as compared to other references in the treaty to “internationally recognized” groups or norms.⁶²

4. The Lingering Question of “Gender”

On its face, the above language does not seem to cover maltreatment of the LGBT population. The fact that the definition of “gender” states that it does not “indicate any meaning different from the above” could be understood to mean that it does not refer to mean anything other than male or female.⁶³ However, while the Rome Statute states that the definition shall not have any other meaning, the meaning that is extracted from the definition itself is still quite unclear, while also leaving room for an interpretation that covers the LGBT community.

The ICC has made clear that sexual orientation is not a group that fits under the genocide heading;⁶⁴ therefore if prosecution will ever take place, it must be under the Article 7 “crimes against humanity” umbrella. In order to understand how sexual orientation as a protected group may fit within the parameters of Article 7, the text and its history must be explored further.

61. *Id.* art. 7(3).

62. *See infra* Part I.E.

63. Oosterveld, *supra* note 15, at 57.

64. The idea of expanding the definition of “genocide” was explicitly considered during the negotiations of the Rome Statute; however, it was decided that expanding the definition to include other groups would only serve to create controversy. Alycia T. Feindel, *Reconciling Sexual Orientation: Creating a Definition of Genocide That Includes Sexual Orientation*, 13 MICH. ST. J. INT’L L. 197, 213 (2005). The ICC has since made clear that the crime of genocide is not expanded to any additional groups. *See, e.g.*, Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir ¶ 114 (Mar. 4, 2009) (“The Majority highlights that the crime of genocide is characterised by the fact that it targets a specific national, ethnic, racial or religious group.”).

C. THE LEGISLATIVE HISTORY OF THE ROME STATUTE

Although the negotiations surrounding the definition of “gender” were contentious, they produced a definition that provides adequate ambiguity to allow for an argument that the LGBT community is protected. Subsection 1 details the negotiations that led to the formulation of “gender” under the Rome Statute; Subsection 2 presents the criticisms of the resultant definition; and Subsection 3 explains why that definition still provides flexibility.

1. The Debate over the Definition of “Gender” in the Rome Statute

The definition of “gender” included in the Rome Statute was the result of intense negotiations between sides with incompatible views. The contradictions within the definition of gender are a reflection of the opposing sides that negotiated the definition: women advocacy groups on one side, and the Vatican, Arab League states, and conservative organizations on the other side.⁶⁵ The word “gender” made its first appearance within the provisions on crimes against humanity as a prohibited ground upon which persecution could be committed in February 1997.⁶⁶ The introduction of the term concerned many parties that its inclusion would leave open the possibility that sexual orientation would be a protected ground upon which one could be persecuted.⁶⁷ The Vatican, several Arab states, and some conservative North American organizations made an attempt to remove the word “gender” completely from the Rome Statute during negotiations.⁶⁸ That conservative coalition worked to eliminate the word “gender” entirely not only because of concerns that sexual orientation would be a protected group but also because the term evoked thoughts of gender roles and each genders’ place in society, considerations that these groups sought to exclude from the protection of the Rome Statute.⁶⁹

65. See Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L.J. 217, 233 (2000).

66. Oosterveld, *supra* note 15, at 59.

67. Joydeep Sengupta, *How the UN Can Advance Gay Rights*, GAY & LESBIAN REV., Nov.–Dec. 2003, at 32.

68. *Id.*

69. See Copelon, *supra* note 65, at 236.

Some negotiators thought that the Rome Statute should simply adopt the United Nations (UN) definition of “gender.”⁷⁰ The UN definition, although it varies slightly across the many institutions within the organization, has three crucial elements: (1) gender is a socially constructed concept; (2) it is influenced by culture, the roles of each sex, and the value a particular culture places on the sexes fitting into those roles; and (3) the definition of “gender” varies depending on the time and place.⁷¹ However, the conservative coalition opposed this view because they feared it could be interpreted to mean that laws outlawing homosexuality would be criminal.⁷²

Rather, the conservative coalition advocated for the use of the term “sex” instead of “gender” because “sex” would be understood to mean simply the biological differences between men and women.⁷³ There was considerable pushback on this view because of a feeling that the definition needed to include sociological elements in order to be “an accurate reflection of the current state of international law.”⁷⁴ The UN, for example, had used the word “gender” for that very reason: because it encompassed both the biological meaning and sociological ones.⁷⁵

The view that the term “gender” ought to be utilized prevailed, but there was continued concern that homosexuality would be a protected ground under this definition.⁷⁶ Ultimately, the wording “within the context of society” was included in order to satisfy both sides that there was some flexibility while still maintaining a degree of precision.⁷⁷ That precision originated from the 1995 Beijing Declaration and Platform for Ac-

70. LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM* 159 (M. Cherif Bassiouni ed., 2002).

71. Oosterveld, *supra* note 15, at 67–70.

72. SADAT, *supra* note 70.

73. Cate Steains, *Gender Issues*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 357, 373 (Roy S. Lee ed., 1999).

74. *Id.*

75. *Id.*

76. *Id.* at 374.

77. *Id.*

tion⁷⁸ in which the word “gender” was used in the “ordinary, generally accepted” way.⁷⁹

The result of these negotiations is what is included in the Rome Statute: “[T]he 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.”⁸⁰ This was the only definition that could be negotiated that would satisfy both sides of the debate, and the coalition of Arab states made clear that this was the only definition they would accept.⁸¹ In the end, “[t]he reference to ‘the two sexes, male and female’ was a concession to The Vatican, while the reference to gender ‘within the context of society’ was a concession to women’s groups, who wanted to include as fluid a concept, and as many iterations, of the term gender as possible.”⁸² Although the controversy surrounding this definition has served as a possible barrier to prosecuting persecutors of the LGBT community, there continues to be flexibility in how this definition will be used and it is this elasticity that also opens the door to future prosecution.⁸³

2. The Criticisms of the Definition of “Gender” Under the Rome Statute

On its face, the definition of “gender” found in the Rome Statute may be, possibly deliberately, “the most puzzling and bizarre language ever included in an international treaty.”⁸⁴

78. The goal of the Beijing Declaration was to “advance the goals of equality, development and peace for all women everywhere in the interest of all humanity” Fourth World Conference on Women, *Report of the Fourth World Conference on Women*, resolution 1, annex I ¶ 3, U.N. Doc. A/CONF.177/20/Rev.1 (1995).

79. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Working Paper on Article 20, Paragraph 3*, U.N. Doc. A/CONF.183/C.1/WGAL/L.3 (July 13, 1998).

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

81. Steains, *supra* note 73, at 374–75.

82. Brian Kritz, *The Global Transgender Population and the International Criminal Court*, 17 YALE HUM. RTS. & DEV. L.J. 1, 36 (2014).

83. It is this flexibility that has been at the middle of the controversy which serves as the subject of this Note. Although the ICC has not yet prosecuted a persecutor of the LGBT community, the door has remained open for such prosecution to take place in the future. This Note advocates for the use of the current language of the Rome Statute as a means for empowering OTP to prosecute such individuals in the future. *See infra* Part III.

84. Rosemary Grey, *Hate Crime Against Humanity? Persecution on the Grounds of Sexual Orientation Under the Rome Statute*, BEYOND THE HAGUE (Feb. 21, 2014), <http://www.beyondthehague.com/2014/02/21/hate-crime>

However, the criticism extends beyond the confusion behind the definition. Valerie Oosterveld, who has commented extensively on how the Rome Statute interacts with gender-based crimes, points to four distinct criticisms of the definition of “gender” under the Rome Statute.⁸⁵ Beyond acknowledging the controversy addressed by this Note, whether the LGBT community is covered under the definition, Oosterveld states that the primary concerns with the definition are that: (1) the terms “gender” and “sex” have mistakenly been made interchangeable by some readers of the Rome Statute; (2) the reference to “within the context of society” may be limited in its application; and (3) gender issues may not be promoted as a result of this definition.⁸⁶ Others have noted that there is a clear distinction between male and female and those who identify with both sexes or neither may not be protected.⁸⁷ Additionally, Brian Kritz, who has explored the treatment of transgendered individuals by the Rome Statute, points out that the “within the context of society” language seems to provide at least an argument that cultures wherein certain sexual preferences may not be mainstream are not subjected to this provision.⁸⁸

3. This Definition Maintains Flexibility

Because of the opposing views involved in the negotiations, what is left is a definition that seems contradictory on one hand and flexible on the other. It is important to note that since Article 120 of the Rome Statute prohibits reservations from the treaty, this definition applies to all signatories.⁸⁹ What makes the definition of “gender” so flexible is the fact that although “the compromise[d] language employed . . . was crafted to appease two irreconcilable points of view, both sides may assert that the definition as adopted reflects their understanding of

-against-humanity-persecution-on-the-grounds-of-sexual-orientation-under-the-rome-statute (citing Oosterveld, *supra* note 15, at 56 n.4).

85. Oosterveld, *supra* note 15, at 71.

86. *Id.*

87. Kritz, *supra* note 82, at 36–37.

88. *Id.*

89. See Rome Statute, *supra* note 1, art. 120 (“No reservations may be made to this Statute.”). For a discussion of statements that realistically amount to a reservation (none of which involve the definition of “gender”), see generally *International Criminal Court: Declarations Amounting to Prohibited Reservations to the Rome Statute*, AMNESTY INT’L (Nov. 24, 2005), <https://www.amnesty.org/en/documents/IOR40/032/2005/en>.

the term.”⁹⁰ Indeed, there are those that have suggested that this constructive ambiguity was employed intentionally to resolve these “irreconcilable” viewpoints.⁹¹ Those in support of including sexual orientation within the meaning of gender will emphasize not only that the term “gender” was utilized because of its broader application, but also that “within the context of society” makes clear that sociological considerations are part of the definition.⁹² Those on the other side will argue that the definition makes clear that it refers only to the male/female distinction.⁹³ Yet, because of its seeming inconsistency, the definition “effectively leaves the term open for the future Court to interpret and apply to the circumstances before it, as appropriate.”⁹⁴

D. ELEMENTS NEEDED TO PROSECUTE UNDER THE ROME STATUTE

In order to more fully understand what is required to prove a case in front of the ICC, it is necessary that the elements of prosecution be highlighted. After satisfying the admissibility criteria under Article 17,⁹⁵ there are specific elements for each particular crime that must be met. The first element under Article 7(1)(h) is “[t]he perpetrator [must have] severely deprived . . . one or more persons of fundamental rights.”⁹⁶ Next, a prosecutor would be required to demonstrate that the persecutor targeted individuals because of their membership in the group and that the targeting was based on their political, racial, national, ethnic, cultural, religious, or gender affiliation, or other grounds that are “universally recognized.”⁹⁷ The conduct itself must have been committed in conjunction with any act referred

90. SADAT, *supra* note 70, at 160.

91. Valerie Oosterveld, *Constructive Ambiguity and the Meaning of “Gender” for the International Criminal Court*, 16 INT’L FEMINIST J. POL. 563, 564 (2014) (suggesting that the resulting language is the product of “a tactic used by diplomats and other negotiators . . . to adopt indefinite language to seemingly resolve disparate points of view”).

92. Oosterveld, *supra* note 15, at 65 (“While an unusual solution, [the definition of ‘gender’] . . . reaffirmed the valuable sociological reference to ‘context of society.’”).

93. *See infra* Part II.B.

94. Steains, *supra* note 73, at 374.

95. *See supra* Part I.B.1.

96. ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, at 122, ICC Doc. ICC-ASP/1/3, U.N. Sales No. E.03.V.2 (2011) [hereinafter ASSEMBLY OF STATES].

97. *Id.*

to in Article 7 (such as rape, murder, torture, etc.)⁹⁸ or any crime within the jurisdiction of the ICC, such as a war crime or the crime of genocide.⁹⁹ The acts themselves must have been part of a “widespread or systematic attack directed against a civilian population.”¹⁰⁰ Last, there must be a showing that the perpetrator knew or intended for the conduct to be part of a “widespread or systematic attack.”¹⁰¹

It is worth noting that there are no elements for the definition of gender.¹⁰² Therefore, what is left for advocates and opponents to argue over is simply the definition itself; there is no guidance from the ICC on what ultimately will satisfy the meaning of “gender” under Article 7.

E. WHY PROSECUTION CANNOT HAPPEN UNDER THE “UNIVERSALLY RECOGNIZED” PORTION OF ARTICLE 7

Article 7 of the Rome Statute does allow for a degree of flexibility in determining which groups are protected, by stating that in addition to the enumerated groups, any group that is “universally recognized” will also be protected.¹⁰³ Although at first glance this seems to provide a carve-out in the Rome Statute for groups such as the LGBT community to be brought under the protection of the ICC, the “universally recognized” standard seems to imply a high burden that this group would not be able to meet.¹⁰⁴ This language is the only reference to a

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

99. ASSEMBLY OF STATES, *supra* note 96, at 122.

100. ASSEMBLY OF STATES, *supra* note 96. “[T]he term ‘widespread’ connotes the large-scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims. It entails an attack carried out over a large geographical area or an attack in a small geographical area directed against a large number of civilians. The underlying offences must also not be isolated.” Prosecutor v. Gombo, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 83 (June 15, 2009) (citations omitted).

101. *Id.*

102. In fact, the only places that gender is mentioned within the *Elements of Crimes* is to say that within the context of rape, “invasion” is a gender-neutral term that can be applied to both males and females. *See id.* at 119, n.15.

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

104. *See* George E. Edwards, *International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy*, 2 YALE J. INT’L L. 323, 377 (2001) (explaining that “universally recognized” is more narrow a category than the alternative “internationally recognized” category).

“universally recognized” set of rights or groups in the entire treaty, whereas other parts of the Rome Statute acknowledge that there are “internationally recognized human rights” and “internationally recognized norms and standards.”¹⁰⁵ This provision could have stated that these groups must be “internationally recognized” rather than “universally recognized,” and the language utilized suggests that there is a higher threshold for proving that a group is “universally recognized.”¹⁰⁶

By seemingly increasing the burden of proof required for a group to be considered “universally recognized,” it appears as though the Rome Statute requires that the protection of such a group be at least a *jus cogens* norm in order for the Rome Statute to treat them as such. A *jus cogens* norm, also referred to as a peremptory norm, “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.”¹⁰⁷ In other words, this is a standard that all states have acknowledged exists and is one that all states are compelled to follow.¹⁰⁸ In order for a norm to ripen into *jus cogens*, it must be a practice that has become “more or less uniform” and states have behaved in this manner out of a feeling that they have a “legal obligation” to do so.¹⁰⁹

If this is the proper reading of this provision of Article 7, then it is highly unlikely that the LGBT population can be protected under this language. The LGBT community itself has not received recognition to the level that their protection can be considered a *jus cogens* norm; as there are states that have yet to realize full equality for homosexuals and transgendered individuals, it is clear that their dignity has yet to receive uniform treatment. The mere fact that several states still criminalize homosexual conduct in and of itself indicates non-uniformity of this protection principle.¹¹⁰ Therefore, the only avenue toward protecting members of the LGBT community must go through the Rome Statute’s definition of “gender.”

105. See, e.g., Rome Statute, *supra* note 1, art. 21(1)(c), art. 21(3).

106. *Id.*

107. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, K.A.V. 2424.

108. *See id.*

109. MARK WESTON JANIS, INTERNATIONAL LAW 48 (6th ed. 2012).

110. *See supra* note 11 and accompanying text.

F. HOW THE INTERNATIONAL COMMUNITY GENERALLY AND INTERNATIONAL HUMAN RIGHTS COURTS SPECIFICALLY HAVE PROTECTED THE LGBT COMMUNITY

As has been demonstrated above, the Rome Statute provides a singular route by which the ICC can protect members of the LGBT community using the definition of “gender.” International human rights courts have made this move already as both the ECHR and the IACHR have addressed cases involving discrimination on the basis of sexual orientation. The international community in general has also seen a movement towards a protection of these rights. Those courts’ case law is addressed in detail below, looking first to the ECHR in Subsection 1 and the IACHR in Subsection 2. Subsection 3 briefly touches on developments in the international community as a whole, showing a trend towards respecting the rights of the LGBT community.

1. The European Court of Human Rights (ECHR)

The ECHR has protected members of the LGBT community in several different scenarios and its reasoning could certainly apply with equal force to the ICC. ECHR’s recognition of the nature of discrimination against the LGBT community and its understanding of an emerging right to sexual choice has informed its jurisprudence.¹¹¹ By examining several ECHR cases below and demonstrating the interconnectedness of the roles of the ECHR and the ICC,¹¹² it becomes apparent that the ICC ought to look to the ECHR for guidance on this issue.

In general, the ECHR has protected members of the LGBT community under Article 14 of the European Convention on Human Rights, which touches on discrimination.¹¹³ By invoking

111. See PAUL JOHNSON, *HOMOSEXUALITY AND THE EUROPEAN COURT OF HUMAN RIGHTS* 89 (2013) (“[T]he [ECHR] has adopted a particular ontological understanding of homosexuality and this has underpinned the progressive development of its case law through which it has narrowed the margin of appreciation available to states in respect of certain discriminatory practices. . . . The Court’s methods have not, therefore, precluded it from issuing strong condemnations of practices that maintain inequalities on the ground of sexual orientation.”).

112. See *infra* Part II.C.

113. See European Convention on Human Rights art. 14, Dec. 10, 1948, 213 U.N.T.S. 232 (“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 status.”).

its discrimination provision, while also coupling it with Article 8, which protects the “right to respect for . . . private and family life,”¹¹⁴ the ECHR found in favor of a Polish national who had been evicted from his home because of his sexual orientation.¹¹⁵ The ECHR took into consideration developments in society “including the fact that there [was] not just one way or one choice in the sphere of leading and living one’s private life” and refused to accept that “a blanket exclusion of persons living in a homosexual relationship from succession to a tenancy . . . as necessary for the protection of the family.”¹¹⁶ The ECHR, therefore, found protection for this homosexual man by finding that there had been “a violation of Article 14 taken in conjunction with Article 8.”¹¹⁷

In other cases, the ECHR has found that there has been a violation of a specific right and found that the violation, in tandem with discrimination, was enough to find the state guilty, much like is required in the Rome Statute.¹¹⁸ In *X v. Turkey*, the ECHR found that a man who had been placed in solitary confinement out of concern that he, as a homosexual, would be harmed by other inmates had suffered a violation of the ECHR’s torture provisions.¹¹⁹ However, more generally, the ECHR stated that discrimination “based solely on . . . sexual orientation . . . would amount to discrimination” by itself and that “sexual orientation attracts the protection of Article 14,”

114. *Id.* art. 8.

115. *Kozak v. Poland*, Eur. Ct. H.R., (2010), <http://www.hudoc.echr.coe.int/eng?i=001-97597>.

116. *Id.*; see also Press Release, Registrar of the Court, European Court of Human Rights, Repeated Unjustified Ban on Gay-Rights Marches in Moscow (Oct. 21, 2010) (on file with author) (describing the court’s decision in *Alekseyev v. Russia*: “[W]hile no European consensus had been reached on questions of adoption by or marriage between homosexual people, ample case law had shown the existence of a long-standing European consensus on questions such as the abolition of criminal liability for homosexual relations between adults, on homosexuals’ access to service in the armed forces, to the granting of parental rights, to equality in tax matters and the right to succeed to the deceased partner’s tenancy. It was also clear that other Convention member States recognised the right of people to openly identify themselves as gay and to promote their rights and freedoms, in particular by peacefully and publicly gathering together.”).

117. *Kozak v. Poland*, Eur. Ct. H.R., (2010), <http://www.hudoc.echr.coe.int/eng?i=001-97597>.

118. See *X v. Turkey*, Eur. Ct. H.R., (2012), <http://www.hudoc.echr.coe.int/eng?i=001-113876>.

119. See *id.*; European Convention on Human Rights, *supra* note 113, art. 3.

the discrimination provision of the European Convention on Human Rights.¹²⁰

Not only does the growing support for the protection of the LGBT community within legal institutions demonstrate that the ICC ought to protect this group, a comparison of the treaties of the ICC and ECHR demonstrates that similar principles could be applied in the chambers of the ICC. ECHR found room for protection of the LGBT community under its discrimination provision despite the fact that this article only mentions “sex” as a protected group and not “gender.”¹²¹ It appears as though the ECHR determined that the LGBT community fell under the more restrictive term of “sex.”¹²² The ECHR performed a similar analysis in the *Kozak* and *X* cases than what would be seen in the ICC: only after identifying specific enumerated, prohibited conduct under which the victim had been wronged were the defendants found to have violated the ECHR’s provision on discrimination.¹²³

However, one important difference between cases brought to the ECHR and those heard by the ICC is the fact that cases can be brought to the ECHR by citizens.¹²⁴ Yet, this difference does not point to a glaring flaw of the Rome Statute, only a difference of the roles of the two courts. Instead, this variation in the ICC’s functioning only serves to reinforce the thesis of this Note: OTP must act to bring crimes against humanity cases committed against members of the LGBT community to the ICC. Because such cases cannot be flagged by injured individuals, the ICC has a duty to protect these individuals by using its resources to investigate and prosecute those who have committed crimes against humanity against the LGBT community.¹²⁵

120. *X v. Turkey*, Eur. Ct. H.R., ¶ 50 (2012), <http://www.hudoc.echr.coe.int/eng?i=001-113876>.

121. See European Convention on Human Rights, *supra* note 113, art. 14.

122. It is doubtful that the ECHR would find that the LGBT community fell under the categorization of the other protected groups: “[R]ace, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status.” *Id.* Thus, simple logic would seem to indicate that the ECHR chose to include “homosexual” under the “sex” heading of the treaty.

123. See *X v. Turkey*, Eur. Ct. H.R., (2012), <http://www.hudoc.echr.coe.int/eng?i=001-113876>; *Kozak v. Poland*, Eur. Ct. H.R., (2010), <http://www.hudoc.echr.coe.int/eng?i=001-97597>.

124. European Convention on Human Rights, *supra* note 113, art. 25 (“The Commission may receive petitions . . . from any person . . . claiming to be the victim of a violation . . .”).

125. See Rome Statute, *supra* note 1, art. 21 (“The application and inter-

2. The Inter-American Commission on Human Rights (IACHR)

The IACHR has found that mistreatment of homosexuals constitutes a violation of Article 11, which relates to an individual's right to privacy.¹²⁶ In the *Giraldo* case, the court found that a prisoner's right to privacy had been violated when her request for an intimate visit in prison was denied, in violation of Colombian law, because she was a homosexual.¹²⁷ The Colombian government's argument that the denial was appropriate because of a "deeply rooted intolerance in Latin American culture of homosexual practices" was denied.¹²⁸ Article 11 of the Inter-American Convention on Human Rights, which was used as the basis upon which the petitioner was protected, relates to privacy and protects three distinct rights: (1) an individual's honor and dignity; (2) the right of an individual to not "be the object of arbitrary or abusive interference with his private life"; and that (3) all individuals have the right to be protected by the law from such "interference or attacks."¹²⁹ This case makes clear that homosexuals cannot be discriminated against under the Inter-American Convention on Human Rights and cultural relativity cannot be used as a means by which one can argue that these provisions do not apply.

3. Developing Trends in the International Community in General

Since the time the Rome Statute was negotiated in the late 1990s, there have been considerable developments in the international community on the treatment of gays and lesbians. In considering the rights of transgender individuals in the ICC, Brian Kritz points to many developments that indicate greater acceptance internationally for the rights of members of the LGBT community.¹³⁰ Specifically, Kritz notes countries like Ma-

pretation of law pursuant to this article must be . . . without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.").

126. *Giraldo v. Colombia*, Case 11.656, Inter-Am. Comm'n H.R., Report No. 71/99, OEA/Ser.L/V/II.106, doc. 3 rev. ¶ 21 (1999).

127. *Id.* ¶ 6.

128. *Id.* ¶ 12.

129. Inter-American Convention on Human Rights art. 11, Nov. 22, 1969, 1144 U.N.T.S. 123.

130. Kritz, *supra* note 82, at 1.

lawi and Colombia have made significant steps towards promoting the dignity of the LGBT communities within their respective borders.¹³¹ However, the most impactful movement from the international community is likely the UN Resolution on Human Rights, Sexual Orientation and Gender Identity.¹³² The UN noted crimes of violence that have occurred against members of the LGBT community and recognized that the UN has an obligation to “promot[e] universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner.”¹³³ Yet, this step does not obviate the need for progress within the ICC; despite the passage of this resolution (by a slim margin no less, with nineteen countries voting against the proposal),¹³⁴ violations against the LGBT community still continue such that the ICC must step in hold persecutors accountable.

* * * * *

As has been demonstrated above, the definition of “gender” found in the Rome Statute was the result of a series of contentious negotiations and does not, on its face, appear to protect members of the LGBT community. Yet, this route seems to present the only possible opportunity by which the ICC can protect members of this vulnerable population. The definition employed by the treaty maintains a degree of flexibility and by looking to the work of other international institutions, a developing trend of protecting the rights of the LGBT community becomes apparent. Both the momentum in the international system as well as the definition at the disposal of the ICC can be utilized to prosecute persecutors of LGBT populations. While this Note establishes that the debate over the meaning of “gender” under the Rome Statute continues, it explores how sexual orientation fits into this framework, concludes that the LGBT community is covered under the definition, and proposes that

131. *See id.*

132. Human Rights Council, Res. 17/19, U.N. Doc. A/HRC/RES/17/19 (July 14, 2011).

133. *Id.* This language is similar to the language found in Article 21(3) of the Rome Statute, directing the ICC to apply only law that makes no “adverse distinction” among protected groups. *See id.*

134. *See id.* Angola, Bahrain, Bangladesh, Cameroon, Djibouti, Gabon, Ghana, Jordan, Malaysia, Maldives, Mauritania, Moldova, Nigeria, Pakistan, Qatar, Russia, Saudi Arabia, Senegal, and Uganda all voted against the proposal, with Burkina Faso, China, and Zambia abstaining from the vote. *Id.*

the approaches of other international institutions can inform the processes of the ICC.

II. INTERPRETATION OF THE ROME STATUTE'S DEFINITION OF GENDER AND EMPLOYING THE AMBIGUITY THEREIN

By analyzing the definition of “gender” in the Rome Statute, the criticisms become exceedingly clear. These criticisms all lead to the same conclusion: the application of the definition of “gender” beyond the male and female distinction remains unsettled. Yet, it is because this issue has not yet been resolved that allows one to argue that the LGBT community does in fact fit under this definition. While there are those that argue they do not, the arguments in the other direction hold more weight. An explanation of the criticisms of the definition¹³⁵ and how the social construction of gender fits into this discussion¹³⁶ both make clear that sexual orientation can be comprehended under the current formulation of “gender” found in the Rome Statute. Although the definition certainly evokes a wide range of reactions, it is important to note that the definition did not close the door on including members of the LGBT community. This flexibility and ambiguity are both tools that can be used in order to advocate that the ICC look to approaches by international human rights courts for guidance.

In this Part, the ambiguity of the definition of “gender” is further analyzed. Section A discusses the flexibility of the definition and demonstrates that the question of whether or not the LGBT community falls within this definition is one left unanswered. Next, Section B addresses arguments that some have advanced stating that the definition of “gender” precludes the idea that the LGBT community falls within its bounds. However, this Note rejects those arguments while also demonstrating that sexual preference indeed does fall under the “gender” heading. Finally, Section C establishes that, although human rights courts have a different function than the ICC, it is appropriate for the ICC to consider their jurisprudence on persecution of individuals on the basis of sexual orientation.

135. See *supra* Part I.C.2.

136. See *infra* Part II.B.2.

A. THE APPLICABLE MEANING OF THE DEFINITION OF “GENDER” IS STILL AN OPEN QUESTION

In spite of the criticism of the definition of “gender,”¹³⁷ and indeed highlighted by it, the meaning of the Rome Statute’s definition of “gender” is one that allows for considerable conjecture as to whether the LGBT community falls under its protection. Unsurprisingly, the definition of “gender” produced by the negotiations of the Rome Statute has received widespread criticism because of its inherent inconsistencies as well as because of its seemingly narrow application.¹³⁸ It is this uncertainty that enables one to make the argument that members of the LGBT community who have been the targets of crimes against humanity can be protected under Article 7 of the Rome Statute.¹³⁹

First, it is important to recall that the negotiations of the Rome Statute ultimately employed the term “gender” precisely because of its broader application beyond the simple male and female distinction.¹⁴⁰ By not using the term “sex,” the ICC has implicitly acknowledged the “well-established practice of using [a] broader concept in international instruments.”¹⁴¹ The term “sex” could be understood to refer only to the biological differences between men and women, but the use of “gender” seems to acknowledge the social construction of gender roles.¹⁴²

In fact, OTP has given guidance that indicates the office will specifically consider such non-biological meanings.¹⁴³ The first such indication can be found in OTP’s own definition of

137. See *supra* Part I.C.2.

138. See *supra* Part I.C.2.

139. *Contra* Bohlander, *supra* note 11, at 409 (“[I]t appears unconvincing to assume that the drafters engaged in a conspiratorial exercise of ‘constructive ambiguity’ with the intention of leaving the door open to the ICC judges to interpret a wider meaning into the term ‘gender’ in Art. 7(3)”). However, rather than this disagreement meaning that the language specifically excludes protection of the LGBT community, it simply led to a more open-ended definition. What was achieved was an entirely ambiguous and divided definition. This ambiguity does not by itself preclude reinterpretation.

140. See Steains, *supra* note 73.

141. Barbara Bedont & Katherine Hall-Martinez, *Ending Impunity for Gender Crimes Under the International Criminal Court*, 6 BROWN J. WORLD AFF. 65, 68 (1999).

142. See Margaret McAuliffe deGuzman, *Article 21: Applicable Law*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 701, 712 (Otto Triffterer ed., 2d ed. 1999).

143. See generally OFFICE OF THE PROSECUTOR, *supra* note 3 *passim* (stating repeatedly that the “social construction” of gender is inherent in any consideration of the term).

“gender-based crimes,” which states that this category of crimes includes acts “committed against persons, whether male or female, because of their sex and/or socially constructed gender roles.”¹⁴⁴ Not only does this statement recognize the difference between the terms “sex” and “gender,” it makes explicit that OTP will consider variations of gender that transcend the realm of biology. To go a step further, OTP has acknowledged that there are valuable precedents that can be borrowed from the area of persecution under refugee law.¹⁴⁵ OTP has made explicit reference to the United Nations High Commissioner for Refugees (UNHCR) and its understanding of “persecutions on the basis of gender in refugee law.”¹⁴⁶ UNHCR, for its part, has made clear that sexual orientation ought to be considered when an individual “has been subject to persecutory (including discriminatory) action on account of his or her sexuality or sexual practices.”¹⁴⁷ Such a reference by OTP, in its official position paper on gender no less, seems to be a strong signal that, at the very least, it has considered, albeit not officially and formally, how sexual orientation may fall within the Rome Statute’s definition of “gender.” Lastly, and most importantly, OTP has stated that the definition of “gender” under Article 7(3) of the Rome Statute “acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys.”¹⁴⁸ Thus, it seems clear that OTP has acknowledged that it is open to a broader definition of “gender” than one that only contemplates the female/male distinction.

Additionally, the definition of “gender” is not one that ought to change as one crosses borders. The definition does not

144. *Id.* at 3.

145. *Id.* at 19 n.34.

146. *Id.* (citing U.N. High Comm’r for Refugees, *Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, ¶¶ 3, 16, 17, 30, U.N. Doc. HCR/GIP/02/01 (May 7, 2002) [hereinafter U.N. High Comm’r for Refugees]).

147. U.N. High Comm’r for Refugees, *supra* note 146, ¶ 16 (“A claimant’s sexuality or sexual practices may be relevant to a refugee claim where he or she has been subject to persecutory (including discriminatory) action on account of his or her sexuality or sexual practices. In many such cases, the claimant has refused to adhere to socially or culturally defined roles or expectations of behaviour attributed to his or her sex. The most common claims involve homosexuals, transsexuals or transvestites, who have faced extreme public hostility, violence, abuse, or severe or cumulative discrimination.”).

148. OFFICE OF THE PROSECUTOR, *supra* note 3, at 3.

allow for cultural relativity but instead requires a broad interpretation of the meaning of gender, as laid out above.¹⁴⁹ Indeed, the “within the context of society” part of the definition was included so as to acknowledge these “sociological differences,” not to ignore them.¹⁵⁰

B. SOME ARGUE THAT THE DEFINITION OF “GENDER” CONTEMPLATES, AND REJECTS, INCLUSION OF THE LGBT COMMUNITY, YET THESE OBSERVATIONS ARE MISGUIDED

Some commentators have argued that the Rome Statute has rejected the notion advocated by this Note, instead stating that, by defining “gender” along the biological male/female divide, the Rome Statute has rejected any argument that this definition encompasses the rights of the LGBT community. However, these arguments ignore that sociological considerations are a part of the “gender” definition and that sexual orientation is itself a sociological construct. Subsection 1 explores these arguments while Subsection 2 establishes that the term “gender” inherently considers the sociological considerations.

1. Arguments That the Rome Statute’s Definition of “Gender” Does Not Include the LGBT Community

Those who posit that the definition of “gender” found in the Rome Statute does not cover members of the LGBT community base their argument on the understanding that the definition states that it applies “to the two sexes, male and female.”¹⁵¹ Thus, the argument goes, the definition of “gender” has categorically eliminated any meaning that goes beyond simply the biological differences between men and women. Yet, this understanding of the term contains two fatal flaws: (1) it conflates

149. See Kelly D. Askin, *Crimes Within the Jurisdiction of the International Criminal Court*, 10 CRIM. L.F. 33, 47–48 (1999).

150. Bedont & Hall-Martinez, *supra* note 141.

151. See, e.g., Rana Lehr-Lenardt, *One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court*, 16 BYU J. PUB. L. 317, 340 (2002) (“[G]ender means male and female, not homosexual.”); David Scheffer, *The International Criminal Court*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW 67, 71 (William Schabas & Nadia Bernaz eds., 2011) (“[T]he term ‘gender,’ which is used as a category of discriminatory conduct for the crime of persecution, can refer only ‘to the two sexes, male and female, within the context of society.’ Thus, at least in theory, widespread or systematic persecution based on other types of possible gender discrimination (gays, transvestites, bisexuals) might not qualify as a crime against humanity under the Rome Statute.”).

the terms “gender” and “sex”; and (2) it ignores the understanding of the definition of “gender” by OTP, which explicitly acknowledges the social construction of the term. “Gender” and “sex” are two terms that mean crucially different things.¹⁵² Inherently, the term “gender” recognizes the social differences and construction of gender identity norms, while the term “sex” does not. OTP has stated as much by acknowledging that in considering a gender-based crime, it is crucial that the social construction of the term be considered.¹⁵³ Additionally, the phrase “within the context of society” was included in the text¹⁵⁴ and must be given meaning;¹⁵⁵ indeed, this phrase indicates that sociological concerns must be part of any consideration of gender and not restricted simply to a distinction between men and women. Thus, it seems clear that these arguments that the definition of “gender” eliminated the LGBT from protection under the Rome Statute ought to be rejected.

2. How Sexual Preference Fits into the Definition of “Gender”

It is important to recall that the term “gender,” and not “sex,” was included in the Rome Statute because of its broader meaning, which contemplates the social construction of gender and the roles that society applies to each gender.¹⁵⁶ This deliberate choice in the process of the negotiations cannot mean nothing—every word and its choice should be given its appropriate meaning.¹⁵⁷ In this case, the use of the word “gender” explicitly acknowledges that crimes based on gender, and not just

152. See HEAVEN CRAWLEY, REFUGEES AND GENDER: LAW AND PROCESS 163 n.1 (2001).

153. See, e.g., OFFICE OF THE PROSECUTOR, *supra* note 3, at 3 (stating that the definition of “gender” “acknowledges the social construction of gender”).

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

155. See Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331, 340, 8 I.L.M. 679, 691–92 (establishing the text of the treaty as the primary source for treaty interpretation). Other sources can be used to supplement that interpretation, but the text is to be consulted first “in good faith in accordance with the ordinary meaning given” to such words. See *id.* art. 31(1)–(2).

156. See Steains, *supra* note 73.

157. In statutory interpretation, it is well accepted that all words in a given statute or treaty should be recognized as having meaning. See, e.g., LARRY M. EIG, CONG. RESEARCH SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 13–14 (2011), <https://www.fas.org/sgp/crs/misc/97-589.pdf> (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . .” (internal citations omitted)).

those based on the biological distinctions between men and women, will be recognized under the Rome Statute.

As this aspect of social construction is acknowledged in the definition of “gender,” so too is the fact that this definition ought to cover members of the LGBT community. Sexual orientation is itself a concept that is “social in origin.”¹⁵⁸ Sexual orientation is a socially constructed concept that is learned by humans and some follow certain “scripts” as it relates to how society expects them to behave sexually.¹⁵⁹ Human sexuality itself is not something that is devoid of social pressures and these forces ought to be recognized when analyzing gender-based crimes.¹⁶⁰

Indeed, some will likely argue that this group is one that does not need protection and will question the proposition that the LGBT community is a group at all; rather, many may argue that the immoral behavior of this group is targeted, not the individuals themselves. However, the adverse treatment of the LGBT community is in fact an acknowledgement that this group exists. By treating individuals who possess this “moral deficiency” as targets of persecution, those who deny these groups’ existence only affirm it. Their actions speak to the fact that their societies recognize such groups and, in recognition of individuals’ membership in that group, they are subjected to persecutory treatment. What may appear to be an outward rejection of the existence of the group of the LGBT community is in fact an implicit acknowledgement of the group’s actuality. Members of the LGBT community are targeted for these crimes *because* of society’s recognition of their membership in this group and certain individuals’ views of that group. The fact that LGBT individuals do not conform to society’s construction of gender is precisely why these gender-based crimes exist. The

158. Richard R. Troiden, *The Formation of Homosexual Identities*, 17 J. HOMOSEXUALITY 43, 44 (1989) (“Sexual conduct is primarily social in origin. Existing sociocultural arrangements define what sexuality is, the purposes it serves, its manner of expression, and what it means to be sexual. People learn to be sexual pretty much as they learn everything else. Women and men are born with an open-ended, diffuse, and relatively fluid capacity for bodily pleasure that is shaped and expressed through sexual scripts[,] . . . [which] are articulated by the wider culture” (citations omitted)).

159. *Id.*

160. *See id.*; *see also* JOHN H. GAGNON & WILLIAM SIMON, SEXUAL CONDUCT: THE SOCIAL SOURCES OF HUMAN SEXUALITY ix (2d ed. 2005) (introducing what has become known as the “social constructionist” view of human sexuality).

ICC certainly should acknowledge this social construction in its decisions to prosecute.

C. THE INTERCONNECTEDNESS OF THE WORK DONE BY INTERNATIONAL HUMAN RIGHTS COURTS AND THAT OF THE ICC

At first glance, it appears as though international human rights courts and the ICC have different roles in the international judicial community. The role of human rights courts is more often viewed as a mechanism by which states are held responsible,¹⁶¹ while the ICC was established to bring individual actors to justice.¹⁶² However, the two are connected in that both promote and protect the same sets of rights; the ways in which they guarantee those rights may differ, but their roles are interconnected so as to allow one to borrow from the other. Additionally, both are governed by principles of *jus cogens*, which apply to all international actors.¹⁶³ As such, there is a considerable degree of practicality in courts recognizing and upholding a more or less uniform set of rights so as to conform with their complementary roles within the international system.¹⁶⁴ It would be foolhardy for the international legal community collectively to espouse differing sets of rights, which depended solely on under which jurisdiction a particular case fell. In fact, OTP has stated that it hopes to contribute to the international community's growing understanding of the meaning of gender-based violence, thus acknowledging the interconnectedness of the ICC's work with the work of other human rights courts.¹⁶⁵

161. See, e.g., European Convention on Human Rights, *supra* note 113, art. 19 (“To ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention, there shall be set up . . . [a] European Court of Human Rights . . .”).

162. Rome Statute, *supra* note 1, art. 1 (“An International Criminal Court (‘the Court’) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over *persons* for the most serious crimes of international concern . . .”) (emphasis added).

163. See *supra* Part I.E.

164. See Harmen van der Wilt & Sandra Lyngdorf, *Procedural Obligations Under the European Convention on Human Rights: Useful Guidelines for the Assessment of ‘Unwillingness’ and ‘Inability’ in the Context of the Complementarity Principle*, 9 INT’L CRIM. L. REV. 39, 41–42 (2009) (“The concurrence of state responsibility and individual responsibility which is increasingly recognized in legal doctrine is an incentive for courts to consult each other’s decisions and elaborate, when appropriate and with the necessary modifications, on each other’s findings in the field of evidence and legal concepts.” (citations omitted)).

165. OFFICE OF THE PROSECUTOR, *supra* note 3, at 10–11 (“The objectives of the policy [of sexual and gender-based crimes] are to . . . [c]ontribute,

Jus cogens, which governs all conduct in the international community,¹⁶⁶ and the complementarity of these courts supports a more well-defined set of rights to be protected. *Jus cogens* dictates that there is a duty to prosecute crimes against humanity,¹⁶⁷ and when states have failed to bring justice to the victims of such crimes, the ICC has the role of prosecuting.¹⁶⁸ Many critics have pointed out that a failure of the ICC to prosecute in certain regards can constitute a grant of amnesty to individuals who have committed atrocious crimes.¹⁶⁹ The inaction of the ICC, and domestic courts, leads to impunity for those individuals; thus, the ICC has a duty to prosecute crimes falling under this heading.¹⁷⁰

Indeed, the Rome Statute and the organic treaty of the ECHR, the European Convention on Human Rights, both derive from similar principles. Notably, both treaties acknowledge that their purpose is to promote international “peace” and “justice.”¹⁷¹ Although each treaty invokes differing mechanisms for achieving these ends, both acknowledge that they are established for similar purposes. Not only were these treaties designed to uphold similar rights but also, in striving to meet these goals, it is appropriate to compare their methods for doing so.

Specifically in the area of persecution based on gender, “the ICC should also look outside of international criminal law for guidance” because of the fact that this relatively “newly identified [area of] gender-based persecution has not been analyzed in the same depth” as other crimes against humanity.¹⁷² Because the area of gender was so contentious during the nego-

through its implementation, to the ongoing development of international jurisprudence regarding sexual and gender-based crimes.”).

166. JANIS, *supra* note 109.

167. Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation To Prosecute Human Rights Crimes*, 59 LAW & CONTEMP. PROBS. 41, 52–59 (1996).

168. See Rome Statute, *supra* note 1, art. 17(1)(a).

169. See generally Scharf, *supra* note 167, at 41 (providing examples of countries that granted amnesty) (citing Michael Vickery & Naomi Roht-Arriaza, *Human Rights in Cambodia*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 251 (Naomi Roht-Arriaza ed., 1995)).

170. See *id.*

171. Rome Statute, *supra* note 1, pmb1; European Convention on Human Rights, *supra* note 113, pmb1.

172. Valerie Oosterveld, *Gender, Persecution, and the International Criminal Court: Refugee Law's Relevance to the Crime Against Humanity of Gender-Based Persecution*, 17 DUKE J. COMP. & INT'L L. 49, 49 (2006).

tiation process and the ICC's precedents offer little guidance in this area, the ICC should be even more willing to find guidance in the approaches of other courts.¹⁷³ Therefore, when the ICC judges are exploring areas of the law yet to be broached by the ICC, they can and ought to find guidance in the work of other courts who have examined these issues.¹⁷⁴ A judicial body, such as the ICC, with limited precedents and practice seems to be exactly the kind of court that could borrow from the experiences of other courts that have grappled with similar issues. OTP itself has acknowledged the value of looking to precedents in refugee law, citing the work by Professor Oosterveld.¹⁷⁵

The Rome Statute itself provides guidance that seems to demonstrate that it is appropriate to consider human rights and the practices of other institutions. The standards of admissibility of the ICC consider not only a complete failure of the national judicial systems but also "situations involving *some* judicial action, however in a manner that fails to conform with fundamental human rights."¹⁷⁶ Thus, the Rome Statute explicitly recognizes that considerations of human rights are to be

173. *See id.*

174. *See id.* at 51–52. Oosterveld makes a link between international refugee law and the developing area of law that is gender-based persecution under Article 7 of the Rome Statute:

This link is helpful because international and domestic refugee law has explored certain elements of gender-related persecution that are, at present, unexplored in international criminal law. Therefore, when the ICC's judges are determining the content of the elements of the crime against humanity of gender-based persecution, they should examine principles or rules found within refugee law. This is not to argue that a definition of gender-related persecution found within international refugee law should be directly transferred to the crime against humanity of gender-based persecution. . . . Rather, the ICC should evaluate how refugee law approaches to gender-related persecution can shed considerable light on international criminal law's relatively undeveloped understanding of gender-based persecution. Even if the ICC decides that certain aspects of refugee law relating to gender-related persecution do not rise to the level of 'principles and rules of international law' or general principles of domestic law, they may still help guide the ICC toward a full understanding of gender-based persecution.

Id. (citations omitted). Professor Oosterveld's connection between refugee law and the crime of gender-based persecution is informative in this regard as well, as the ICC's practices of prosecuting based on persecution of the LGBT community can borrow approaches and principles from other institutions and bodies of law that have previously addressed these issues. *See id.*

175. OFFICE OF THE PROSECUTOR, *supra* note 3, at 19 n.34.

176. Jessica Almqvist, *Complementarity and Human Rights: A Litmus Test for the International Criminal Court*, 30 LOY. L.A. INT'L & COMP. L. REV. 335, 339 (2008) (citing Rome Statute, *supra* note 1, art. 20(3)).

weighed in determining whether or not a case should be brought in front of the ICC.¹⁷⁷ Those same considerations ought to apply not only when evaluating domestic judicial action, but also when human rights violations are implicated. Most importantly, the Rome Statute states that the tribunal shall apply “law . . . [that is] consistent with internationally recognized human rights, and . . . without any adverse distinction founded on grounds such as gender, as defined in article 7, paragraph 3.”¹⁷⁸ Thus, no matter what the definition of gender states, if human rights law protects members of the LGBT community, then the ICC must apply that law.

It is quite clear that not only *should* the ICC consider acts of other human rights courts but also that the ICC *must* do so. Examining several cases from the ECHR and IACHR and developments in the international court generally¹⁷⁹ makes clear that the international human rights community has made steps toward protecting members of the LGBT community and that ICC ought to do the same.

III. THE PRACTICES BY HUMAN RIGHTS COURTS AND DEVELOPMENTS IN INTERNATIONAL LAW PROVIDE AVENUES TOWARD PROTECTING MEMBERS OF THE LGBT COMMUNITY IN THE ICC

Other courts’ processes and means for protecting members of the LGBT community can be informative in determining how the ICC can do the same. Although the structures of human rights courts and the means by which they adopt their standards differ from a court with international criminal jurisdiction like the ICC, the framework under which the ECHR and the IACHR protect on the basis of sexual orientation can serve as a model for the ICC. Human rights courts, as protectors of specified civil liberties, and criminal courts, which punish those who violate those same rights, have a connected function in the international judicial system. As such, the practices of one can inform the other.

As the interconnectedness of the frameworks of the ICC and human rights courts have been established in Part II.C, Section A begins by employing the analyses from the ECHR and IACHR in the context of the ICC. Next, Section B proposes

177. *See id.*

178. Rome Statute, *supra* note 1, art. 21(3).

179. *See supra* Part I.F.

specific language OTP can adopt in order to make clear that the LGBT community is protected under the Rome Statute's definition of "gender." Section C addresses counterarguments some may levy against this proposal. Finally, Section D concludes by exploring developments in international law generally and considers how they may inform the conversation.

A. USING THE METHODS EMPLOYED BY HUMAN RIGHTS COURTS WITHIN THE CONTEXT OF THE ICC

The ECHR and the IACHR employed logic that is not unique to the area of human rights law; indeed, the same logic can apply to the ICC's persecution analysis under Article 7(1)(h) of the Rome Statute. The ICC must look to other international law sources, particularly human rights courts, for precedent, especially in areas the ICC itself has not addressed.¹⁸⁰ Although the ECHR and IACHR cases discussed above examined discrimination, the ICC can follow that approach when determining how to treat cases involving the maltreatment of the LGBT community. Additionally, the Rome Statute contains provisions, namely Article 21, which provide the same sort of recognitions of dignity that were vital in the analysis conducted by both the ECHR and IACHR.¹⁸¹

Although discrimination and persecution both serve as distinct bases for crimes in these courts, their relationship is simply one of scale and gravity. What is most important in recognizing the relationship between the crimes of discrimination and persecution is that they are both founded in the same principle: targeting an individual because of that person's membership in a particular group is impermissible. "[T]he dividing line between discrimination and persecution is not a clear one"; however, it is one that exists and under certain circumstances, "discrimination can constitute persecution."¹⁸² It may be helpful to imagine the two concepts on a spectrum, where conduct that is considered discriminatory can cross into being considered persecution once a certain threshold is breached. There is a predominant view that in order for "non-violent discrimination to amount to persecution, a high threshold of that form of ill-

180. See *supra* Part II.C.

181. Rome Statute, *supra* note 1, art. 21.

182. U.N. High Comm'r for Refugees, *Guidelines on the Protection of Refugee Women*, ¶ 55, U.N. Doc. EC/SCP/67 (July 22, 1991).

treatment [must] be surmounted.”¹⁸³ Where that line is remains a question that cannot be easily answered. However, knowing that there is a point at which discriminatory behavior transforms into persecution is an important consideration in applying the case law of the ECHR and IACHR to the ICC. Although none of the cases addressed by these two human rights courts has dealt with persecution per se, it is accepted, both by the Rome Statute¹⁸⁴ and more generally,¹⁸⁵ that gender-specific discrimination is the kind of conduct that will fall under the jurisdiction of the ICC if it rises to the level of persecution.

Understanding this relationship is crucial in understanding how the jurisprudence surrounding discrimination law in international human rights courts can be applied to the ICC. Clearly, the fact that these human rights courts have addressed the maltreatment of the LGBT community within the context of discrimination should not hinder the ICC from adopting the approaches of these courts. In fact, as persecution is a harsher form of discrimination, the ICC should be *eager* to prosecute when it is faced with a set of facts that would amount to the gravity and severity required to move a crime from the realm of discrimination to persecution. Further, the ECHR and IACHR have found it proper to extend their protection to members of the LGBT community despite the fact that their enabling treaties refer only to discrimination based on “sex” rather than based on “gender.”¹⁸⁶ Although “sex” is viewed as the narrower of the two terms,¹⁸⁷ the LGBT community has been protected under this heading and the same logic can certainly be applied under a broader “gender” framework.

Therefore, in order to apply the same analysis from the human rights courts discussed above, what must first be identified is a principle within the Rome Statute that recognizes the right to dignity for all individuals. The character of the treaty itself may serve as a starting point in this regard; however, a

183. Robin Tam, *Immigration Judicial Review: Essential Respondent Cases*, 5 JUD. REV. 121, 125 (2000).

184. See Rome Statute, *supra* note 1, art. 7(1)(h) (listing “gender” as a protected group under the persecution provision of the crimes against humanity article).

185. Bret Thiele, *Persecution on Account of Gender: A Need for Refugee Law Reform*, 11 HASTINGS WOMEN’S L.J. 221, 231 (2000) (“[T]ransgression of social mores and sexual discrimination can rise to the level of persecution.”).

186. See European Convention on Human Rights, *supra* note 113, art. 14; Inter-American Convention on Human Rights, *supra* note 129, art. 1.

187. See *supra* Part II.A.

more specific view on the topic can be found in Article 21, the provision on the applicable law of the ICC.¹⁸⁸ In full, Article 21 states the following:

- (1) The Court shall apply:
 - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
 - (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
 - (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
- (2) The Court may apply principles and rules of law as interpreted in its previous decisions.
- (3) The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.¹⁸⁹

Most crucially for the purposes of this Note, this provision recognizes the importance of (1) looking to other sources of international law for guidance; (2) that the applicable law of the ICC should conform to human rights law; and (3) the application of the law should be done in a way that does not bring an “adverse distinction” to any group. These first two points make clear that looking to the law of the ECHR and IACHR for guidance is appropriate; the last states that the LGBT community should not be deprived of the protection afforded to other groups.

When viewed in conjunction with one another, these two establish a crucial premise: no person shall be persecuted under the jurisdiction of the ICC and the ICC ought to enforce the law so as to prevent distinction among the groups enumerated in Article 21. The overarching principle found within Article 21(3) is the equal application of laws in such a way that no particular group is disadvantaged. Of course, sexual orientation is not listed explicitly as a protected ground, but this Note’s discussion of the Rome Statute’s definition of “gender” demonstrates that the LGBT community can, and should, fit under

188. Rome Statute, *supra* note 1, art. 21.

189. *Id.*

this heading. Justice clearly calls for the equal protection of the law to extend to this group and the practices of human rights courts such as the ECHR and IACHR indicate that work is already being done on this front. In order to best “guarantee lasting respect for and the enforcement of international justice”¹⁹⁰ the ICC must adopt a policy of prosecuting those who persecute members of the LGBT community.

B. OTP SHOULD ADOPT AN EXPLICIT POLICY RECOGNIZING THAT MEMBERS OF THE LGBT COMMUNITY ARE COVERED UNDER THE ROME STATUTE’S FORMULATION OF “GENDER”

In order to effectuate a more open and natural reading of the Rome Statute’s definition of “gender,” it is crucial that OTP promulgate an official, explicit policy that makes clear that members of the LGBT community fall within this definition. OTP holds an important role in that it is the body that both brings crimes in front of the ICC and it plays a crucial role in deciphering the text of the Rome Statute when determining what cases can and cannot be brought before the ICC.¹⁹¹ OTP has not shied away from interpreting its obligations, outlining its understanding of certain aspects of the Rome Statute, and proclaiming future goals;¹⁹² therefore, such a step by OTP is by no means radical or an invalid extension of its power. OTP has signaled that it may be moving in this direction by stressing that the definition of “gender” involves sociological considerations¹⁹³ and by making clear that it will continue to focus on gendered crimes going forward.¹⁹⁴ Such a policy could take the form of the following language:

Recognizing that the current definition of “gender” found within the Rome Statute: (1) was the result of contentious debates; (2) arose in an environment in which the rights of the LGBT community were not as widely accepted as they are today; and (3) was ultimately adopted in order to acknowledge both the biological and sociological differ-

190. Rome Statute, *supra* note 1, pmbl.

191. *See supra* notes 15–16 and accompanying text.

192. For a list of papers on policy and strategy OTP has released, see *Policies and Strategies*, INT’L CRIM. CT., <https://www.icc-cpi.int/about/otp/Pages/otp-policies.aspx> (last visited Nov. 28, 2016) (including policy papers on the following topics: “Policy Paper on the Interest of Justice,” “Policy Paper on Victims’ Participation,” “Policy Paper on Sexual and Gender-Based Crimes,” “OTP Strategic Plan 2016–2018,” and “Draft Policy Paper on Case Selection and Prioritisation”).

193. *See* OFFICE OF THE PROSECUTOR, *supra* note 3, *passim*.

194. *Strategic Plan: 2016–2018*, INT’L CRIM. CT. (Nov. 16, 2015), https://www.icc-cpi.int/iccdocs/otp/EN-OTP_Strategic_Plan_2016-2018.pdf.

ences between members of different gendered identities, OTP acknowledges that members of the LGBT community are covered under the Rome Statute's definition of "gender." OTP, the ICC itself, and the negotiators of the Rome Statute have all long recognized that the term "gender" included sociological considerations and this policy serves as an explicit recognition that members of the LGBT community who are subjected to persecutory conduct (that meets all other requirements) will be considered to be a gendered group under Article 7 of the treaty. Not only does a plain reading of the words employed by the Rome Statute inform this interpretation, but so does the ICC's following obligations to: (1) conform to human rights law generally; and (2) apply the law in such a way as not to adversely affect distinct groups. As such, OTP concludes that it has the jurisdiction to prosecute those who have targeted members of the LGBT community under Article 7.

Without such an explicit policy, the debate on whether or not crimes committed against the LGBT community can be brought in front of the ICC will continue. Until the OTP takes action, the same arguments advanced by both sides will be recycled and it is unlikely that any progress will be made on this front. Although some signatories to the Rome Statute may be opposed to such an interpretation, this result is one that flows naturally from the negotiations of the treaty and the developments in international law.

Many practical barriers to prosecution still exist,¹⁹⁵ but with this threshold question resolved, OTP will be enabled to

195. Both the limited resources of the ICC and the desires of victims are of tantamount concern. See *Paper on Some Policy Issues Before the Office of the Prosecutor*, INT'L CRIM. CT. 3 (Sept. 2003), https://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf ("The Court is an institution with limited resources. The Office will function with a two-tiered approach to combat impunity. On the one hand it will initiate prosecutions of the leaders who bear most responsibility for the crimes. On the other hand it will encourage national prosecutions, where possible, for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice by some other means."); see also Catherine Gegout, *The International Criminal Court: Limits, Potential and Conditions for the Promotion of Justice and Peace*, 34 THIRD WORLD Q., 800, 811 (2013) ("[V]ictims can disagree with the work of the ICC, as they feel it provides symbolic justice, it is biased, it does not provide protection, it does not provide justice as they understand it, and it does not address their needs. . . . Victims are often reluctant to testify to the ICC for fear of further attack. Victims could prefer local justice systems to justice meted out by an international court."). Additionally, some argue that domestic truth commissions may be preferable to prosecution under the ICC when the goal is rebuilding the state. See, e.g., Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. 205, 215–20 (2000). While these topics are beyond the scope of this Note, it is crucial to remember these con-

bring crimes committed against the LGBT community in front of the ICC. The result of such an explicit policy by OTP is that the debate over whether or not persecutors of the LGBT community are subject to criminal investigation and prosecution under the Rome Statute will end and then, and only then, will the ICC be empowered to punish such offenders. Many gay and lesbian individuals throughout the world suffer persecution on a daily basis at the hands of the state and private individuals uncontrolled by the government.¹⁹⁶ Those individuals should not be made to continue to suffer in silence before the ICC; rather, their hardships should be acknowledged and their persecutors should be brought to justice when governments are unwilling or unable to act. The ICC does not need to restructure itself in order to address this problem because it already has all the necessary requisites to protect the LGBT community. All that is needed is action within the bounds of the power of OTP and ICC, and such a step is required by the Rome Statute, international law, and justice.

C. OTP ADOPTING SUCH A POLICY WOULD NOT VIOLATE THE TREATY NOR THE SOVEREIGNTY OF THE SIGNATORY STATES

While the proposed language may certainly be promulgated by OTP, some may argue that such language would not only constitute a “bait and switch” but would also violate both the sovereignty of member states and the structure of the ICC. This Section addresses both of those arguments and concludes that they are not sufficient to defeat this proposal.

The first argument that critics of this proposal may suggest is that signatories to the original language did not agree to this “new” interpretation. However, this is not the case; signatories agreed to the ambiguous language found within the treaty, fully aware that such language could be interpreted multiple ways. Additionally, these signatories agreed to abide by international human rights standards, which, as has been discussed above, support such a reading.

Yet another, seemingly more legitimate, counterargument to this proposal stems from the concept that the signatory states have not sacrificed their sovereignty in signing the Rome Statute; rather than the ICC manufacturing the norms with

siderations while noting that such an interpretation by OTP may not lead to immediate prosecution.

196. See *supra* Part I.A.

which such states must comply, the ICC should simply enforce violations of norms already in place at the national level. This sort of criticism could be seen as a “bottom-up” approach: the norms ought to come from the states themselves and the ICC simply has the role of enforcing those norms. However, such a criticism ignores the primary role of the ICC: to supplement the judiciary efforts of states when those states have failed to act in accordance with international human rights norms. In such a system, the norms are indeed coming from the “bottom-up” because the violations of those norms on the ground in the signatory states is what is creating the need for the ICC to act. Member states are indeed identifying the areas in which the ICC must act by failing to protect the rights of certain groups.

D. DEVELOPMENTS IN INTERNATIONAL LAW GENERALLY INDICATE A MOVEMENT TOWARD PROTECTING THE LGBT COMMUNITY AND THE ICC SHOULD FOLLOW THIS TREND

Such a reading of the Rome Statute would be consistent with trends in international law, a consideration that is required both by logic and the Rome Statute itself. Individual countries and the international community as a whole have seen changes in their respective approaches to LGBT rights such that the ICC would not be blazing a new, unexplored trail.¹⁹⁷ The ECHR has acknowledged that the LGBT community is a group in need of protection and that doing so is proper.¹⁹⁸ Its view is that international law’s developments and a changing view of the rights of the LGBT community have had a profound impact on the ICC and its treatment of disparate treatment on the basis of sexual orientation.¹⁹⁹ The rights of the LGBT community, once ignored as an international problem, has taken hold in the international community and has been recognized in various parts of the world.²⁰⁰ While LGBT rights may once have been “subject to easy change by shifting majorities” because of a disjointed world community view on this group, history has taught the international community that the rights of homosexuals and transgendered individuals “are so

197. See *supra* Part I.F; see also Rome Statute, *supra* note 1, art. 21(3) (“The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights . . .”).

198. See JOHNSON, *supra* note 111.

199. See *id.*

200. See *supra* Part I.F.

essential that [they ought to be] entrench[ed]" in the international community and the ICC itself.²⁰¹

Although there has been change, more is needed to stop the crimes that are currently being perpetrated against members of the LGBT community. The international community at large has made strides, but there are others within the community that refuse to acknowledge the rights of this group.²⁰² The ICC may in fact play an important role in deterring these crimes²⁰³ as it has the ability to bring many of those offenders under its jurisdiction. The international community has not yet demonstrated a willingness to *universally* recognize this group and this alone shows how crucial it is that the ICC intervene. As has been demonstrated, not only does the ICC have the ability to do so, it must do so in order to fulfill its mandate and protect this distinct group.

CONCLUSION

The LGBT community has been the target of crimes against humanity and the world community's reluctance to acknowledge this group's rights in the ICC is complicit in their persecution. OTP has made several suggestions that it may be willing to consider the LGBT community to fall under the definition of "gender," yet that definition has sparked intense debate since it was first introduced into the Rome Statute. However, the attitudes of the international community have been moving toward recognition that the rights of the LGBT community must be realized under human rights law. The practices of the ECHR and IACHR demonstrate that this population has been protected by human rights courts and those courts' methodology can be utilized by the ICC.

This Note suggests that the language of the Rome Statute itself does not need revision; rather, what is needed is an explicit policy by OTP recognizing that members of the LGBT community qualify as a protected group under the Rome Statute's definition of "gender." Such a policy aligns the obligations

201. See ALAN DERSHOWITZ, RIGHTS FROM WRONGS 81 (2004) (arguing that the establishment of a right comes not from natural sources, but from history's lessons on what is and is not proper).

202. See, e.g., *supra* Part I.A.; *supra* Part II.B.2.

203. See Kevin Burke, *The Deterrent Effect of the International Criminal Court*, CITIZENS FOR GLOBAL SOLUTIONS (Mar. 2, 2015), <http://globalsolutions.org/blog/2015/03/Deterrent-Effect-International-Criminal-Court#.Vv7RJ-IrLX4>.

of the ICC with the realities of both the international community in general and also the practices of human rights courts. By embracing the ambiguity employed by the drafters of the Rome Statute and adopting the propriety of other international courts, the ICC can see a path before it wherein crimes of persecution directed at the LGBT community will be punished accordingly. Such an understanding of the definition of “gender,” especially when acknowledged explicitly by OTP, will be the first move towards protecting vulnerable LGBT communities under the Rome Statute.