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INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

Protection of LGBTQIA+ rights in armed conflict: How (and whether) to ‘queer’ the crime against humanity of persecution in international criminal law?

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Abstract

The discrimination faced every day by LGBTQIA+ individuals does not disappear during armed conflict. On the contrary, such persons have been, and continue to be, targeted for particularly heinous human rights violations due to their sexual orientation and/or gender identity. And while international human rights law has, in the last two decades, made significant leaps in prohibiting discrimination on these grounds, international criminal law lags behind. The Rome Statute of the International Criminal Court only criminalizes persecution, an extreme form of discrimination, on grounds of gender and other grounds universally recognized in international law rather than on grounds of sexual orientation or gender identity. In the absence of clear textual criminalization of queer persecution, this article argues international law can be queerly reinterpreted to fit sexual orientation and gender identity into the confines of ‘gender’. However, while acknowledging the normative and expressive gains that could come from using international criminal law to pursue queer persecution, this article also notes the costs, including the flattening of queer discrimination into the narrow rubric of gender and suppressing its more radical principles. Therefore, while concluding international criminal law can be queerly reinterpreted, this article expresses doubts as to whether, in fact, it should.

Keywords: International Criminal Court; international criminal law; international human rights law; LGBTQIA+ protection; queer theory

1. Introduction

Queer erasure in armed conflict dooms history to repeat itself. People were persecuted on the basis of sexual orientation and/or gender identity during armed conflict under Nazi Germany 80 years ago, under the Khmer Rouge 40 years ago, during the Colombian civil war 20 years ago, under the Islamic State six years ago, and during Russia’s current invasion of Ukraine. There is a long history of queer invisibility in armed conflict,¹ despite that queer people today are more visible than ever

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¹The report of Victor Madrigal-Borloz, the UN Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, to UN General Assembly in July 2022, published in November 2022, is the first UN initiative dedicated specifically to queer lives in armed conflict. See V. Madrigal-Borloz, Report of the UN Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, UN Doc. A/77/235 (2022).

before in international law. Since the 1990s, reinterpretation of international human rights law, including by expanding the meaning of ‘sex’ and ‘gender’ in existing human rights treaties to include sexual orientation and gender identity, has seen significant advances in the protection of queer people, with queer discrimination increasingly recognized as prohibited. But within this context, international criminal law has proven particularly resistant to being queerly reinterpreted. The Rome Statute that created the permanent International Criminal Court (ICC) in 1998² heralded significant scope for the intermingling of human rights with international criminal law through the crime against humanity of persecution, which is based on an intentional and severe deprivation of the human right of non-discrimination.³ However, the text of the Rome Statute does not explicitly recognize queer rights, and despite the contemporaneous progress on queer rights, over two decades have passed without the ICC considering queer persecution in its case law.

What would it take for international criminal law to become a source of redress for queer suffering in conflict? This article addresses two related but distinct limbs of this question, which have been considered separately but rarely together; whether international criminal law *can* be ‘queered’, that is to say, read and used in a way that advances the protection of queer people in conflict, and whether it *should*. Focusing first on the possibility, this article begins by justifying the need for the protection by contextualizing queer realities in armed conflict, both at the individual and group level. It then canvases advancements in queer protection in the field of human rights, given the human right to non-discrimination creates the framework for the crime against humanity of persecution. Finally, it considers how to queerly reinterpret persecution in international criminal law, with a particular focus on the gains already made in queer rights through gender and discrimination frameworks. Ultimately, on the first limb, it finds that it is possible to advance legal protection of queer rights through the current state of international criminal law, but to do so requires a somewhat unsatisfactory merging of the broader experience of discrimination on the basis of gender with the narrower experience of discrimination on the basis of sexual orientation and/or gender identity. Having established the possibility, this article then moves to the second limb of the question, being the desirability. Though it can, this article queries whether international criminal law *should* be so used – or to put another way, whether international criminal law is the best vehicle for advancing queer rights. Initially it analyses some of the possible gains of this strategy, including normative and expressive ones. Then it turns to the costs, questioning whether such a queer reinterpretation is sufficient, or whether alternatives to criminal processes for mass human rights violations suggest that queer rights demand a complete queer reimagination of international law instead.

2. How to ‘queer’ international criminal law?

2.1 Queer realities

Several terms warrant definition at the outset. Reference in this article to ‘queer’ people describes people who are situated in the LGBTQIA+ community of individuals who may be ‘othered’ or discriminated against on the basis of their actual or perceived sexual orientation and/or gender identity.⁴ Sexual orientation refers to experience of sexual attraction and sexual relations, while gender identity refers to experience and expression of gender, which may or may not correspond with biological sex as assigned at birth. Of course, these individual terms within the LGBTQIA+ acronym are reflections of political and legal identities, and individuals may self-identify in other ways.⁵ Likewise, individuals beyond these descriptions may also experience being ‘othered’ or

²1998 Rome Statute of the International Criminal Court, 2187 UNTS 90 (Rome Statute).

³*Ibid.*, Art. 7.

⁴Acknowledging, however, that intersex people may instead be ‘othered’ on the basis of sex characteristics.

⁵See Madrigal-Borloz, *supra* note 1, para. 4.

discriminated against on this basis, including those who engage in certain marginal sexual practices such as non-monogamy, sadomasochism or other expressions of erotic desire which may be connected with but not specific to a sexual orientation or gender identity.⁶ Thus the use of 'queer' seeks to maximize inclusivity; it is broad and fluid, and is being reclaimed from its derogatory use as an assertion of transgressive practice, identity, and politics.⁷

Turning then to 'rights'. Queer people are human and are therefore holders of all human rights normally owed. This includes specialist rights like children's rights,⁸ which are owed to queer children. However, this article is concerned with violations of rights that are causally connected to the queer identity of the rights-holder – queer people's human rights violated *because* they are queer, and therefore being discriminated against. Every major human rights treaty contains an article which prohibits discrimination on various enumerated grounds,⁹ and in due course this article will discuss how discrimination on the basis of sexual orientation and/or gender identity fits into these enumerated grounds. That being so, reference in this article to 'queer rights' and abuse thereof speaks to a two-fold violation of the predicate right *and* the accompanying violation of the right to non-discrimination that attaches in such circumstances. The right to life, for example, is owed to all people without discrimination; imposing the death penalty for consensual sexual activity prohibited on the basis of sexual orientation violates a queer person's right to life *and* to non-discrimination.¹⁰ The right to non-discrimination on the basis of sexual orientation and/or gender identity is central to this article.

Finally, the term 'persecution'. Deprivation of human rights is not normally a matter for criminal law, but human rights have influenced the development of international criminal law in many ways.¹¹ Indeed, creation of the ICC was seen as a crucial step by which to punish offenders of human rights.¹² One of the most explicit intersections between these two fields is that the intentional and severe deprivation of fundamental human rights, contrary to international law, is now the international crime against humanity of persecution and can be prosecuted in the ICC. Persecution in the Rome Statute is a crime whether it occurs in times of war or peace,¹³ though this article focuses on the former. And while individual atrocities against queer people can be prosecuted as individual international crimes, such as the full complement of war crimes contained in the Rome Statute, persecution is the only international crime that recognizes the discriminatory targeting of queer people as an identifiable group from whom human rights are withheld. Therefore, the crime against humanity of persecution is central to this article's examination of the protection of *all* queer people as a group, rather than individual queer victims of international crimes.

⁶P. Lee, 'Struggle for Recognition: Theorising Sexual/Gender Minorities as Rights-Holders in International Law', (2022) 30 *Feminist Legal Studies* 73, at 87–8.

⁷This article also acknowledges the distinction between LGBTQIA+ advocacy and critical queer theory, though both inform it. See D. Otto, 'Introduction: Embracing Queer Curiosity', in D. Otto (ed.), *Queering International Law: Possibilities, Alliances, Complicities, Risks* (2017), 1, at 5; R. Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (2020), 60.

⁸See 1989 Convention on the Rights of the Child, 1557 UNTS 3.

⁹See, e.g., 1966 International Covenant on Civil and Political Rights, 999 UNTS 171, Arts. 2, 14, 24–26; 1966 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, Art. 2; 1965 Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195, Arts. 1, 2, 4, 5; 1989 Convention on the Rights of the Child, 1557 UNTS 3, Art. 2; 1979 Convention on the Elimination of All Forms of Discrimination Against Women, 1249 UNTS 13, Arts. 2–4, 15; 2007 Convention on the Rights of Persons with Disabilities, 2515 UNTS 3, Arts. 3, 4, 5, 12.

¹⁰And, of course, possibly other rights, such as the right to privacy. For an analysis of how queer people may experience certain rights see, e.g., yogyakartaprinciples.org/ ('Yogyakarta Principles'), with additional principles added in 2017.

¹¹See, e.g., A. Clapham, 'Human Rights and International Criminal Law', in W. A. Schabas (ed.), *The Cambridge Companion to International Criminal Law* (2016), 11.

¹²C. Barrera Moore, 'Embracing Ambiguity and Adopting Propriety: Using Comparative Law to Explore Avenues for Protecting the LGBT Population under Article 7 of the Rome Statute of the International Criminal Court', (2017) 101 *Minnesota Law Review* 1287, at 1287.

¹³See Rome Statute, *supra* note 2, Art. 7.

And yet, the simple reality of living while queer is enough to attract intentional and severe deprivation of fundamental human rights. In 2023, 67 jurisdictions around the world still criminalize private and consensual queer sexual activity, of which 11 can impose the death penalty.¹⁴ In many ways, this global form of everyday discrimination is a bigger outrage than conflict-related queer rights abuse.¹⁵ While no international criminal tribunal has considered whether criminalizing queer people is a form of persecution,¹⁶ numerous scholars and critics have.¹⁷ Queer discrimination, however, takes many different forms. The horrors of the Holocaust, perhaps the first recognized widespread persecution of queer people in armed conflict, went on to inspire the creation of international criminal law. The Nuremberg Tribunal, the world's first international criminal law prosecution, examined persecution of numerous classes of persons. Its work led directly to the adoption of the Universal Declaration of Human Rights, precisely to ensure enjoyment of rights and freedoms by all. Yet queer people were not recognized in the former, and therefore also not in the latter.¹⁸ This was so despite their persecution by the Nazis being widespread, systematic, and well-documented, including by the use of the pink triangle badge to identify homosexuals in concentration camps, explicitly linking their targeting to their sexuality. The Nuremberg Tribunal's failure to reckon with queer persecution¹⁹ robbed victims of the legal acknowledgement of the atrocities they suffered and, consequently, of their place in the historical record.²⁰ That same flawed record, then used as the basis of subsequent peace-building processes, consolidated queer erasure and excluded queer people from newly minted legal protections. Today there remains no specific protection for queer people in armed conflict, which is why the first question this article asks is, *can* international criminal law be so used.

Queer persecution has continued to be a feature of armed conflict. In Central and South America, lesbians and trans women have been subjected to a barbarically named practice of 'corrective rape' in the context of armed violence.²¹ Government forces and paramilitary and guerrilla groups alike have persecuted queer people in Colombia through humiliation, enslavement, rape, and killing, as well as highly gendered forced labour – cis and trans women experienced domestic servitude through cooking, cleaning, and caring to 'correct' gender expression.²² The Revolutionary Armed Forces of Colombia (FARC) engaged in a 'cleansing'

¹⁴Human Dignity Trust, 'Map of Countries That Criminalise LGBT People', available at www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation. Many such laws were inherited from British imperialism – for a thorough discussion of British efforts to remove anti-sodomy laws it imposed on its colonies see R. Rao, 'A Tale of Two Atonements', in Otto, *supra* note 7, at 15.

¹⁵M. Bohlander, 'Criminalising LGBT Persons Under National Criminal Law and Article 7(1)(h) and (3) of the ICC Statute', (2014) 5(4) *Global Policy* 401, at 402.

¹⁶L. Davis and D. Bradley, 'Victory for Women and LGBTIQ+ Rights under International Criminal Law: Gender in the Draft Crimes against Humanity Treaty', in I. Rosenthal, V. Oosterveld and S. SáCouto (eds.), *Gender and International Criminal Law* (2022), 187, at 199.

¹⁷See, e.g., J. Scheinert, 'Is Criminalization Criminal?: Antisodomy Laws and the Crime Against Humanity of Persecution', (2015) 24 *Tulane Journal of Law and Sexuality* 99; see Bohlander, *supra* note 15; M. Bejzyk, 'Criminalization on the Basis of Sexual Orientation and Gender Identity: Reframing the Dominant Human Rights Discourse to include Freedom from Torture and Inhuman and Degrading Treatment', (2017) 29 *Canadian Journal of Women and the Law/Revue Femmes et Droit* 375.

¹⁸L. Davis, 'Reimagining Justice for Gender-Based Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes Against Women and LGBTIQ Persons', (2018) 24 *William and Mary Journal of Women and the Law* 513, at 516; see Scheinert, *supra* note 17, at 110. See also Otto, *supra* note 7, at 7, on the exclusion of homosexuals in the Universal Declaration of Human Rights.

¹⁹Intersecting layers of discrimination has also meant that the confirmed targeting of lesbians, transgender people, and gender non-confirming people in Nazi Germany features even less prominently in the historical record – see L. Davis, 'Dusting Off the Law Books: Recognizing Gender Persecution in Conflicts and Atrocities', (2021) 20 *Northwestern University Journal of International Human Rights* 1, at 29–36.

²⁰*Ibid.*, at 2.

²¹A. Margalit, 'Still A Blind Spot: The Protection of LGBT Persons During Armed Conflict and Other Situations of Violence', (2018) 100 *International Review of the Red Cross* 237, at 241.

²²See Davis, *supra* note 19, at 43–5.

campaign, directing queer people to leave the region and disappearing those who did not.²³ Queer persons participating in the conflict with armed groups described fear of violence should their sexuality be discovered.²⁴ Reports of queer persecution from Iraq and Syria implicate both government and militant group forces. The terrorist group Islamic State has thrown gay men from building rooftops, issued death warrants against lesbians, killed young people accused of being ‘faggots’ on the basis of certain haircuts and clothing styles, and targeted various transgression of gender roles, including men who are unable to grow beards and women who perform professional work deemed inappropriate for their gender, such as journalism.²⁵ The removal of the individual from the theatre of war is no guarantee to ending the persecution. Trans and gender-diverse people with identity documents that do not correspond to their physical presentation have faced difficulties evacuating and crossing borders,²⁶ and reports have emerged of harassment, assault, arrest, and torture of queer refugees in Lebanon and Kenya, as well as rape and forced genital examinations in Syrian detention facilities.²⁷ Police and prison staff in conflict-affected countries are also reported to perpetrate violence, often in the context of enforcing queer criminalization laws, as are medical staff who carry out forced ‘treatments’ in state facilities.²⁸ There can be no doubt of the need for protection of queer people, by reason of their queer identity, in armed conflict.

This is true at both the individual and societal levels. While individual queer victims are disregarded, queerness itself is misappropriated in the language of waging war. In Nazi Germany, queerness posed a threat to the patriarchal order and the reproduction of the ‘Aryan’ race and had to be met with a militarized hetero-masculinity to eradicate the ‘homosexual conspiracy’.²⁹ Some 80 years later, Islamic State promoted the same militarized masculinity by claiming to give men the opportunity to be ‘true’ men by joining the fight against the ‘sodomites’ of the West.³⁰ In 2022, President Vladimir Putin justified Russia’s invasion of Ukraine as a response to the West seeking to destroy ‘our traditional values’ and lead ‘our people’ to ‘degradation and degeneration’ contrary to human nature.³¹ Both sides of conflicts claim normative hetero-masculinity and characterize the enemy in gendered (and racialized) terms as deviant and inhuman, thus casting doubt on their sovereignty and justifying their ‘penetration’.³² Soldiers, persuaded that militaristic masculinity is what it means to be a real man, enact the domination of the enemy.³³ Men who perpetrate sexual violence against other men are rarely attributed with queerness themselves, as their conduct is often motivated not by sexual desire but by the exertion of dominance – but the negative

²³M. W. Moore and J. R. Barner, ‘Sexual Minorities in Conflict Zones: A Review of the Literature’, (2017) 35 *Aggression and Violent Behaviour* 33, at 36.

²⁴*Ibid.*, at 35.

²⁵See Davis and Bradley, *supra* note 16, at 202–3; Davis, *supra* note 18, at 524–30. The UN has also recognised Islamic State’s targeting of sexual minorities; see, e.g., Madrigal-Borloz, *supra* note 1, paras. 8, 49.

²⁶See Madrigal-Borloz, *ibid.*, para. 41.

²⁷See Margalit, *supra* note 21, at 239–41; UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/25/65 (2014), paras. 67–70; UN Human Rights Council, Discrimination and Violence against Individuals Based on Their Sexual Orientation and Gender Identity, UN Doc. A/HRC/29/23 (2015), para. 31; Report of the UN Secretary-General, Conflict-Related Sexual Violence, UN Doc. S/2015/203 (2015), para. 61; Report of the UN Secretary-General, Conflict-Related Sexual Violence, UN Doc. S/2016/361 (2016), para. 69.

²⁸Including forced psychiatric hospitalization, sterilization, castration – see Moore and Barner, *supra* note 23, at 35.

²⁹See Davis, *supra* note 19, at 29, quoting G. J. Giles, ‘The Denial of Homosexuality: Same-Sex Incidents in Himmler’s SS and Police’, (2002) 11 *Journal of the History of Sexuality* 256, at 260–9.

³⁰See Davis, *supra* note 19, at 40; Davis, *supra* note 18, at 523–4.

³¹Transcript: Vladimir Putin’s Televised Address on Ukraine’, *Bloomberg News*, 24 February 2022, available at www.bloomberg.com/news/articles/2022-02-24/full-transcript-vladimir-putin-s-televised-address-to-russia-on-ukraine-feb-24.

³²D. Otto, ‘Queerly Troubling International Law’s Vision of “Peace”’, (2022) 116 *AJIL Unbound* 22, at 22, citing T. Ruskola, ‘Raping Like a State’, (2010) 57 *University of California Los Angeles Law Review* 1477.

³³E. J. Wood, ‘Variation in Sexual Violence During War’, (2006) 34 *Politics and Society* 307, at 321–3.

imputation of homosexuality on the victim³⁴ is another aspect of maligned queer identity in war,³⁵ something the ICC Office of the Prosecutor itself has recognized.³⁶ Hypermasculinity and homophobia are highly prevalent in militarist and nationalist movements, with the opposing force frequently described in feminized or queer terms as a signifier of inferiority. Thus the occurrence of conflict around the world is accompanied by narratives which reinforce the queer discrimination individual queer people face during these conflicts.³⁷ Queer prejudice is institutionally reiterated, making wartime (and peacetime) violence against queer people more socially acceptable – if society denounced these acts, perpetrators would see no advantage in their execution.³⁸ It is therefore not enough to protect queer individuals; it is also necessary to protect queerness itself in society.

To date, international criminal law has not been the source of any meaningful protection. Efforts by advocates to recognize queer experiences in armed conflict through international criminal law have faced many barriers. No international court has dealt with a case of queer persecution at the time of writing. In 2016, a transgender woman gave evidence at the Extraordinary Chambers in the Courts of Cambodia on the forced population movement, imprisonment, sexual violence, and killing experienced by transgender people under the Khmer Rouge, and about being forced to live as a man and marry a woman. Yet this milestone occurred not because the Court was hearing a case of queer persecution, but because the witness herself applied as a civil party to participate in one of the Chambers' cases.³⁹ In November 2017, a communication was submitted to the ICC requesting a preliminary examination into gender-based persecution of queer people perpetrated by Islamic State.⁴⁰ The ICC Office of the Prosecutor deliberated for over two years before declining the request.⁴¹ In 2019, the ICC Pre-Trial Chamber authorized an investigation into the situation in Myanmar and Bangladesh, recognizing that transgender, intersex, and third-gender persons (among others) were victims of attacks, though the case was not a gender persecution case and remains in the investigation stage only.⁴² Most recently, in 2022, the ICC Prosecutor released a policy paper on gender persecution, which explicitly stated that LGBTQIA+ persons can be targeted for gender persecution,⁴³ though it will remain to be seen whether it translates to cases before the ICC. The scant tangible, legal outcomes have come from the Colombian Special Jurisdiction for Peace, a transitional tribunal set up to prosecute crimes arising out of the war between Colombia's government and the FARC. In April

³⁴In this sense, the victim is generally the subject of penetration, consistent with the notion that being the passive recipient or 'bottom', rather than the penetrator or 'top', is demeaning, in part because it is associated with 'taking sex like a woman' – see, e.g., A. Shalakany, 'On A Certain Queer Discomfort with Orientalism', (2007) 101 *Proceedings of the Annual Meeting American Society of International Law* 125, at 128–9.

³⁵D. A. Lewis, 'Unrecognized Victims: Sexual Violence Against Men in Conflict Settings Under International Law', (2009) 27 *Wisconsin International Law Journal* 1, at 7–8.

³⁶International Criminal Court, *Policy on the Crime of Gender Persecution* (2022), para. 51.

³⁷See Davis, *supra* note 19, at 2.

³⁸See Madrigal-Borloz, *supra* note 1, para. 45.

³⁹M. Elander, 'In Spite: Testifying to Sexual and Gender-Based Violence during the Khmer Rouge Period', in Otto, *supra* note 7, at 120–3.

⁴⁰The Human Rights and Gender Justice (HRGJ) Clinic of the City University of New York (CUNY) School of Law, MADRE, The Organization Of Women's Freedom in Iraq (OWFI), 'Communication to the ICC Prosecutor Pursuant to Article 15 of the Rome Statute Requesting a Preliminary Examination into the Situation of: Gender-Based Persecution and Torture as Crimes Against Humanity and War Crimes Committed by Islamic State of Iraq and the Levant (ISIL) in Iraq', 8 November 2017, available at peacewomen.org/sites/default/files/CUNY%20MADRE%20OWFI%20Article%2015%20Communication%20Submission%20Gender%20Crimes%20in%20Iraq%20PDF.pdf.

⁴¹The ICC Office of the Prosecutor's response is not published, but the authors of the original communication have referred to this outcome in Davis and Bradley, *supra* note 16, at 204.

⁴²N. Leddy, 'Investigative and Charging Considerations for International Crimes Targeting Individuals on the Basis of Sexual Orientation and Gender Identity', (2022) 20 *Journal of International Criminal Justice* 911, at 927–32 provides a useful summary of this and the ICC's other engagement with queer victims.

⁴³See International Criminal Court, *supra* note 36, para. 5.

2021, it accredited five queer persons as victims of the said armed conflict on the basis of gender-based persecution,⁴⁴ and in a separate case in December 2022, an individual accepted charges of gender persecution for the murder of a gay man killed as part of a systematic execution of civilians concealed as war casualties, though has not yet been sentenced.⁴⁵ Thus while there is an evident need to protect queer people and queer identity in armed conflict, one of the principal frameworks relied on for such intervention, being international criminal law, has demonstrated a reluctance to fulfil this role. Whether this reluctance is structural or social is a matter that requires some detailed attention to the language of rights.

2.2 Queer rights

If the lack of queer rights in international criminal law is a source of disappointment, then queer rights in international human rights law may be a contrast. While there remains no international human rights treaty that explicitly prohibits discrimination on the basis of sexual orientation and/or gender identity, a decades-long and ongoing campaign to read these words into the existing language of treaties has found much success. In 1994, the UN Human Rights Committee's landmark decision of *Toonen v. Australia*⁴⁶ considered the text of Articles 2(1) and 26 of the International Covenant on Civil and Political Rights⁴⁷ and their prohibition against discrimination on the ground of 'sex' and found that 'sex' included sexual orientation. Notwithstanding that this subsumption creates conceptual difficulties for truly acknowledging the underlying target of discrimination as queer discrimination rather than sex discrimination, a matter to which this article will return, the outcome in *Toonen* was that queer criminalization was a violation of both the right to privacy⁴⁸ and non-discrimination.⁴⁹ Likewise, in 2022, the Committee for the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)'s decision in *Calder-Flamera v. Sri Lanka* considered criminalization of lesbian same sex activity and found such a law breached the Convention.⁵⁰ In the 28 years between these bookends, international human rights law has evolved significantly on queer rights and queer discrimination, incrementally at first, and then more significantly from the 2010s onwards. Queer

⁴⁴S. Aboueldahab, 'Gender-Based Persecution as a Crime against Humanity: A Milestone for LGBTI Rights before the Colombian Special Jurisdiction for Peace', *EJIL:Talk!*, 4 May 2021, available at www.ejiltalk.org/gender-based-persecution-as-a-crime-against-humanity-a-milestone-for-lgbti-rights-before-the-colombian-special-jurisdiction-for-peace/; caribeaformativo.lgbt/wp-content/uploads/2021/04/AUTO-66-2021.pdf. A July 2023 search of the website for the victim accreditation numbers did not yield any further updates.

⁴⁵The perpetrator is now due to publicly acknowledge the justice system, the victims and the country in a further hearing, after which he may be sentenced. See www.jep.gov.co/Sala-de-Prensa/Paginas/JEP-proceso-restaurativo-23-comparecientes-aceptaron-responsabilidad-falsos-positivos-casanare.aspx; R. Uruña, 'Perspectives on Gender Persecution: Colombia's Transitional Justice Process', *Just Security*, 23 June 2023, available at www.justsecurity.org/87021/perspectives-on-gender-persecution-colombias-transitional-justice-process/.

⁴⁶UN Human Rights Committee, Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, UN Doc. CCPR/C/50/D/488/1992 (1994) (*Toonen v. Australia*).

⁴⁷See 1966 International Covenant on Civil and Political Rights, *supra* note 9.

⁴⁸*Ibid.*, Art. 17(1).

⁴⁹*Ibid.*, Art. 2(1).

⁵⁰UN Committee on the Elimination of Discrimination against Women, Views adopted by the Committee under article 7(3) of the Optional Protocol, concerning communication No. 134/2018, UN Doc. CEDAW/C/81/D/134/2018 (2022) (*Flamer-Caldera v. Sri Lanka*). See also C. Chinkin and K. Yoshida, 'CEDAW's Landmark Decision on the Criminalisation of Same Sex Conduct Between Women', *EJIL:Talk!*, 5 April 2022, available at www.ejiltalk.org/cedaws-landmark-decision-on-the-criminalisation-of-same-sex-conduct-between-women/. The Committee found violations of numerous Articles, including Arts. 2 (non-discrimination), 5 (obligation to eliminate prejudicial stereotypes), 7 (right to participate in public life, here specifically as a human rights defender), 15 (equality with men before the law, here specifically regarding access to legal remedies), and 16 (family rights, on which the Committee noted [at 9.7] that Flamer-Caldera has had difficulties finding a partner, has to hide her relations and runs the risk of being investigated and prosecuted in that context).

rights have been acknowledged in human rights treaty committee decisions and general comments in relation to the International Covenant on Economic, Social and Cultural Rights in 2009,⁵¹ CEDAW in 2010,⁵² the Convention on the Rights of the Child in 2011,⁵³ the Convention on the Elimination of All Forms of Racial Discrimination in 2015,⁵⁴ and the Convention on the Rights of Persons with Disabilities in 2016.⁵⁵ In 2017, the UN confirmed that all the major treaties ‘interrelate with the issue of sexual orientation and gender identity’.⁵⁶ Many UN Special Rapporteurs have made statements in support of queer rights,⁵⁷ and in 2016, an Independent Expert on Sexual Orientation and Gender Identity was created.⁵⁸ The UN General Assembly has also contributed to this activity, passing resolutions on extrajudicial killings which acknowledged queer victims as early as 2002,⁵⁹ while the UN Human Rights Council passed the first UN resolution specifically on sexual orientation and gender identity in 2011,⁶⁰ though it is necessary to acknowledge that these developments were not universally supported. Regionally, jurisprudence from the European Court of Human Rights and the Inter-American Commission on Human Rights in particular has protected queer rights, and the Organization of American States and the African Commission on Human and Peoples’ Rights have also made statements recognizing the rights to non-discrimination for queer people.⁶¹ Elsewhere in international law, queer protection has begun to be considered in refugee⁶² and humanitarian law.⁶³

Efforts to queer international human rights law are relevant to efforts to queer international criminal law due to the convergence in these fields in the crime against humanity of persecution. While the origins of crimes against humanity date back much earlier, the concept was first legally defined for the Nuremberg Tribunal. Recognizing certain acts, due to their scale and severity, were

⁵¹See, e.g., UN Committee on Economic, Social, and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/20 (2009), para. 32.

⁵²See, e.g., UN Committee on the Elimination of Discrimination against Women, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, UN Doc. CEDAW/C/2010/47/GC.2 (2010), para. 18.

⁵³See, e.g., UN Committee on the Rights of the Child, General Comment No. 13: The Right of the Child to Freedom from All Forms of Violence, UN Doc. CRC/C/GC/13 (2011), paras. 60, 72(g).

⁵⁴See, e.g., UN Committee on the Elimination of Racial Discrimination, Concluding Observations on the Combined Nineteenth to Twenty-Second Periodic Reports of Germany, UN Doc. CERD/C/DEU/CO/19-22 (2015), para. 16.

⁵⁵See, e.g., UN Committee on the Rights of Persons with Disabilities, General Comment No. 3: Women and Girls with Disabilities, UN Doc. CRPD/C/GC/3 (2016), [4(c)].

⁵⁶UN Human Rights Council, Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, UN Doc. A/HRC/35/36 (2017), para. 20.

⁵⁷See, e.g., International Commission of Jurists, Joint Statement from the Special Rapporteur on the Situation of Human Rights Defenders and the Special Rapporteur on Protection of the Right to Freedom of Opinion, 1 March 2010: Uganda, available at www.icj.org/sogiu/jurisprudence/joint-statement-from-the-special-rapporteur-on-the-situation-of-human-rights-defenders-and-the-special-rapporteur-on-protection-of-the-right-to-freedom-of-opinion-1-march-2010-uganda; P. Alston, Addendum to the Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to Nigeria, UN Doc. E/CN.4/2006/53/Add.4 (2006).

⁵⁸HRC Res. 32/2, UN Doc. A/HRC/RES/32/2 (2016) for an initial period of three years, and renewed in June 2019 through HRC Res. 41/18, UN Doc. A/HRC/RES/41/1 (2019).

⁵⁹GA Res. 57/214, UN Doc. A/RES/57/214 (2003), para. 6.

⁶⁰HRC Res. 17/19, UN Doc. A/HRC/RES/17/19 (2011).

⁶¹This is a mere summary, but much more comprehensive analyses of queer advances in international human rights law can be found in the sources which have informed said summary – see, e.g., Davis and Bradley, *supra* note 16, at 197–8; Davis, *supra* note 18, at 549–52; R. Grey et al., ‘Gender-based Persecution as a Crime Against Humanity: The Road Ahead’, (2019) 17 *Journal of International Criminal Justice* 957, at 966–7; Barrera Moore, *supra* note 12, at 1307–10; Bejzyk, *supra* note 17, at 383.

⁶²See, e.g., D. Anker and S. Ardalán, ‘Escalating Persecution of Gays and Refugee Protection: Comment on “Queer Cases Make Bad Law”’, (2012) 44(2) *New York University Journal of International Law and Politics* 529.

⁶³See, e.g., Margalit, *supra* note 21; V. Rossouw, ‘“Or Any Other Similar criteria”: Towards Advancing the Protection of LGBTIQ Detainees Against Discrimination and Sexual and Gender-Based Violence During Non-International Armed Conflict’, (2020) 102 *International Review of the Red Cross* 765.

so evil as to pervert the basic principles of humanity and thus damage us all,⁶⁴ and that Jewish persecution was one such example, the Tribunal's jurisdiction included the crime against humanity of persecution on political, racial or religious grounds in connection to an armed conflict.⁶⁵ For the *ad hoc* international criminal tribunals of the 1990s, the connection to armed conflict was dropped, grounds of ethnicity and national origin were explicitly added,⁶⁶ and judicial opinion emerged that other discriminatory grounds including 'sexual preference' could form the basis of the crime.⁶⁷ Since then, many acts constituting persecution have been recognized, from discriminatory attacks on political, social, and economic rights, all the way through to discriminatory attacks consisting of physical violence.⁶⁸ Demonstrably, the crime has evolved to respond to different circumstances. At least insofar as the physical aspect of this crime is concerned, it seems able to recognize a milieu of discrimination against queer people.

The Rome Statute's conception of persecution is the most expansive yet: persecution in the ICC is the intentional and severe deprivation of fundamental rights contrary to international law from a group, by reason of the group's identity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law. For the persecution to be a crime against humanity, it must be committed as part of a widespread or systematic attack directed against any civilian population.⁶⁹ Other scholars have undertaken detailed analyses of the various elements, which need not be repeated.⁷⁰ Suffice to say, discrimination is intrinsic to persecution, and its criminalization creates a pathway for prosecuting violations of the international human right of non-discrimination.⁷¹ Yet for all the flexibility within the physical aspect of persecution, it cannot escape notice that neither sexual orientation nor gender identity are explicitly listed among the grounds of impermissible discrimination. This is perhaps unsurprising considering the relatively nascent state of international human rights law on queer discrimination at the time of the Rome Statute negotiations in 1998, other than the decision of *Toonen*. Thus in international criminal law, as in international human rights law, there is no clear textual protection for queer victims of persecution.

2.3 Queer reinterpretation

Returning then to the first question, whether international criminal law can be used to protect queer rights in armed conflict. International human rights law has proven that even without that clear textual protection, it is possible to read in prohibitions on discrimination on the basis of sexual orientation and/or gender identity. But doing so in international criminal law is not a matter of simple transference. As it stands, there is little precedent; the *ad hoc* international criminal tribunals very minimally considered cases in which individuals were attacked for transgressing gender norms.⁷² In the ICC, there is no scope to extend textual protection to queer people by analogy – Article 22(2) of the Rome Statute specifically prohibits this and requires the

⁶⁴W. A. Schabas, *An Introduction to the International Criminal Court* (2004), 26–7; E. Chertoff, 'Prosecuting Gender-Based Persecution: The Islamic State at the ICC', (2017) 126 *Yale Law Journal* 1050, at 1065–6.

⁶⁵For a good overview of the history of crimes against humanity as a concept see A. W. Brown and L. Grenfell, 'The International Crime of Gender-Based Persecution and the Taliban', (2003) 4 *Melbourne Journal of International Law* 347.

⁶⁶SC Res. 995, UN Doc. S/RES/955 (1994) ann (*Statute of the International Tribunal for Rwanda*), Art. 3; see Brown and Grenfell, *supra* note 65, at 356.

⁶⁷*Prosecutor v. Tadić*, Appeal Judgement, IT-94-I-A, A. Ch., 15 July 1999, para. 285.

⁶⁸*Prosecutor v. Kupreškić*, Judgement, IT-95-16-T, T.Ch., 14 January 2000, paras. 597, 600. See also Brown and Grenfell, *supra* note 65, at 348.

⁶⁹See Rome Statute, *supra* note 2, Arts. 7(1)(h), (2)(g).

⁷⁰See, e.g., Barrera Moore, *supra* note 12, at 1304; see Chertoff, *supra* note 64; Grey et al., *supra* note 61.

⁷¹See Scheinert, *supra* note 17, at 103; Barrera Moore, *supra* note 12, at 1287.

⁷²See, e.g., *Prosecutor v. Nahimana (Judgement)*, ICTR-99-52-T, T.Ch.I, 3 December 2003, para. 1079, describing Tutsi women who were considered to be acting as agents of the enemy in a way that was at odds with gendered expectations were then targeted for violence as a result. See also discussion in Davis and Bradley, *supra* note 16, at 199–200.

definition of a crime to be strictly construed. Efforts at queering international criminal law must therefore work within the confines of the text, that is to say, queer persecution can only be recognized to the extent that it can exist within the group's identity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law.

Of these options, racial, national, and religious grounds immediately fall away as clearly unrelated to being queer. Political and cultural grounds are also discarded, albeit that some scholars have considered whether queer persecution could be considered as persecution on political grounds – the victim's membership in the group is defined by the perception of the perpetrator, so individuals targeted for being queer activists, for example, are defined in the mind of the perpetrator as a political group. Yet, while living as an openly queer person can be a political statement in certain jurisdictions, and may in some circumstances signal certain political leanings, it is unlikely to provide universal coverage for all queer people.⁷³ Likewise, without denying the existence of queer culture, the experience of queerness is likely too varied across geography to provide universal coverage for all queer people. What remains is the possibility of capturing queer persecution as carried out either on the basis of 'gender' or on the basis of 'other grounds that are universally recognized as impermissible under international law'.

Turning first to the latter. On its face, the provision is well placed to facilitate queering international criminal law, precisely because it permits the ICC to respond to emerging forms of discrimination, and in so doing, acknowledge the formation of customary international law prohibiting it.⁷⁴ The ICC Prosecutor has recognized international human rights law is evolving 'to put an end to violence and discrimination on the basis of sexual orientation or gender identity',⁷⁵ and the ICC Trial Chamber has confirmed discrimination on sexual orientation is not permitted in the context of granting reparations.⁷⁶ Yet the phrasing of 'universally recognized' in Article 7(3) does sit in contrast to other parts of the Rome Statute, which instead refer to 'internationally recognized' rights and norms,⁷⁷ a seemingly lower standard. The use of 'universal' must therefore be assumed deliberate. However, rather scant guidance presents on its meaning. In case law, the ICC has indicated a right is universally recognized if it 'finds expression in international and regional treaties and conventions'.⁷⁸ A more powerful argument could be made if, in fact, there was an explicit expression of queer rights in an international treaty – but there is not. Instead, as discussed, queer rights have been read into treaties, a position which on its face is less expressive. On the other hand, this process was in its infancy at the ICC's inception but is now well advanced and has occurred in virtually all major international human rights law treaties. Commentary is of limited assistance; in 2010, one commentator speculated that the 'relatively primitive' state of international law as regards queer rights excluded it from this ancillary ground, but that the situation would undoubtedly change as the law progressed.⁷⁹ Slightly more recent scholarly consideration as at 2016⁸⁰ and 2017⁸¹ has been circumspect on whether the enduring lack of consensus among states as to queer non-discrimination can render it 'universally recognized', particularly noting the 27 Rome Statute states

⁷³A. Sumner Hagopian, 'Persecution and Protection of Sexual and Gender Minorities under Article 7(1)(h) of the Rome Statute', (2016) 3 *SOAS Law Journal* 55, at 59–60.

⁷⁴See Brown and Grenfell, *supra* note 65, at 358.

⁷⁵International Criminal Court, *Policy Paper on Sexual and Gender-Based Crimes* (2014), paras. 26–27, fns. 23, 25.

⁷⁶See Davis, *supra* note 18, at 543; *Prosecutor v. Lubanga*, Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904, T.Ch.I, 7 August 2012, para. 191.

⁷⁷See Rome Statute, *supra* note 2, Arts. 21(1)(c), 21(3), for example. See also Barrera Moore, *supra* note 12, at 1305–6.

⁷⁸*Prosecutor v. Lubanga*, Reasons for the 'Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007', ICC-1/04-1/06-OA8, A.Ch., 22 February 2007, para. 12.

⁷⁹W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), 186.

⁸⁰See Sumner Hagopian, *supra* note 73.

⁸¹See Barrera Moore, *supra* note 12.

that still criminalize being queer.⁸² While combinations of scholarly work, the trend of decriminalization, and developments in the Colombian Special Jurisdiction for Peace discussed above provide further scope to mount the argument,⁸³ there is no firm assurance that this route is already open, and may at best be in the process of opening.

Analysis on prosecuting queer persecution on the basis of gender is significantly more advanced, and officially supported by the ICC Prosecutor,⁸⁴ though it too retains some complexities. Gender is the only persecutory ground to be defined in the Rome Statute. The definition states that gender ‘refers to the two sexes, male and female, within the context of society’ and ‘does not indicate any meaning different from the above’.⁸⁵ While the broader negotiating history of the Rome Statute is beyond the scope of this article, note that this definition came about after lengthy negotiations driven by women’s rights groups on one hand and a coalition comprising Catholic and Arab states and conservative organizations on the other.⁸⁶ True that the latter sought to use ‘sex’ rather than ‘gender’, or at least define gender in terms of biological sex precisely to exclude sexual orientation and non-binary understandings of gender,⁸⁷ even as most states accepted a phrasing that reflected international law at the time – by then, the UN used ‘gender’ and not ‘sex’ precisely because the former acknowledged biological *and* sociological dimensions.⁸⁸ Yet no single side claimed a wholesale victory. The resulting compromise utilized ‘constructive ambiguity’⁸⁹ to satisfy both sides, retaining the biological link of ‘the two sexes’ to comfort the conservative faction while retaining the ‘context of society’ to confirm what women’s rights activists had fought for, that gender is a socially constructed and evolving understanding of what it means to be a female (or male, or any other gender).⁹⁰ To fit queer rights into this paradigm requires that sexual orientation and/or gender identity be part of what it means to be a particular gender.

There is an argument for broad interpretation, as is evident from the difference between sex and gender. This can be important in a discrimination framework such as persecution. Discrimination may be based on socially constructed gender, or biological sex, or a combination of both. Not all gender-based violence is sexual,⁹¹ though whether, in reverse, not all sexual or sexed violence is gender-based is less certain. Some suggest sexual violence is also gender-based only when there is an additional dimension of enacting gender discrimination through the violence.⁹² Genital torture, for example, may be selected purely for pain maximization and therefore, the argument goes, is sexual or sexed but not gendered.⁹³ Forced sterilization of women to prevent

⁸²See Leddy, *supra* note 42, at 921: Leddy notes that the trend in the last decade is in favour of decriminalization and that these laws may not be enforced, or may only be enforced rarely. However, any law that remains on the books, regardless of frequency of use, speaks to the attitude of the state in question as to queerness.

⁸³*Ibid.*, at 925–7.

⁸⁴See International Criminal Court, *supra* note 36.

⁸⁵See Rome Statute, *supra* note 2, Arts. 7(1)(h), 7(3).

⁸⁶For further details about the drafting history see, e.g., R. Copelon, ‘Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law’, (2000) 46 *McGill Law Journal* 217; V. Oosterveld, ‘The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?’, (2005) 18 *Harvard Human Rights Journal* 55; V. Oosterveld, ‘Constructive Ambiguity and the Meaning of “Gender” for the International Criminal Court’, (2014) 16 *International Feminist Journal of Politics* 563; Barrera Moore, *supra* note 12.

⁸⁷See Oosterveld (2014), *ibid.*, at 567; Bohlander, *supra* note 15, at 401.

⁸⁸See Davis, *supra* note 18, at 537–8; V. Oosterveld, ‘Gender, Persecution, and the International Criminal Court: Refugee Law’s Relevance to the Crime Against Humanity of Gender-Based Persecution’, (2006) 17 *Duke Journal of Comparative and International Law* 49, at 58 and fn. 37.

⁸⁹See Oosterveld (2014), *supra* note 86, at 563–6.

⁹⁰*Ibid.*, at 567. See also Oosterveld (2005), *supra* note 86, at 64.

⁹¹As recognized by the ICC’s Prosecutor in International Criminal Court, *supra* note 75, at 3.

⁹²*Ibid.*, at 12, para 16; see Davis, *supra* note 19, at 18; L. Ocampo-Moreno, ‘Keynote Address—Interdisciplinary Colloquium on Sexual Violence as International Crime: Interdisciplinary Approaches to Evidence’, (2010) 35 *Law and Social Inquiry* 839, at 841.

⁹³See Davis, *supra* note 19, at 19.

childrearing is more immediately connected to biological functions than gender, *per se*. But such violence is still experienced because of the victim's sex, which is inextricably tied to their gender in the context of society, even if the two do not correspond, and therefore carries a gendered dimension of which the perpetrator is surely aware.⁹⁴ Without resolving this matter, what is clear is that gender-based discrimination is broader than just sexed or sexual violence and includes other deprivations of human rights based on gender. Such an approach, endorsed by the ICC's Prosecutor, seeks to correct the conflation of 'gender' with 'woman' and 'sex' in international law which has led to overly narrow constructions of sexual and gender-based violence.⁹⁵ This analysis is an important starting point in mapping out the contours of gender and sex, and therefore considering whether gender can encompass sexual orientation and/or gender identity.

The *Al Hassan* case currently before the ICC, the first trial of gender persecution charges,⁹⁶ provides some guidance on what gender means in practice. It concerns militants in Timbuktu in 2012 and 2013 who are alleged to have prohibited women from interacting with men other than their husbands and brothers, prohibited women from meeting freely with other women, and forced women to abide by strict dress codes.⁹⁷ The Pre-Trial Chamber accepted that the perpetrators had treated women like objects,⁹⁸ due to discriminatory opinions about the appropriate role of women.⁹⁹ The same is true of women executed by Islamic State for working as journalists, politicians, and other professions that stray from the work women 'should' do.¹⁰⁰ This kind of persecution is related to rigidly prescribed gender norms and has little if anything to do with biological sex; indeed, it conflates gender with sex, given that, as noted earlier, persecution as crime relies on the perpetrator's perception of the victim's membership, rather than any actual membership, in the discriminated group.¹⁰¹ Therefore, returning to the wording of the Rome Statute, this must be a reflection of what it means to be 'female, within in the context of society'. If within the context of society today, gender roles are central to the meaning of the word 'gender' as a discriminatory ground, it follows that perpetrators punishing those who they perceive to transgress those roles are enacting a form of gender persecution.¹⁰²

Here, the door opens for gender including sexual orientation and/or gender identity. Queer sexual orientation and gender expression are examples of gender role transgressions as they challenge dominant cisgendered heteronormativity. The ICC Prosecutor noted that gender roles may determine, among other matters, where someone can go, who someone can marry, where someone can work and how someone can dress.¹⁰³ If women being targeted based on the

⁹⁴Society superimposes a sexed/gendered discourse based on anatomical difference of sexes, and this influences an individual's conscious or unconscious choice of gender identity; see G. Gilleri, 'Abandoning Gender "Identity"', (2022) 116 *AJIL Unbound* 27, 29–30; see also D. Otto, 'Queering Gender [Identity] in International Law', (2015) 33(4) *Nordic Journal of Human Rights* 299.

⁹⁵V. Oosterveld, 'The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law', (2018) 24 *William and Mary Journal of Women and the Law* 443, at 447.

⁹⁶Gender persecution has been charged once before but did not progress past confirmation of charges – see *Prosecutor v. Mbarushimana*, Decision on the confirmation of charges, ICC-01/04-01/10-465-Red, P.T.Ch.I, 16 December 2011. Additionally, two of the ICC's current cases, *Prosecutor v. Abd-al-Rahman* and *Prosecutor v. Said*, are gender persecution cases concerning men targeted on the basis of assumptions that men are combatants and/or defenders of their group or community.

⁹⁷*Prosecutor v. Al Hassan*, Closing statements, ICC-01/12-01/18-T-213-ENG, T.Ch.X, 23 May 2023.

⁹⁸*Le Procureur c. Al Hassan*, Rectificatif à la Décision Relative à la Confirmation des Charges Portées Contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-461-Corr-Red, P.T.Ch.I, 13 November 2019, para. 700 (own translation).

⁹⁹*Le Procureur c. Al Hassan*, Version Publique Expurgée de la « Version Amendée et Corrigée du Document Contenant les Charges Contre M. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-335-Corr-Red, P.T.Ch.I, 2 July 2019, para. 948 (own translation). See also Grey et al., *supra* note 61, at 976.

¹⁰⁰See Davis, *supra* note 18, at 514–15, 524–30.

¹⁰¹*Prosecutor v. Ntaganda*, Judgment, ICC-01/04-02/06-2359, T.Ch.VI, 8 July 2019, para. 1011. This is also acknowledged in International Criminal Court, *supra* note 36, para. 44.

¹⁰²See International Criminal Court, *supra* note 36, at 4.

¹⁰³*Ibid.*

perpetrators' views of how they should behave is gender persecution, it is axiomatic that queer people being targeted based on the perpetrators' views of how they should behave is also gender persecution.¹⁰⁴ This applies as much to lesbians, gays, and bisexuals who are targeted based on the perpetrator's view that women should be attracted only to men and *vice versa*, as it does to trans, non-binary, and gender non-conforming people who are targeted based on the perpetrator's view that gender is binary and corresponds with biological sex. Thus, while the larger philosophical question of whether the specific experience of queer discrimination is recognized when it is subsumed into gender remains unresolved at this stage and will be returned to, this analysis tends to suggest that on a practical level, international criminal law can have queer rights protection read into it through the definition of gender discrimination in the crime against humanity of persecution. The ICC Office of the Prosecutor is in increasing agreement with this analysis. In 2014, policy confirmed that 'sex' in fact means biological and physiological characteristic, while 'gender' encompasses the roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys.¹⁰⁵ In 2022, policy evolved further, with the Key Terms of the document omitting a definition of 'sex' at all and instead defining 'gender' as 'sex characteristics and social constructs and criteria used to define maleness and femaleness, including roles, behaviours, activities and attributes', further adding that as a social construct, gender varies within societies and can change over time.¹⁰⁶

Some scholars argue sexual orientation and/or gender identity is excluded from the definition of gender, relying on the Rome Statute's negotiation history for support of this position.¹⁰⁷ That reliance is misplaced. First, as discussed, the negotiation history was contested and does not definitively support any one position. Further, a treaty is to be interpreted in accordance with the ordinary meaning of its terms in their context and in light of its object and purpose; recourse to negotiating materials can only confirm a treaty's meaning in this respect. Acknowledging that the original ordinary meaning may have since changed, nevertheless the ordinary meaning of 'gender' cannot simply equate to biological sex, because then 'context of society' has no work to do.¹⁰⁸ Second, this ignores the hard-won fact that the Statute does use 'gender' and not 'sex', with the deliberate choice to use the former over the latter considered today to be among the most significant developments in the drafting.¹⁰⁹ Third, to the extent ambiguity exists, and reiterating the requirement to interpret the treaty in light of its object and purpose, it cannot be that 'the highest international institution of universal justice' should resolve it in favour of discrimination.¹¹⁰ The better view is that, by agreeing to an intentionally opaque definition, states left it to the ICC itself to interpret gender in the context of society.¹¹¹ If states had wanted to 'curb the excesses of judicial discretion',¹¹² they simply would not have agreed to the Treaty's final ambiguous form, nor to Article 21(3) of the Statute,¹¹³ which accepts internationally recognized human rights as a source of law for the ICC, further considered below. In practice, this wording left space for

¹⁰⁴See Davis, *supra* note 19, at 78; Leddy, *supra* note 42, at 919–20.

¹⁰⁵See International Criminal Court, *supra* note 75, 3.

¹⁰⁶See International Criminal Court, *supra* note 36, at 3.

¹⁰⁷See, e.g., Bohlander, *supra* note 15, who relies, among other things, on the negotiations to argue that the state parties could not have intended for queer persecution to be covered.

¹⁰⁸1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Arts. 31–32, with Art. 31(1) relevantly establishing the treaty text as the primary source of interpretation. While other sources can supplement the text, the text is to be consulted first 'in good faith in accordance with the ordinary meaning' of the words. See also Grey et al., *supra* note 61, at 963; Barrera Moore, *supra* notes 12, at 1316; Leddy, *supra* note 42, at 917.

¹⁰⁹See Grey et al., *supra* note 61, at 959–60; Oosterveld (2005), *supra* note 86, at 82; Davis and Bradley, *supra* note 16, at 191.

¹¹⁰See Copelon, *supra* note 86, at 237; Oosterveld (2005), *supra* note 86, at 78.

¹¹¹See, e.g., Davis and Bradley, *supra* note 16, at 195; Oosterveld, *supra* note 95, at 450–1; see Oosterveld (2014), *supra* note 86, at 563–6; see Oosterveld (2005), *supra* note 86, at 77; Copelon, *supra* note 86, at 237.

¹¹²Which Bohlander, *supra* note 15, at 410 argues was an underlying policy in the Rome Statute and another part of his argument that the Statute clearly excludes queer persecution and leaves no room for judicial interpretation otherwise.

¹¹³See Barrera Moore, *supra* note 12, at 1327.

advocates to advance societal understandings of gender to inform this interpretation,¹¹⁴ which, as preceding paragraphs note, includes 25 years of growing international human rights law protection of queer rights and understandings of gender, sex, gender identity, and sexual orientation.¹¹⁵

Closing this circle is the fact that states also agreed to abide by international human rights law and to Article 21(3) of the Rome Statute.¹¹⁶ That article states that the application and interpretation of law ‘must be consistent with internationally recognized human rights, and be without any adverse distinction’ founded on various grounds, which are significantly wider than persecutory grounds and which include the catch-all ‘other status’ at the end.¹¹⁷ The sweep of this wording sheds no further light on the degree of international recognition required, though logically, it must be less than the ‘universal’ standard in the crime against humanity of persecution. The wording is similarly non-specific in further defining the human rights, creating scope to look beyond narrow, formal sources. In sum, then, it suggests an openness to a wide range of evolving norms which are generally accepted among the international community.¹¹⁸ Yet even if these two limbs were significantly more stringent, this provision would nevertheless remove any doubt about the meaning of gender as a social construct which includes sexual orientation and/or gender identity. The ICC’s Prosecutor has confirmed as much by stated that, in accordance with Article 21(3), gender must be interpreted and applied consistent with internationally recognized human rights as they have evolved and without adverse distinction.¹¹⁹ The preponderance of UN and international law understandings of gender are as a social construct.¹²⁰ It is the Rome Statute’s definition that is an aberration. So much so, in fact, that while the Rome Statute’s definition was initially imported into a draft treaty on crimes against humanity, in 2019 it was deemed outdated and replaced.¹²¹ Recognition of such an evolution is precisely what is contemplated by Article 21(3) and must apply to ‘gender’ specifically because the meaning of it was left ambiguous in the Rome Statute.

While Article 21(3) has been lauded for its potential to innovate future ICC legal interpretation,¹²² its exact limits remain unknown. It is unclear whether or how exactly the ICC should apply human rights norms or jurisprudence.¹²³ After all, unlike Articles 21(1) and 21(2), which identify the ICC’s sources of law and commence with ‘the Court shall apply ...’, Article 21(3) is phrased as an interpretive rule rather than a source of law *per se*, which argues against simply importing the meaning of ‘gender’ from human rights instruments. Still, the ICC has occasionally used the provision as a gap-filling mechanism more akin to a source of law.¹²⁴ Even viewed strictly, as permission not for the ICC to apply human rights law but rather to apply approved sources of law, including the ambiguous meaning of ‘gender’ in the Rome Statute in a

¹¹⁴See Oosterveld (2014), *supra* note 86, at 574.

¹¹⁵See Davis and Bradley, *supra* note 16, at 188, 195, 202. It is important to note however that this 25-year growth has not been equally distributed among the queer community, and the situation in relation to transgender, intersex, non-binary and agender people is not as well developed. See, e.g., B. Kritz, ‘The Global Transgender Population and the International Criminal Court’, (2014) 17 *Yale Human Rights and Development Law Journal* 1.

¹¹⁶See Barrera Moore, *supra* note 12, at 1327.

¹¹⁷See Rome Statute, *supra* note 2, Art. 21(3).

¹¹⁸R. Young, ‘“Internationally Recognized Human Rights” before the International Criminal Court’, (2011) 60 *International and Comparative Law Quarterly* 189, at 193, 207.

¹¹⁹See International Criminal Court, *supra* note 75, para. 26.

¹²⁰Very extensive scholarly work has covered this proposition – see, e.g., Grey et al., *supra* note 61; Davis and Bradley, *supra* note 16, at 188.

¹²¹See Grey et al., *ibid.*, at 959–60; Davis and Bradley, *ibid.*, at 187.

¹²²See Schabas, *supra* note 79, at 398; Schabas, *supra* note 64, at 93.

¹²³C. O’Rourke, ‘Fragmentation Fears or Interaction Opportunities? The Role and Potential of International Human Rights Law in Shaping International Criminal Law’s Gender Jurisprudence’, in Rosenthal, Oosterveld and SáCouto, *supra* note 16, at 348–9.

¹²⁴See Young, *supra* note 118, at 192–3, 201.

manner consistent with human rights law, the provision confirms international criminal law is a vehicle for human, and therefore queer, rights. Naturally, the provision is particularly pertinent to the crime against humanity of persecution, which differs from the human rights violation of discrimination only in gravity and scale. The pair exist on the same spectrum of prohibited targeting of individuals on the basis of membership in a group.¹²⁵ Human rights courts and the ICC thus have the same mission of overcoming discrimination, albeit that the former is concerned with culpability of states and the latter, of individuals.¹²⁶ This means human rights understandings of discrimination are critical to international criminal law understandings of persecution,¹²⁷ and noting the comparatively nascent state of international criminal law on the meaning of gender, it is both logical and expressly permitted for human rights law to inform the ICC's ambiguity.

Article 21(3) is part of a broader phenomenon of states creating international judicial bodies which have their own constitutive texts but are expressly empowered to fall back on general principles and therefore encourage international court integration.¹²⁸ For the ICC, which has a unique complementary jurisdiction, the effects of this integration can be pushed out even further to the domestic realm. Given the ICC exists on the basis of complementarity, encouraging and supporting domestic prosecution in the first instance, queer reinterpretation of international criminal law need not be confined to the Rome Statute. Advancement of queer rights in the ICC, whether through a queer persecution case or even through some of the statements issued by the Prosecutor in support of queer rights, has the potential to be domesticated – a process that occurs as international norms transmute into local ones.¹²⁹ Rome Statute states are obliged to prosecute international crimes domestically and while some states have replicated the Rome Statute language faithfully, others have not. In relation to persecution, numerous states refer only to 'gender' as a ground in their domestic implementing legislation, without the Rome Statute's extended definition.¹³⁰ The implementing legislation of the Philippines goes even further and expressly includes sexual orientation as a persecutory ground.¹³¹ This in turn is relevant as *opinio juris* in the formation of customary international law, which, after all, may be codified by international courts but is in fact created by states. Queer reinterpretation at the state level influences the same at the international level, and *vice versa*, consolidating a cycle of queer rights advancement.

3. Whether to 'queer' international criminal law?

3.1 Queer recognition

Understandably, much existing analysis is concerned with the possibility of queering international criminal law. But possibility does not equate to desirability. If this article has thus far established that it can be done, it now turns to whether it should be done. There are some obvious and persuasive arguments in favour. The formulation of the crime against humanity of persecution means it can grapple with issues that other international crimes cannot, and uniquely recognize targeting of individuals for the mere fact of belonging to a group,¹³² therefore having some

¹²⁵See Barrera Moore, *supra* note 12, at 1322–3.

¹²⁶*Ibid.*, at 1318.

¹²⁷And *vice versa*, with the ICC Prosecutor expressing a hope to contribute to growing understandings in the international community of, for example, gender-based violence – see International Criminal Court, *supra* note 75, para. 6.

¹²⁸See Young, *supra* note 118, at 208.

¹²⁹F. Ní Aoláin, 'Gendered Harms and their Interface with International Criminal Law: Norms, Challenges and Domestication', (2014) 16 *International Feminist Journal of Politics* 622, at 623–6. For example, the ICC Prosecutor stated that recognition of gender persecution can 'reflect the continuum of historical and longstanding structural discrimination and fundamental rights deprivations experienced by vulnerable gender groups such as women, girls and LGBTQI+ persons' and can help disrupt institutionalised discrimination – see International Criminal Court, *supra* note 36, at 5.

¹³⁰Such as Belgium, Georgia, Panama, and South Korea, to name but a few – see Bohlander, *supra* note 15, at 409.

¹³¹*Republic Act No 9851* (Philippines), s 6(h).

¹³²See Sumner Hagopian, *supra* note 73, at 55–6.

potential to address both the individual and societal level queer realities described above. Given the ICC has confirmed genocide is recognized only on national, ethnic, racial or religious lines,¹³³ crimes against humanity are the only route by which to recognize systemic abuses of other groups, including queer people, in international criminal law. In this sense, the rationale behind the crime of genocide is apposite. Like genocide, persecution is a composite crime comprising a series of acts. For queer people in armed conflict, this may be a series of any of the kind of acts discussed in the previous part, from political, social and economic discrimination to enslavement, disappearance, rape or killing, in circumstances where queer people are targeted by reason of being part of the queer group identity and where the acts are part of a widespread or systematic attack directed against a civilian population.

As with genocide, while each constitutive act could be prosecuted separately, either domestically or internationally, the composite charge is ‘more morally blameworthy and damaging than the sum of its parts’.¹³⁴ Thus a prosecution for queer persecution has expressive value which more could broadly advance queer rights. Not only does a prosecution seek to end impunity, it indicates to perpetrators that queer persecution is a crime of international concern which will not be tolerated.¹³⁵ Given queer discrimination has a symbolic secondary impact, beyond those directly affected, in that it reinforces prejudice in society and strengthens the social legitimacy of the prejudice,¹³⁶ this would be a significant gain. It also confirms that queer persecution is an atrocity of equivalent severity to persecution on the other enumerated grounds;¹³⁷ after all, queerness is as fundamental an aspect of identity as any other persecutory ground. The crime against humanity of persecution demands delineating between ‘tolerable and criminal conduct’ and expresses the point at which social bias against a particular group becomes so severe as to require international intervention.¹³⁸ The severity of the examples discussed in this article should leave no room for doubt in this respect.

In the reverse, while a pathway to prosecute queer persecution itself offers expressive value, that value is diminished if no charge follows.¹³⁹ The theoretical possibility of charging queer persecution under the Rome Statute needs to be followed with the practical reality of such a charge – only then will there be precedent and therefore preventative force.¹⁴⁰ This concept of norm creation and expressive value is central to international law. A fundamental function of international criminal law is to declare that the weight of international opinion has coalesced into a norm against the conduct in question, and that legal, diplomatic, economic and even military consequences may follow.¹⁴¹ So was the case with the norm against genocide, which began with moral outrage following the Second World War and progressed into an international treaty on genocide prevention, the international crime of genocide, and the creation of tribunals explicitly tasked with prosecuting genocide (the International Criminal Tribunals for the Former Yugoslavia and Rwanda).¹⁴² Considering the increased political and public attention to queer persecution, and the progression in international human rights law on queer discrimination, a prosecution would not be the beginning of a new norm, but would instead

¹³³*Prosecutor v. Al Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, P.T.Ch.I, 4 March 2009, para. 114; see Barrera Moore, *supra* note 12, at 1299. For a critique of genocide’s exclusion of queer identity see, e.g., A. Feindel, ‘Reconciling Sexual Orientation: Creating a Definition of Genocide that Includes Sexual Orientation’, (2005) 13 *Michigan State Journal of International Law* 197; see Kritz, *supra* note 115.

¹³⁴See Chertoff, *supra* note 64, at 1064.

¹³⁵See Davis, *supra* note 19, at 60.

¹³⁶See Madrigal-Borloz, *supra* note 1, para. 44.

¹³⁷See Chertoff, *supra* note 64, at 1063.

¹³⁸*Ibid.*, at 1083–4; see also W. A. Schabas, *Genocide in International Law: The Crime of Crimes* (2009), 242.

¹³⁹See Chertoff, *supra* note 64, at 1071, citing A. Eisenberg, ‘Expressive Enforcement’, (2014) 61 *University of California Los Angeles Law Review* 858, at 860.

¹⁴⁰See, e.g., L. Sadat, ‘Crimes Against Humanity in the Modern Age’, (2013) 107 *American Journal of International Law* 334.

¹⁴¹See Chertoff, *supra* note 64, at 1071.

¹⁴²*Ibid.*, at 1073–4.

contribute to a development that has been ongoing in international law more broadly since the 1990s. Human rights law is a confirmed source of normative content for international criminal law.¹⁴³ To the extent that the norm against queer persecution is not present in all Rome Statute states, again noting that 27 state parties of the ICC are among the 67 jurisdictions which criminalize being queer, it is precisely the ICC's function to intervene when national jurisdictions have failed to act in accordance with human rights norms. Unfettered queer rights abuse creates a need for the ICC to act, precisely because states have not.¹⁴⁴

Feminist engagement with international criminal law provides an example. In the decades of consideration by the international community to create a permanent international criminal court, gender-based violence was rarely mentioned. In response to systemic sexual abuse in the Yugoslav Wars, feminist advocates mounted a campaign to include gender-based violence in the *ad hoc* international criminal tribunals in the 1990s.¹⁴⁵ Women's rights advocates also fought for that category of violence against women to be broadened beyond rape to include sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization,¹⁴⁶ and eventually for crimes against humanity to include gender persecution.¹⁴⁷ Jurisprudence from the *ad hoc* tribunals produced substantive analyses of sexual violence, including how rape can constitute genocide, a crime against humanity, and torture,¹⁴⁸ and more generally to dismantle the narrative of rape as incidental to or a spoil of war. The normative activity by feminists produced legal effect and legally binding commitments, including in the hitherto-closed forums of international criminal law, thus opening new avenues of redress for survivors, new enforcement options against perpetrators and new entry point for civil society participation and influence.¹⁴⁹ While beyond the scope of this article, critiques of fragmentation in international law abound,¹⁵⁰ including that the interpretations offered by different apparatuses within different fields of law will threaten the coherence of the law broadly. For feminist advocates, however, this phenomenon represents an opportunity to strategize where to be heard – to select the most sympathetic venue when seeking adjudication or the most institutionalized when seeking norm consolidation.¹⁵¹ Over a period of years, this broad-based campaign drew on both lawyering and advocacy, and on both international human rights law and international criminal law, to secure historic successes for the international women's movement.¹⁵² In considering whether to queerly reinterpret international criminal law, the possibility for replicating this success is a powerful factor.

3.2 Queer reimagination

Thus far, this article has made the case that international criminal law can and should be queered. But one complication has repeatedly reared its head. Legally sound though this reinterpretation is, the pathway to arrive at it is not straightforward, and that serves to highlight the fact that this system was not designed to grapple with queer rights. The conceptual critique referred to several times herein is whether persecution on gender grounds truly acknowledges the underlying discrimination to queer identity – whether positioning queer persecution as being wholly contained within the notion of gender discrimination recognizes only the gendered

¹⁴³See Young, *supra* note 118, at 190. The Rome Statute itself recognizes this in Art. 21(3).

¹⁴⁴See Barrera Moore, *supra* note 12, at 1327–8.

¹⁴⁵See Davis and Bradley, *supra* note 16, at 190.

¹⁴⁶See Davis, *supra* note 18, at 517.

¹⁴⁷See Brown and Grenfell, *supra* note 65, at 348.

¹⁴⁸A more detailed examination of this advocacy effort is found in Ní Aoláin, *supra* note 129, at 625.

¹⁴⁹See O'Rourke, *supra* note 123, at 353.

¹⁵⁰See, generally, International Law Commission, Fragmentation of International Law: Difficulties Arising for the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682 (2006).

¹⁵¹See O'Rourke, *supra* note 123, at 353.

¹⁵²See Davis, *supra* note 18, at 557–8.

dimension of the victimhood rather than the queer dimension.¹⁵³ The ICC Prosecutor has pledged to ‘pursue an intersectional approach to discrimination to fully reflect the inter-relationship between gender, age and other aspects of an individual’s identity or circumstances’, such as race, ethnicity, religion, wealth or other status.¹⁵⁴ But sexual orientation and gender identity are entirely subsumed within gender; the approach draws no distinction between women who are targeted for violence and lesbian women who are targeted for violence, even though there is a distinct difference, or additional component, in such targeting.¹⁵⁵ Of course, the fact that there is another part of the victim’s identity, that is their sexual orientation, which is targeted does not remove the aspect of gender persecution.¹⁵⁶ A truly intersectional approach, however, would recognize persecution on the multiple intersecting grounds of gender and sexual orientation and thus acknowledge that some victims are targeted on multiple grounds.¹⁵⁷ While the above application of gender to queer persecution opens the ICC to a deeper understanding of gendered constructions,¹⁵⁸ it may be that there are real limits to this strategy, not to mention heavy costs.

A closer look at feminist intervention in international criminal law is instructive. This article has acknowledged several important gains which were hard fought by feminist advocates and does not seek to minimize the significance of both the process and the outcome. On a practical level, however, one must question the extent of this success when gender-based persecution has only been charged twice in the ICC (the first time not making it past the confirmation of charges stage) while other grounds of persecution continue to be more frequently charged even in cases containing evidence of widespread rape of women.¹⁵⁹ More generally as regards gender-based violence, at the time the ICC Office of the Prosecutor released its policy paper on gender-based crimes in 2014, 57 charges of sexual and gender-based violence had been brought in 20 cases, but only 35 proceeded to charge confirmation stage, and only 20 were indeed confirmed; not a single one had been convicted.¹⁶⁰ In those circumstances, it is hard to be convinced that international criminal law has had any role in advancing a ‘feminist world that is free of gendered hierarchy and violence’.¹⁶¹ The same malaise may be even more acute given, in absolute terms, queer people make up a smaller percentage of the population than women. To reframe the question this article poses, just because international criminal law can be queerly reinterpreted, does not mean that it will be queerly reinterpreted.

A further conceptual critique must also acknowledge the result of conflating violence and discrimination. The decision by women’s rights activists to focus on sexual violence may have paid off, but the cost of that decision has resulted in elevating sexual violence to be seen as the primary harm encountered by women.¹⁶² The vast majority of gender case law in international criminal law has focused on sexual violence, but the case law on other gendered harms is scant and so the broader conceptualization of ‘gender’ in international criminal law is limited.¹⁶³ Wartime sexual violence captures the imagination – indeed, at times, it does so to the point of producing a

¹⁵³See Sumner Hagopian, *supra* note 73, at 68–9.

¹⁵⁴See International Criminal Court, *supra* note 36, para. 29.

¹⁵⁵See Moore and Barner, *supra* note 23, at 34.

¹⁵⁶See Scheinert, *supra* note 17, at 129–30.

¹⁵⁷See Grey et al., *supra* note 61, at 971; International Criminal Court, *supra* note 75, para. 27.

¹⁵⁸See Oosterveld, *supra* note 95, at 450.

¹⁵⁹See Chertoff, *supra* note 64, at 1070.

¹⁶⁰See Oosterveld, *supra* note 95, at 445. Since then, the ICC has also convicted Bosco Ntaganda and Dominic Ongwen of various sexual and gender-based violence charges. The outcome of two current gender persecution cases at the ICC, *Prosecutor v. Abd-al-Rahman* and *Prosecutor v. Said*, may change this landscape.

¹⁶¹D. Otto, ‘Is International Criminal Law Particularly Impervious to Feminist Reconstruction? Legally Authorized Resistances to Feminist Judging’, in Rosenthal, Oosterveld and SáCouto, *supra* note 16, at 389.

¹⁶²See Ní Aoláin, *supra* note 129, at 625–6.

¹⁶³See Davis, *supra* note 19, at 10.

‘pornography of violence’ in which the most heinous examples receive the highest attention.¹⁶⁴ Not only does such a discourse splinter wartime sexual violence from the daily violence experienced by women in times of peace, the focus on violence overall confirms rather than challenges notions of female vulnerability. Further, the narrative of by who and from whom women are protected continues to invoke racialized and imperialist ideals.¹⁶⁵ Critical feminist theory recognizes a disconnect between apparent gains in international criminal law and actual impacts of those gains on women’s everyday lives.¹⁶⁶ Again, these lessons loom large in any effort to queer international criminal law; the magnitude of daily violent and non-violent discrimination experienced by queer people is lost in the narrative of wartime violent queer persecution, but this kind of extreme wartime violent queer persecution is that which readily lends itself to being addressed by international criminal law.

Lesbian advocacy highlights a similar tension in international human rights law, split as it is along two sometimes conflicting paths. Lesbians have sought recognition and protection through the feminist efforts to promote women’s rights as well as through the queer efforts to promote queer rights. Despite their overlap, these movements provide very different answers to a foundational question of women’s sexuality – is it primarily a site of violence, as conceived of by the women’s rights movement, or is it primarily a site of pleasure, as conceived of by queer advocacy?¹⁶⁷ Focusing only on pleasure erases the structural inequality that infuses (hetero)sexual relations with danger, but focusing only on sexual violence erases women’s sexual agency, autonomy, and desire. In today’s discourse, the narrative of violence has the clear edge. This is a critical blow to the broader efforts of queer advocacy, which have been uniquely concerned with pleasure.¹⁶⁸ The focus of the women’s rights movement on conflict-related sexual violence and the increasing infusion of international human rights with criminal sanctions has further sidelined not just pleasure but also autonomy and agency, in favour of ‘the politics of heteronormative injury’. The focus on subordination by the male/masculine of the female/feminine is a paradigm which is often antithetical to queer experience and therefore calls for some circumspection before adopting wholesale the strategies and goals of the women’s rights movement.¹⁶⁹ Situating queer rights within international human rights law, which is then picked up by international criminal law, may achieve some protection in one respect, but in doing so, it moves further away from the broader goals of queer advocates.

A potent example is the Yogyakarta Principles, a series of 29 initial principles developed by civil society in 2007, with a further ten added in 2017. The Principles set out how existing international human rights law can apply to address queer rights abuses; one referred to earlier is Principle 4, that pursuant to the right to life, the death penalty shall not be imposed for consensual sexual activity.¹⁷⁰ Given their formulation was tied to the existing state of the law, it is perhaps understandable that the Principles are conservative. Violence continues to be a focus, mentioned explicitly 23 times, and the concern about it leads to the Principles focusing on protection through privacy rights and non-discrimination, as well as integration into heteronormative structures.¹⁷¹ In doing so, the Principles fail to challenge these problematic structures. The right to found a family in Principle 24, for example, talks of adoption and marriage,¹⁷² assuming that the family

¹⁶⁴R. Marrit Anholt, ‘Understanding Sexual Violence in Armed Conflict: Cutting Ourselves with Occam’s Razor’, (2016) 6 *Journal of International Humanitarian Action* 1, at 2.

¹⁶⁵*Ibid.*, at 4–5.

¹⁶⁶See Ní Aoláin, *supra* note 129, at 626; C. O’Rourke, *Gender Politics in Transitional Justice* (2014), 4.

¹⁶⁷D. Otto, ‘Between Pleasure and Danger: Lesbian Human Rights’, (2014) 6 *European Human Rights Law Review* 618, at 618–19.

¹⁶⁸*Ibid.*

¹⁶⁹See Ní Aoláin, *supra* note 129, at 622; Otto, ‘Introduction: Embracing Queer Curiosity’, *supra* note 7, at 1; J. Halley, ‘Take a Break from Feminism?’, in K. Knop (ed.), *Gender and Human Rights* (2004), 57, at 59–61, 67–8.

¹⁷⁰See Yogyakarta Principles, *supra* note 10, Principle 4.

¹⁷¹See Otto, *supra* note 167, at 627–8.

¹⁷²See Yogyakarta Principles, *supra* note 10, Principle 24.

unit remains effectively unchanged.¹⁷³ Rather than imagining diverse models of family, the Principles see assimilation towards a 'gay' family that is still monogamous, nuclear, procreative, and heteronormative.¹⁷⁴ In this sense, the Principles offer 'freedom of, but not freedom from' sexual orientation and gender identity.¹⁷⁵ In other words, rather than challenging mainstream understandings of sexual orientation and gender identity, the Principles attempt to fit diverse queer practices into them.¹⁷⁶ This sanitizes queer people by bringing them closer to the 'normal' cisgendered heterosexual majority rather than truly emancipating them,¹⁷⁷ reducing the extent to which queer individuals are 'othered' (freedom of) but not addressing the prejudice towards the 'other' (freedom from). In this sense, any queer reinterpretation of international criminal law based on human rights replicates the reality that many of the fundamental concepts in human rights law continue to enforce heteronormative structures, even when interpreted queerly.

Such queer reinterpretations often enforce not only a heteronormative baseline, but also a Westernized one.¹⁷⁸ While beyond the scope of this article to discuss in detail given the present focus on situating of sexual orientation and/or gender identity within the confines of gender, it is worth noting the concept of the 'Gay International'.¹⁷⁹ He is a universalized, Western gay male¹⁸⁰ who exists in contrast to heterosexuality, is out of the closet, and is able to (and does) assimilate in the manner discussed above by virtue of living in a 'superior' Western society which grants legal recognition to same-sex marriage.¹⁸¹ But not all societies divide people into hetero and non-heterosexual categories. Queer sexual relations can occur without being the exclusive sexual relations of those individuals and may not represent sexual orientation in the binary Western manner, nor are these relations or experiences necessarily integral to each person's identity, as the Yogyakarta Principles suggest.¹⁸² The risk of using international criminal law to prosecute queer persecution is that it can create 'gays' where there are none, in societies in which same-sex practices do not subscribe to these categories,¹⁸³ and in societies in which queer visibility can come at a tremendous personal cost.¹⁸⁴ Given the very premise of this article, that queer people are targeted in armed conflict by reason of their being, or being perceived to be, queer, extreme care should be taken in considering, in assuming, that 'gay rights' are universal and both 'gay' and 'rights' are identical everywhere.¹⁸⁵

Social and political critiques such as these call for social and political change; legal change, on the other hand, means 'flattening' radical critiques into a more confined and technical change to write

¹⁷³See Otto, *supra* note 167, at 627–8.

¹⁷⁴R. Kapur, 'The (Im)possibility of Queering International Human Rights Law', in Otto, *supra* note 7, at 134–5; see Otto, *supra* note 94, at 310–11.

¹⁷⁵A. M. Gross, 'Sex, Love, and Marriage: Questioning Gender and Sexuality Rights in International Law', (2008) 21 *Leiden Journal of International Law* 235, at 251.

¹⁷⁶See Otto, *supra* note 167, at 627–8.

¹⁷⁷See Kapur, *supra* note 174, at 142–3.

¹⁷⁸P. Kastner and E. Roy Trudel, 'Unsettling International Law and Peace-Making: An Encounter with Queer Theory', (2020) 33 *Leiden Journal of International Law* 911, at 917; see Gross, *supra* note 175, at 239.

¹⁷⁹See Shalakany, *supra* note 34, 127, citing J. Massad, 'Re-Orienting Desire: The Gay International and the Arab World', (2002) 14 *Public Culture* 361, at 382–4.

¹⁸⁰For an analysis of how gay men tend to dominate LGBTQIA narratives in the context of human rights law see L. Hodson, 'Sexual Orientation and the European Convention on Human Rights: What of the "L" in LGBT?', (2019) 23 *Journal of Lesbian Studies* 383.

¹⁸¹See Kapur, *supra* note 174, at 133–4; Gross, *supra* note 175, at 243–9.

¹⁸²See Gross, *ibid.*, at 250–1; A. Gross, 'Queer Theory and International Human Rights Law: Does Each Person Have a Sexual Orientation?', (2007) 101 *Proceedings of the Annual Meeting American Society of International Law* 129, at 130; Lee, *supra* note 6, at 78.

¹⁸³See Gross (2007), *ibid.*, at 130, citing Massad, *supra* note 179.

¹⁸⁴See Kapur, *supra* note 174, at 140–1, quoting Shalakany, *supra* note 34, 'Activism from the Closet: Gay Rights Strategizing in Egypt', (2006) 7 *Melbourne Journal of International Law* 28, and Gross (2007), *supra* note 182. See also Kapur, *supra* note 7, at 67.

¹⁸⁵See Gross, *supra* note 175, at 241.

an improved law,¹⁸⁶ as strategic human rights litigation on queer rights has tended to do in international courts and committee decisions. The criminal process requires further flattening still. It relies on strict notions of admissible evidence and appropriate procedure which uphold certain narrow views of objectivity and neutrality, with judges tightly constrained by precedent and pressure to apply the law to its letter.¹⁸⁷ Whether testimony should be heard in a courtroom is itself a hotly debated question, in response to which the system has seen non-judicial alternatives present themselves without, for example, standard rules of evidence.¹⁸⁸ It is also well known that criminal cases can take many years to conclude, and the ICC's specific focus on high-level perpetrators of the most serious crimes lengthens that process further still, while also conducting it in a faraway institution that may have limited links back to the affected community to then drive social and political change.¹⁸⁹ Yet even then, it is not clear that criminal processes achieve the narrower goal of deterrence in persecution cases. Persecution of queer people is unlikely to be conceived of by the perpetrator as a 'crime' *per se*; rather, it is part of an ideological striving for their idea of a 'good' society,¹⁹⁰ in this case protecting the community from the dangers of queer people.

What emerges from this critique is the limited capacity for international criminal law to spark transformative change.¹⁹¹ International law tends to *respond* to crises, in a way that does not always enrich international law itself, though it has caused international criminal law to develop.¹⁹² It has thus been more focused on regulating conflict than making peace.¹⁹³ Individual criminal responsibility overlooks the structural causes and broader political context in which this ideological striving fomented and can sometimes even act as an alibi for the broader population's role and responsibility in the conduct.¹⁹⁴ The transformative failure is exemplified by the ICC's practice on Article 21(3). While the provision, discussed above, purports to create a pathway for progressive rights critiques, for example by the CEDAW Committee, to inform international criminal law, in practice the main use of Article 21(3) thus far has been around victim and fair trial rights and procedural rather than substantive issues.¹⁹⁵ Despite being uniquely well placed to do so, the ICC has largely declined to synthesize human rights into international criminal law, let alone to consider more radical critiques of those human rights. The law is undoubtedly a site of power which shapes everyday life, and so demands some ongoing engagement with it, from feminist, queer and other lenses. A critical perspective however recognizes that legal gains are likely to be incremental and tenuous rather than acting as a vehicle for transforming the system of queer prejudice.¹⁹⁶

This article has referred to queering international criminal law in the sense of advancing the rights of queer people in international criminal law. But queering international law can refer to the analytical mode of critiquing the law, with the term 'queer' indicating a range of non-normative positions which are at once sexual, social and political, and which can apply to 'heterosexual' subjects and *not* apply to 'non-heterosexual' subjects.¹⁹⁷ Ultimately, such an approach challenges the very foundations of international law, including how it reinforces existing and unequal power

¹⁸⁶See Ní Aoláin, *supra* note 129, at 631; O'Rourke, *supra* note 166, at 6.

¹⁸⁷See Otto, *supra* note 161, at 387.

¹⁸⁸See, e.g., Elander, *supra* note 39, at 110; D. Otto, 'Impunity in a Different Register: People's Tribunals and Questions of Judgment, Law, and Responsibility', in K. Engle, Z. Miller and D. M. Davis (eds.), *Anti-Impunity and the Human Rights Agenda* (2016), 291.

¹⁸⁹See Davis, *supra* note 19, at 58.

¹⁹⁰P. Alston and R. Goodman, *International Human Rights* (2012), 1283–6, quoting M. Koskeniemi, 'Between Impunity and Show Trials', (2002) 6 *Max Planck Yearbook of United Nations Law* 1.

¹⁹¹See Ní Aoláin, *supra* note 129, at 623.

¹⁹²H. Charlesworth, 'International Law: A Discipline of Crisis', (2002) 65 *Modern Law Review* 377; Brown and Grenfell, *supra* note 65, at 348–9.

¹⁹³See Kastner and Roy Trudel, *supra* note 178, at 912.

¹⁹⁴See Alston and Goodman, *supra* note 190, at 1283–6, quoting Koskeniemi, *supra* note 190.

¹⁹⁵See O'Rourke, *supra* note 123, at 361.

¹⁹⁶See Otto, *supra* note 161, at 390.

¹⁹⁷See Ruskola, *supra* note 32, at 1481; Kapur, *supra* note 7, at 60.

structures.¹⁹⁸ Subsuming it into a rights discourse removes the radicality of this challenge and instead embeds it into the heteronormative, racial and cultural norms in which the law operates, the same way that feminist interventions in international law are now increasingly found inside the halls of the UN, rather than outside of it, picketing the building.¹⁹⁹ Despite these interventions initially identifying the masculine world as the overarching concern,²⁰⁰ the so-called successes of the feminist intervention have largely replicated and indeed confirmed gendered power structures and norms. Thus queer rights might advance through international criminal law, but only within its strict confines.

Ultimately, advancement of queer rights through international criminal law is a pursuit limited by the concept of rights at all. The objectives of human rights include ensuring access to various legal and social benefits, and it is absolutely important for queer people to be granted that access – certainly, so doing is better than disengaging from the disenfranchisement experienced by queer people in this respect.²⁰¹ But bestowal of such rights comes only once the subjects in question are indeed accepted as human. Human rights thus rest on existing normative orders, including a hierarchy of who counts as human – who receives full recognition, who receives some, who receives none.²⁰² The act of decriminalizing queerness, as human rights seek to do, does not suddenly render queer people as subjects who fully enjoy rights. Even if queer people are not criminal, society may continue to view them as ‘othered’ and only view them as human if they submit to the existing heteronormative order.²⁰³ Bestowal of rights itself does little to resolve the hatred that continues to foment in society.²⁰⁴ Likewise, holding an individual perpetrator accountable for queer persecution does little to challenge the perpetrator’s justification for so acting, and thus challenge the cause of queer persecution.²⁰⁵

4. Conclusion

In the so-called ‘age of human rights’ in the twentieth and twenty-first centuries, international criminal law has emerged as a powerful mechanism for protecting victims and punishing perpetrators, with each iteration of the project reaching a bit further than its predecessor, to cover more and more people, more and more rights.²⁰⁶ The extension of that reach to queer persecution would offer a powerful new legal precedent and tool for queer advocates around the world.²⁰⁷ Failure to do so increasingly goes against the grain of international human rights law and customary international law.²⁰⁸ Both the Rome Statute itself and the ICC’s reading of the Statute provide for the influence of human rights on evolving norms.²⁰⁹ By stating that human rights ‘underpin’ every aspect of the Rome Statute and adding that its provisions must be interpreted, and more importantly *applied*, in accordance with internationally recognized human rights, the ICC has embraced this synthesis.²¹⁰ From a strictly legal perspective, a queerly reinterpreted

¹⁹⁸See Otto, *supra* note 7, at 1–2.

¹⁹⁹See Kapur, *supra* note 174, at 135.

²⁰⁰H. Charlesworth, C. Chinkin and S. Wright, ‘Feminist Approaches to International Law’, (1991) 85 *American Journal of International Law* 613, at 621.

²⁰¹See Kapur, *supra* note 174, at 132–3.

²⁰²See Kapur, *supra* note 7, at 58.

²⁰³*Ibid.*, at 59.

²⁰⁴See Kapur, *supra* note 174, at 142.

²⁰⁵See Davis, *supra* note 19, at 4.

²⁰⁶See Kritz, *supra* note 115, at 3.

²⁰⁷See Davis, *supra* note 18, at 518.

²⁰⁸*Ibid.*, at 557–8.

²⁰⁹See O’Rourke, *supra* note 123, at 359. See also Young, *supra* note 118.

²¹⁰*Prosecutor v. Lubanga*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, ICC-01/04-01/06-772, A.Ch., 14 December 2006, para. 37. See also Davis and Bradley, *supra* note 16, at 200.

reading of the international criminal law prohibition on gender persecution is capable of recognizing persecution of queer people, including recognizing the specific basis on which they are targeted, and thus recognize queer people as full rights holders – indeed, recognize them as human, for it is their human rights that are violated in cases of persecution.²¹¹ Nevertheless, in the absence of case law, this queer reinterpretation is no more than an interpretation, one that is not universal, let alone clear. Evidently, then, queer reinterpretation of international criminal law and human rights law cannot alone be the answer to improving the lives of queer people. Such reinterpretation is limited *within* the legal system.

Moreover, such reinterpretation is limited *by* the legal system. Decades of feminist advocacy from both inside and outside the establishment have resulted in many successes identified in this article as regards international criminal law, ultimately culminating in what has been described as the arrival of ‘international conflict feminism’ in global power politics.²¹² While critiques have proliferated of the individual accomplishments within this sequence, less analysis has challenged the feminist utility of engaging with international criminal law at all.²¹³ International criminal law has changed as a result of this feminist intervention, but the power structures that ultimately cause violence remain largely intact. Queer erasure dooms history to repeat itself, but by the time queer advocates look to international criminal law for remedies, this process of erasure is already entrenched. None of this is to conclude that queer rights cannot be advanced by international criminal law.²¹⁴ On the contrary, queer advocacy must engage with reality, including the existing frameworks that constructs it, even as it challenges those frameworks.²¹⁵ Precisely the difficulty for queer reinterpretations and queer reimaginations is to work within international human rights and criminal law while at the same time questioning its concepts of rights, identity, and power.²¹⁶

²¹¹C. A. MacKinnon, *Are Women Human? And Other International Dialogues* (2007), 3.

²¹²See Ní Aoláin, *supra* note 129, at 625.

²¹³See Otto, *supra* note 161, at 389.

²¹⁴And indeed, in more ways than just through prosecuting – Leddy, *supra* note 42, at 934–41 discusses important considerations for the forensic process of actually investigating and charging queer persecution.

²¹⁵See Otto, *supra* note 32, at 26.

²¹⁶See Gross, *supra* note 175, at 253.