Persecution and Protection of Sexual and Gender Minorities under Article 7(1)(h) of the Rome Statute

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While LGBTI discrimination and persecution violates international human rights law, the degree to which sexual and gender minorities are protected under international criminal law remains ambiguous. This Article attempts to clarify the position of sexual and gender minorities as protected groups within the context of the crime against humanity of persecution. It will be argued that sexual and gender minorities may, in some cases, be considered groups on political or gender grounds, as listed in Article 7(1)(h) of the Rome Statute. Despite increasingly robust protection under international law more generally, sexual and gender minorities do not yet meet the required standard to be considered discrete groups within the Statute’s category of ‘other grounds universally recognised as impermissible under international law’.

I. INTRODUCTION

Crimes against humanity occupy a unique position within international criminal law. Prosecutions for crimes against humanity by the International Criminal Court (ICC) ‘may assume a preventive role’¹ and ‘may serve as the predicate for ICC intervention before war and its accompanying atrocities completely overwhelm a civilian population’.² The crime against humanity of persecution, in particular, was expanded considerably with the adoption of the Rome Statute.³ The general scope of its definition, ‘the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity’, allows it to contend with a wide range of

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² ibid.

issues that other international crimes are unable to address. Due to its focus on the identity of the victims, the crime against humanity of persecution encompasses the specific harm that is caused when individuals are targeted for the simple fact of their membership within a group.

Sexual and gender minorities are particularly vulnerable to persecutory and discriminatory acts. These acts are widely documented and include the loss of homes and incomes, arbitrary arrests, physical threats, torture and murder. In the first case of its kind, LGBTI persecution is currently being addressed in Sexual Minorities Uganda (SMUG) v Lively. The case, brought by Ugandan plaintiffs against an American pastor under the Alien Tort Statute, is the first in any jurisdiction that labels the persecution of sexual and gender minorities as a crime against humanity. The outcome of SMUG v Lively will likely have tremendous implications for the LGBTI community in Uganda, and the case itself is an important way for the community to achieve a measure of redress for the widespread persecution to which they are subjected.

Notwithstanding that SMUG v Lively is a civil case that was brought under domestic jurisdiction, the connection between the charges and international human rights law is apparent. The persecutory acts at issue in Lively constitute violations of international human rights law. To what extent, however, can

4 Rome Statute (n 3) art 7(2)(g).
5 See ‘From Torment to Tyranny: Enhanced Persecution in Uganda Following the Passage of the Anti-Homosexuality Act 2014’ (Sexual Minorities Uganda, 9 May 2014) <sexualminoritiesuganda.com/wp-content/uploads/2014/11/SMUG-From-Torment-to-Tyranny.pdf> accessed 31 January 2016. In 2011, the founder of SMUG, David Kato, was murdered after his being outing by a newspaper that carried his photo, among others, and a caption that read, ‘Hang them’. While this report is specific to the experience of sexual and gender minorities in Uganda, such persecution is widespread and is not confined to any geographical area.
6 While recognising that the acronym ‘LGBTI’ (lesbian, gay, bisexual, transgender and intersex) excludes some categories of sexual and gender minorities, it will be used in this Article, for convenience, to refer to all such minorities.
7 Sexual Minorities Uganda v Scott Lively Civil Action 3:12-CV-30051 (MAP) (US District Court for the District of Massachusetts). According to the original complaint, the case was brought, under the Alien Tort Statute, in response to ‘the decade-long campaign [Lively] had waged, in association with his Ugandan counterparts, to persecute persons on the basis of their gender and/or sexual orientation and gender identity.’ (Dkt No 27, Am Compl, para 1). Lively was instrumental in the drafting of Uganda’s 2009 Anti-Homosexuality Bill.
8 Alien Tort Statute, 28 USC § 1350.
9 Human rights violations resulting from Lively’s campaign include, among others, violations of the rights to life, liberty and security of person, freedom from torture and ill treatment and equality before the law. See the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) (ICCPR) 999 UNTS 171, arts 6(1), 7, 9 and 26.
such persecution be considered a crime against humanity under international criminal law?

Central to a consideration of the crime against humanity of persecution is the definition and composition of groups enumerated in Article 7(1)(h) of the Rome Statute. As a crime against humanity, persecution must occur:

against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender... or other grounds that are universally recognised as impermissible under international law.\(^{10}\)

Thus, whether or not sexual and gender minorities conform to the definition of one or more of the groups listed in Article 7(1)(h) will determine if the persecution of these minorities can be considered an international crime.

This Article will argue that sexual and gender minorities, in the context of Article 7(1)(h), may be classified as groups on political or gender grounds and thus derive protection from international criminal law on those bases. While including these groups under the heading of ‘other grounds universally recognised as impermissible under international law’\(^{11}\) would validate LGBTI identity under the law and acknowledge the harm that LGBTI individuals face as a result of their identity, sexual and gender minorities do not yet meet the universally recognised standard articulated in the Rome Statute.

Section II will examine whether LGBTI persons constitute a group, for the purposes of the Statute, on the basis of political or gender grounds. Section III will then examine the meaning of the phrase ‘other grounds universally recognised as impermissible under international law’ and determine whether sexual and gender minorities conform to the standard set forth in the Statute.\(^{12}\) Finally, Section IV will conclude by affirming that the limited protections afforded to sexual and gender minorities under international criminal law may accurately reflect instances of persecution against these groups.

\(^{10}\) Rome Statute (n 3) art 7(1)(h). As sexual and gender minorities do not \textit{prima facie} conform to the definitions of racial, national, ethnic, cultural or religious grounds, these categories will not be discussed.

\(^{11}\) ibid.

\(^{12}\) As sexual and gender minorities do not \textit{prima facie} conform to the definition of racial, national, ethnic or cultural grounds, these categories will not be considered.
II. SEXUAL AND GENDER MINORITIES AND PERSECUTION ON POLITICAL OR GENDER GROUNDS

Victims of the crime against humanity of persecution must belong to a particular group or collectivity identified in Article 7(1)(h). In determining exactly how membership in the group is defined, the jurisprudence of the ICC and the ad hoc and special tribunals reveals two important elements that are relevant to the present discussion. Firstly, ‘the victim’s membership in a group [is] defined by the perpetrator’.13 Following on from that, the ‘group does not only comprise persons who personally carry the… criteria of the group,’14 but it also comprises persons who are perceived (by the perpetrator) to be part of the group.15 The fact that the perpetrator can both define the group, as well as include within the group persons who might not actually be a part of it, has implications for the placement of sexual and gender minorities within the scope of Article 7(1)(h).

2.1 Persecution on Political Grounds

The crime against humanity of persecution on political grounds is common to the ICC and many of the ad hoc and special tribunals.16 The definition of

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13 Prosecutor v Kaing Guek Eav alias Duch (Judgement) 001/18-07-2007/ECCC/TC (26 July 2010) para 377. See also fn 12 and accompanying footnotes and text, citing ICTY precedent. The perpetrator’s definition of the group also speaks to the discriminatory intent (mens rea) of the act.


15 See, inter alia, Situation in the Republic of Côte d’Ivoire in the Case of The Prosecutor v Laurent Gbagbo (Decision on the Confirmation of Charges against Laurent Gbagbo) ICC-02/11-01/11 (12 June 2014) paras 67 and 205. Notably, in Prosecutor v Milorad Krnojelac, Trial Chamber II held that individuals who were mistakenly targeted on the basis of their perceived membership in a protected group could not be considered victims of persecution: ‘[T]o argue that this act amounts nonetheless to persecution if done with a discriminatory intent needlessly extends the protection afforded by that crime to a person who is not a member of the listed group requiring protection in that instance.’ See Prosecutor v Milorad Krnojelac (Judgment) IT-97-25-T (15 March 2002) para 432, fn 1293. The Appeals Chamber held that this interpretation was ‘erroneous’. See also Prosecutor v Milorad Krnojelac (Judgment) IT-97-25-A (17 September 2003) para 185. Subsequent decisions have reinforced this position. The perception that victims belong to a certain group, whether or not they actually do, may also reveal discriminatory intent, satisfying the mens rea of the crime against humanity of persecution. See Kaing (n 13) paras 377—80.

‘political grounds’, as provided by the jurisprudence of the Court and the tribunals, has been well established. As a basis for the crime against humanity of persecution, political grounds do not require membership in a political party. In Kaing, the Supreme Court Chamber of the ECCC affirmed that:

The group or groups persecuted on political grounds may include various categories of persons, such as: officials and political activists; persons of certain opinions, convictions and beliefs; persons of certain ethnicity or nationality; or persons representing certain social strata.\(^{17}\)

Individual members of groups that undertake political activism in order to advance the rights of sexual and gender minorities meet the definition of a political group as articulated by the ECCC. Individuals who take part in such activism, but who are not themselves LGBTI, could also be considered part of a political group in the context of Article 7(1)(h).

Although groups that advocate for LGBTI rights may be considered ‘political’ for the purposes of the Rome Statute, the fact that membership within a group is determined by the perpetrator complicates the position of sexual and gender minorities as a political entity. Attacks that are motivated by homophobia, transphobia or genderphobia usually occur on the basis of the perpetrator’s perception of the victim within the LGBTI spectrum and not on the basis of the victim’s membership in a politically active group. Therefore, it is not immediately clear that the Court would consider persecutory attacks on individuals who advocate for LGBTI rights as attacks committed on political grounds. There does, however, exist some room for further interpretation.

In the Media Case,\(^{18}\) the Trial Chamber I found that the accused ‘essentially merged [their] political and ethnic identity [of their victims], defining their political target on the basis of ethnicity and political positions relating to ethnicity’.\(^{19}\) A background of the case here would perhaps help to illustrate this point. While ethnicity itself is a protected status under Article 3 of the Statute of the International Criminal Tribunal for Rwanda (ICTR), the defendants in this case were charged with, \textit{inter alia}, crimes against humanity of persecution on


\(^{18}\) \textit{Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze} (Judgment and Sentence) ICTR-99-52-T (3 December 2003) (Media Case).

\(^{19}\) ibid para 1071. The Chamber held that attacks against members of the Tutsi ethnic group and their supporters could be defined in political as well as ethnic terms, although ‘the political component predominated’.
political (not ethnic) grounds. The ethnicity of the victims served to refine the perpetrators’ definition of the political group that was targeted. Indicators of perceived membership in a political group, therefore, do not require protected status; they are simply definitional elements of the protected group that perpetrators may use to identify and target their victims.

As political targets, then, it is not necessary to determine whether sexual and gender minorities are protected groups for the purposes of the Rome Statute. LGBTI individuals may be considered members of a political group if a perpetrator defines them as ‘gay activists’ or ‘gender activists’. In this way, the perpetrator would be defining the political group based on certain features that he or she perceives to indicate membership within that group. It may be possible to broaden this proposition even further. For example, it is not tenuous to posit that the mere act of living openly as an LGBTI person in certain places is a political statement and that such an act could be understood to indicate certain political positions or membership in a political group.

2.2 Persecution on The Grounds of Gender

The inclusion of gender within Article 7(1)(h) prompted much debate during the drafting of the Rome Statute; those delegations that opposed its inclusion cited sexual orientation as among the reasons for their opposition. In the end, gender was included, subject to the definition found in Article 7(3), which states that “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above. Ultimately, Article 7(3) placated parties on both sides of the debate.

[It] gave comfort to those opposed to “gender” because they saw it as reaffirming the “two sexes, male and female”, while those supportive felt that it was harmless because it reaffirmed the valuable sociological reference to the “context of society”.

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20 For a detailed account of negotiations surrounding the inclusion of the term ‘gender’ in the Rome Statute, see generally Valerie Oosterveld, ‘The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?’ (2005) 18 Harvard Human Rights Journal 55. Delegations opposed to including gender in the Rome Statute argued that the category ‘could imply rights more expansive than those currently recognised in many states, with the main concern being that the term might sanction rights based on sexual orientation’ (Oosterveld at 63).

21 Rome Statute (n 3) art 7(3).

22 Oosterveld (n 20) 65.
While Article 7(3) may have provided a basis for agreement among the negotiating parties, it did not resolve the underlying question of whether sexual orientation and gender identity can be read into the Statute’s definition of gender.\(^\text{23}\) Some scholars insist that the definition excludes sexual orientation outright and claim that, as a concession to more conservative parties, ‘[d]ebates in Rome resulted in [the adoption of] a limit[ed] definition to ensure that persecution on the basis of sexual orientation would not be covered’.\(^\text{24}\) Others argue that the definition does not ‘implicitly preclude “gender” from encompassing sexual orientation’\(^\text{25}\) and that the last sentence of Article 7(3) is ‘tautological and superfluous’,\(^\text{26}\) leaving room for further interpretation.

Given the definition of gender as it stands, it is quite possible to argue that both sexual and gender minorities are included within the Statute’s definition of ‘gender’ in Article 7(3). Firstly, ‘it is “dubious to argue that any ambiguity should be resolved in favour of discrimination”’.\(^\text{27}\) To read discrimination into the definition of gender, however vague the definition may be, seems contrary to the idea of including persecution as a crime against humanity in the Rome Statute. Secondly, sexual orientation and gender identity are fundamentally tied to, though not exclusively defined by, gender (and vice versa).

Since ‘conceptions of “gender” and sexual orientation are inextricably linked’,\(^\text{28}\) the persecution of men or women on the basis of their sexual orientation is...
necessarily persecution on the basis of the victims’ gender. Based on the same logic presented above with regard to the Media Case, 29 it is plausible that perpetrators may conflate victims’ sexual orientation and gender and use the former to characterise the latter. The sexual orientation of the victims may provide evidence of discriminatory intent, based on the perpetrator’s definition of the group, but is not the sole defining feature of the targeted group (that is, gay men or lesbian women). In other words, it can be argued that the persecution of individuals based on their sexual orientation is persecution on the basis of gender (with, again, the victims being either male or female) for reasons of the victims’ sexual orientation. Gender may therefore be characterised, but not completely defined by, the sexual orientation of the victims.

Whereas sexual minorities may conform to the definition of gender even in its most narrow rendering (that is, only male or female), the position of gender minorities is more complicated. Brian Kritz argues that the definition of ‘gender’ in Article 7(3) may extend protection to transgendered individuals who self-identify as either male or female, 30 but he maintains that Article 7(3) denies outright any protection to individuals who ‘identify as a gender, do not have a gender identity or refuse to be classified as male or female’. 31 This position, whilst acknowledging the fact that some gender minorities may benefit from protection under the Rome Statute, is based on an arguably flawed reading of Article 7(3) and ignores relevant jurisprudence.

Kritz takes the phrase ‘within the context of society’ to mean ‘within our combined global societal notions of male and female’ 32 and, as a test, asks if gender minorities have ‘become mainstreamed in all countries throughout the globe’. 33 It is difficult to accept such a reading of the Statute when there is nothing in A Commentary on the Rome Statute, 34 in contemporary scholarly literature or in the jurisprudence of the ICC to support this interpretation. 35

the purposes of Article 7(1)(g), that ‘corrective rape’ is committed against gay or lesbian individuals with the intention of changing the victims’ sexual orientation.

29 Media Case (n 18).


31 ibid.

32 ibid 37.

33 ibid 36. ‘The answer,’ Kritz writes, ‘seems a resounding “no”.’


35 This Article contends that the two phrases ‘two sexes male and female’ and ‘within the context of society’ were inserted into Article 7(3) simply to placate the two opposing sides of the gender debate during the drafting of the Statute and not to provide a complete definition of the term ‘gender’. See above fns 11-13. Notwithstanding the last sentence of the article, which refers
Further, Kritz’s argument is based on the premise that the victims’ self-identity informs membership within a protected group for the purposes of the Rome Statute, disregarding jurisprudence that indicates otherwise. As stated above, it is the perpetrators who define — accurately or not — their victims’ status as members of a certain group.36

In its Decision on the Confirmation of Charges in the Kenya Situation,37 the ICC addressed the degree to which assumptions provided a basis for defining groups under Article 7(1)(h). The Court affirmed that attacks on ethnic groups based on those groups’ ‘assumed political allegiance… does not diminish the fact that the identification of the targeted population was essentially on political grounds’.38 The Court found that the perpetrators’ underlying assumption was enough to satisfy the definition of a political group. One could argue, therefore, that persecution on the basis of a group’s perceived gender could likewise satisfy, for the purposes of Article 7(1)(h), the definition of an ‘identifiable group or collectivity’ on gender grounds.

Perpetrators of crimes committed with discriminatory intent against gender minorities act on the basis of gender, whether or not the victims outwardly express their gender in conformity with the strict male-female dyad. If the crime concerns the persecution of female transgendered individuals, for example, it is committed on the basis of gender, against a group of people whom the perpetrators assume or perceive to be male, even if the victims themselves do not identify with this perception. Similarly, persecution of those who are agender, intersex, genderqueer or gender fluid may be committed against individuals whom the perpetrators assume or perceive to be either male or female, even if they do not comport with a certain standard of ‘maleness’ or ‘femaleness’.

While to contend that gender as defined in Article 7(3) includes within its scope both sexual and gender minorities is to extend meaningful protection to LGBTI

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36 See above fn 13.
37 Situation in the Republic of Kenya in The Case of the Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-02/11 (23 January 2012) (Kenya Situation).
38 ibid para 144. As in the Media Case, the ethnic character of the group is secondary, given that the defendants in the Kenya Situation were charged with crimes against humanity of persecution on political, not ethnic, grounds. See Kenya Situation para 21. Note that the charges in the Kenya Situation were eventually dropped.
persons through international criminal law, placing such protection within the
definition of gender fails to validate the identity of LGBTI individuals. As
cries against humanity are uniquely able ‘to fully capture the social harm
suffered by victims’,\(^\text{39}\) it is important to address this harm as much as possible.
Tying LGBTI persecution to gender denies a certain aspect of one’s identity and
does not fully address the social harm that follows from gross violations of
human rights that are committed with the intent to discriminate against sexual
or gender minorities. To recognise and validate LGBTI identity more fully, it is
necessary to examine whether, if at all, it is possible to include the category of
LGBTI, on its own and without reference to other characteristics, elsewhere
within the scope of Article 7(1)(h).

III. PERSECUTION ON OTHER GROUNDS UNIVERSALLY
RECOGNISED AS IMPERMISSIBLE UNDER
INTERNATIONAL LAW

In addition to the specific categories listed in Article 7(1)(h), the crime against
humanity of persecution can be committed on the basis of ‘other grounds that
are universally recognised as impermissible under international law’.\(^\text{40}\) While
the very ‘reference to “other grounds” in the final version of Article 7(1)(g) [sic]
invites the Court to extend the scope of persecution’,\(^\text{41}\) the requirement that
such grounds be universally recognised seems to present a significant challenge
to the inclusion of new categories within the scope of the Article. Noting the
‘relatively primitive stage of international law in the area’,\(^\text{42}\) Schabas writes that
the category of other universally recognised grounds excludes sexual
orientation, but he further maintains that ‘the situation will undoubtedly change with the progressive development of international human rights law’.\(^\text{43}\)

Scholars who argue that sexual minorities meet the universally recognised
standard have done so while omitting an analysis of the standard itself.\(^\text{44}\) As the
standard was inserted into the Statute in order to avoid any imprecision that

\(^{39}\) Sadat (n 1) 344. Mouthaan also emphasises the ‘physical, mental, social and cultural suffering’
of victims of gender-based crimes: Mouthaan (n 26) 783.

\(^{40}\) Rome Statute (n 3) art 7(1)(h).

\(^{41}\) Schabas (n 34) 177. The text’s reference to Article 7(1)(g) is erroneous. The section in which it
is found refers only to the crime of persecution and not to the sexual crimes outlined in Article
7(1)(g).

\(^{42}\) ibid.

\(^{43}\) Schabas (n 34) 177 fn 309.

\(^{44}\) See Oosterveld (n 20) 79 and see Josh Scheinert, ‘Is Criminalisation Criminal?: Antisodomy
Sexuality 99, 130–34.
might violate the principle of legality, such an analysis is critical to the discussion at hand.

To illustrate a group against whom persecution is universally recognised as impermissible, Schabas provides the example of persons with disabilities, referring to both a footnote in the Preparatory Committee Draft Statute and the Convention on the Rights of Persons with Disabilities (CRPD). While a treaty such as the CRPD is an authoritative statement of the degree to which a category of persons is protected under international law, the existence of a treaty is not, arguably, required to fulfil the ‘universally recognised’ standard. Inasmuch as the CRPD reveals the position of disabled persons within international law, it is worth noting that the treaty itself, with 153 states parties to it at present, is not universally ratified and that some states have failed, at the policy level, to address and combat discrimination against persons with disabilities. While such discrimination does not rise to the level of persecution as defined in Article 7(2)(g) of the Rome Statute, it does constitute a violation of international human rights law. Considering Schabas cites international human rights law as one source of universal recognition within the scope of Article 7(1)(h), and given that the standard of universal recognition applies with regard to the identity of the group or collectivity being persecuted, a conflict arises between the standard and the way in which it is expressed through state practice. On the one hand, it may be universally recognised that persecution of disabled persons is impermissible; on the other hand, it is possible to violate one of the underlying premises (that is, international human rights law) that gives rise to such universal recognition.

It is possible, then, that the universal recognition standard may not be as insurmountable as a cursory reading of the Statute might at first imply. ‘Universal’ likely does not need to be construed in a literal sense, and the standard itself is probably influenced by a combination of positive law,

46 Schabas (n 34).
47 The elderly provide an example of a group that might conform to the universally recognised standard without being the subject of a treaty. Persecution of certain classes of people, such as that which occurred during China’s Cultural Revolution, might also fit this standard.
49 See fn 4.
50 See fn 38.
51 Universal recognition remains, if not insurmountable, ‘a very high threshold’. See Oosterveld (n 20) 79 fn 144 and Robinson (n 45) 54.
customary law and international norms. With Schabas’ example of persons with
disabilities as a guide, state practice on its own may not factor as heavily as
other sources of law and custom when determining which groups meet the
standard, since such practice may diverge from international human rights
norms and obligations. Nevertheless, it remains an important factor to consider.

While sexual and gender minorities are increasingly protected under
international law, some states still continue to criminalise homosexual acts and
non-cisgender identity.52 Penal codes, some of which have been inherited from
former colonial powers and remain in force, contain references to ‘the
abominable crime of buggery’,53 ‘outrages on decency’54 and ‘unnatural
offences’55 and have been used to prosecute sexual and gender minorities. The
more recent passage of discriminatory legislation,56 including the Anti-
Homosexuality Act in Uganda57 and the so-called ‘gay propaganda bill’ in
Russia, reveals that anti-LGBTI sentiment remains a contemporary issue, with
serious, and sometimes fatal, consequences for members of these communities.
In other places, however, state practice indicates a move towards
decriminalisation of, and more legal protections for, sexual and gender
minorities.58

It is perhaps these positive developments that have led some scholars to argue
that the category of ‘other grounds’ may include sexual minorities. Oosterveld
and Scheinert, for instance, both suggest that sexual orientation could be
included as a protected group under Article 7(1)(h), citing international and

52 See, for example, Aengus Carroll and Lucas Paoli Itaborahy, ‘State Sponsored Homophobia: A
World Survey of Laws: criminalisation, protection and recognition of same-sex love’ (10th edn,
ILGA 2015).
53 Offences against the Person Act (Jamaica) (1864, last amended 2010) § 76.
54 ibid para 79.
56 The UN Human Rights Council (HRC) has found that enacted discriminatory legislation is ‘in
breach of international human rights law, since [it] violate[s] the rights to privacy and non-
discrimination... [The] arrest and detention of individuals [under such laws] is discriminatory
and arbitrary.’ See UN Human Rights Council, ‘Discrimination and violence against individuals
based on their sexual orientation and gender identity’ (4 May 2015) UN Doc A/HRC/29/23 para
43. See also below fn 57.
57 There have been two attempts to pass an Anti-Homosexuality Act in Uganda. The second
proposal, unlike its previous iteration did not contain the death penalty, was signed into law in
2014 but was subsequently overturned by the Constitutional Court of Uganda on a procedural
technicality. LGBTI persons are still criminalised under section 145 of the Penal Code Act 1950,
which provides a life sentence for those convicted of ‘unnatural acts’. See above fn 55.
58 States such as Mozambique, São Tomé and Príncipe and Palau have recently repealed statutes
that criminalised homosexual acts, while in Lithuania, a ‘gay propaganda bill’ was tabled in
parliament (though its reintroduction remains a possibility).
domestic human rights jurisprudence, as well as a number of documents from UN treaty bodies. Additional developments at the international, regional and domestic levels have contributed to the recognition of LGBTI individuals as a protected group under international law more generally.

59 See Oosterveld (n 20) 79 and fn 137 and see Scheinert (n 44) 130—34. Scheinert also contends that the lack of enforcement of antigay laws in states where such legislation exists is evidence that persecution of sexual minorities is universally recognised as impermissible. See Scheinert (n 44) 133. In the context of his article, which maintains that the enforcement of antigay laws, in some instances, may rise to the level of the crime against humanity of persecution, this argument is unconvincing. The very existence of discriminatory legislation, whether enforced or not, is persecutory. In Norris v Ireland, the European Court of Human Rights (ECHR) held that Irish antigay legislation rendered the applicant, who was homosexual, a victim, despite the fact that he had not been prosecuted under national law. ‘A law which remains on the statute book, even though it is not enforced in a particular class of cases for a considerable time, may be applied again in such cases at any time... The applicant can therefore be said to “run the risk of being directly affected” by the legislation in question.’ See Norris v Ireland App no 10581/83 (ECHR, 26 October 1988) para 33. The ECHR then cited Mr Justice McWilliam, who presided over the Norris case in the Irish High Court: ‘One of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasions, to depression and the serious consequences which can follow from that unfortunate disease.’ Thus, it cannot be argued that non-enforcement of antigay legislation is evidence that the persecution of sexual minorities is universally recognised as impermissible, particularly since the existence of such legislation reinforces a climate of hostility toward these minorities that contributes to persecution and discrimination.

60 Various UN organs have adopted treaty body resolutions and other soft law instruments and statements that affirm LGBTI protection through existing non-discrimination clauses in international treaties. See, inter alia, UN Human Rights Council, ‘Human rights, sexual orientation and gender identity’ (22 September 2014) UN Doc A/HRC/27/L.27/Rev.1; UN Human Rights Council, ‘Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity’ (17 November 2011) UN Doc A/HRC/19/41; The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (March 2007); UN Committee on Economic, Social and Cultural Rights, ‘General Comment 20, Non-discrimination in economic, social and cultural rights’ (2 July 2009) UN Doc E/C.12/GC/20 para 32 (stating explicitly that discrimination on the grounds of sexual orientation is prohibited). International refugee law has also moved to provide protection to LGBTI persons seeking asylum from persecution in their home countries by considering the category of LGBTI as a protected group. Some scholars ‘have been particularly engaged with shifting attention away from the applicant’s social group characteristics... in order to focus on the treatment or conduct by the state in question towards social groups’. See Derek McGhee, ‘Persecution and Social Group Status: Homosexual Refugees in the 1990s’ 2001 14 Journal of Refugee Studies 20, 26. Regional bodies have also affirmed LGBTI protections. See also, for example, African Commission on Human and Peoples Rights, Resolution 275 on the Protection against Violence and Other Human Rights Violations against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity (2014). Additionally, a number of states have protected LGBTI rights in non-discrimination and marriage equality legislation.
Positive law and emerging international norms underpin the extensive development of the rights of sexual and gender minorities in international law. In light of the universally recognised standard, however, this Article disagrees with the assertion that sexual minorities comprise a discrete group under the ‘other grounds’ category listed in Article 7(1)(h). Furthermore, there is not enough evidence to conclude that gender minorities similarly comprise such a group.

While the universally recognised standard should not be read in literal terms, there is a troublesome lack of consensus around LGBTI protections in state practice. As state-sponsored discrimination against sexual and gender minorities violates such fundamental principles of international human rights law, one cannot discount state practice entirely when determining which groups benefit from universal recognition under Article 7(1)(h). Additionally, despite a growing consensus on the international level, it is significant to note that the Human Rights Council in 2011 only narrowly approved a resolution ‘expressing grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity’. Given the lack of consensus around the position of sexual and gender minorities within customary law, and persistent state practice that denies the rights of these groups, it is difficult to argue that either group fulfils the standard of universal recognition as required by Article 7(1)(h).

IV. CONCLUSION

While to contend that political and gender grounds may serve as a basis for LGBTI protection under Article 7(1)(h) is to extend meaningful recognition to sexual and gender minorities under international criminal law, placing such protections within political and gender categories does not adequately acknowledge the identity of LGBTI individuals under the law. As argued above, due to the fact that the prosecution of crimes against humanity is uniquely able ‘to fully capture the social harm suffered by victims’, it is important to address this harm as much as possible. Positioning the persecution of sexual and gender minorities within political or gender categories recognises

61 See generally UN Human Rights Council, ‘General Comment 18, Non-discrimination’ (10 November 1989) UN Doc HRI/GEN/1/Rev.9.
63 Sadat (n 1) 344. Mouthaan also emphasises the ‘physical, mental, social and cultural suffering’ of victims of gender-based crimes: Mouthaan (n 26) 783.
their victimhood only inasmuch as it is linked to gender and not to LGBTI identity itself.

Until a stronger consensus develops in state practice and sexual and gender minorities are universally recognised under the Rome Statute, LGBTI individuals will be denied protection based on their identity alone. The inclusion of LGBTI persons within the scope of Article 7(1)(h) on political and gender grounds is, however, very important and may still accurately reflect the experience of LGBTI persons in places where persecution on the basis of sexual orientation and gender identity continues to occur.
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