

QUEERING THE CRIME OF PERSECUTION

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Under international criminal law, persecution is a crime against humanity. As codified in Article 7 of the Rome Statute creating the International Criminal Court, the crime entails the “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.” Such persecution is particularly pernicious because victims are not only deprived of their rights, but they are also targeted for that deprivation by reason of their identity. Yet what “identity” counts? If perpetrators target victims because of their race, religion, ethnicity, nationality, political beliefs, or culture, international law is clear: such abuses may constitute persecution. If a victim is singled out because of their real or perceived sexual orientation or gender identity, however, it is far less clear that a court would recognize this harm as a crime of persecution under international law.

This Article explains the distinct harm caused by persecution based on real or perceived sexual orientation or gender identity (“SOGI-based persecution”) and the importance of recognizing it as a crime of persecution. It argues that the history of the crime of persecution has been one of steady change, with protected classes expanding over time to protect vulnerable groups. Rather than being etched in stone, the crime has long been responsive to changes in social context. The time is ripe for the law to adapt once again. This Article maps two paths toward recognizing SOGI-based persecution as an international crime—first, through the International Criminal Court and, second, through domestic courts. It shows that Colombia has already begun to lead the way, offering lessons for domestic and international courts. These two paths can and should be pursued in tandem, establishing both international and domestic protections from and accountability for SOGI-based persecution.

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I. INTRODUCTION

On May 9, 2022, Oleksii Polukhin, a 22-year-old Ukrainian, was walking through the occupied city of Kherson when he ran into a Russian checkpoint. Oleksii usually kept close track of where the military checkpoints were located to avoid them. But this one was new. Russian soldiers searched his phone and personal documents, quickly finding he was in several LGBTQI+¹ Telegram channels and even ran one. Oleksii was a local LGBTQI+ activist. Upon this discovery, the Russian soldiers forced him to strip naked. They violently beat him, berated him with homophobic

¹ This Article uses the acronym LGBTQI+ because the Office of the Prosecutor at the International Criminal Court prefers this term. The acronym refers to lesbian, gay, bisexual, transgender, queer, and intersex identified persons, with the plus sign representing those who identify with the LGBTQI community but self-identify with different terms. *See* OFFICE OF THE PROSECUTOR, POLICY ON THE CRIME OF GENDER PERSECUTION 3 (2022). We recognize that this acronym is imperfect, however. It is neither exhaustive nor universally accepted. It is limited historically, as this terminology is a recent invention—post-dating some of the historical developments we describe herein. It is also limited culturally, in that it does not capture the full range of gender identities and expressions. *See, e.g.*, ZETHU MATEBENI, RECLAIMING AFRIKAN (2014) (offering perspectives on how gender and sexuality can be understood in Africa).

slurs like “faggot” and “zadenprivodniy,”² and encouraged a passerby to say that all gay men in Kherson “should be killed.”³ They then held Oleksii for 64 days at one of Kherson’s most infamous detention centers. While detained, Oleksii suffered further beatings, electrocutions, and interrogations for information about other LGBTQI+ Ukrainians and organizations. Guards forced him to wear dresses under threat of death. While he was reluctant to discuss the details of what he experienced, he described an environment where guards wielded sexual violence and coercion against detainees.⁴ Unfortunately, Oleksii’s experience is not unique. Since Russia’s 2022 invasion of Ukraine, Russian forces have persecuted LGBTQI+ Ukrainians because of their sexual orientation and gender identity (SOGI).⁵

In August 2021, 2,000 miles away from Kherson, the Taliban seized control of Afghanistan’s capital Kabul. Ramiz S. previously worked in a profession that the Taliban targeted for retribution. In need of money, Ramiz risked returning to his former office to collect an old paycheck. He initially cleared the Taliban’s checkpoints, but then an armed man called him an “izak,” a derogatory term for gay people and transgender women. Taliban members seized Ramiz and transported him to another location. There, four men physically and sexually abused him for hours. When they finally released him, they did so promising to subject him to similar treatment in the future. Ramiz went into hiding. And indeed, in the following weeks, Taliban members visited his office and his parents’ home, demanding to know his whereabouts and beating his siblings. When Ramiz risked a trip to the doctor, he was seized by a Taliban member who seemingly knew of the original attack and beat him once again.⁶

Similar abuses took place during the Colombian civil war. On July 10, 2006, José Rubiel Llanos Arias, one of the few openly gay young people in his town, headed to what he believed was a party. But no celebration awaited him. Instead, he fell into a trap laid by the Colombian military, who detained and beat him.⁷ The local battalion was under orders to “clean Tauramena of undesirable people,” including “disgusting faggots.”⁸ As they beat and tortured José, the soldiers called him slurs—“faggot,”

² A pejorative term in Russian for the receptive partner in male-male sex.

³ J. Lester Feder, ‘Wear It or We Will Beat You to Death,’ N.Y. TIMES (Mar. 15, 2024), <https://www.nytimes.com/2024/03/15/opinion/ukraine-russia-putin-crimes.html> [<https://perma.cc/J4KR-YD9W>].

⁴ *Id.*; PROJECTOR, INSHA & OUTRIGHT INTERNATIONAL, DOCUMENTING WAR CRIMES AGAINST LGBTQI+ IN KHERSON REGION 25-26 (2024).

⁵ See PROJECTOR, INSHA & OUTRIGHT INTERNATIONAL, *supra* note 4; LGBT NASH SVIT CENTER, STRUGGLE FOR THE FUTURE: LGBTQ SITUATION IN UKRAINE IN 2024 29 (2024).

⁶ OUTRIGHT INTERNATIONAL, “EVEN IF YOU GO TO THE SKIES, WE’LL FIND YOU”: LGBT PEOPLE IN AFGHANISTAN AFTER THE TALIBAN TAKEOVER 15-16 (2022).

⁷ Mariana Escobar Bernoske, *El Primer Hombre Gay en Ser Reconocido por la JEP Como Víctima de Falso Positivo* [The First Gay Man to Be Recognized by the JEP as a False Positive Victim], EL ESPECTADOR (Aug. 18, 2022, 10:00 P.M.), <https://www.elespectador.com/judicial/el-primer-hombre-gay-en-ser-reconocido-por-la-jep-como-victima-de-falso-positivo/> [<https://perma.cc/G9NS-43NQ>].

⁸ Jurisdicción Especial Para la Paz [JEP] [Special Jurisdiction for Peace], Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas, julio 14, 2022, Caso 03, Auto Sub D – Subcaso Casanare – 055, Expediente 202203010631 (Colom.), ¶ 638 [hereinafter Subcaso Casanare 055] (“limpiar Tauramena de personas indeseables...maricas detestables”).

“whore,” “bastard,” “pervert.”⁹ Fearful he would cause problems if he got away, the soldiers killed José, and attempted to frame his murder as a combat casualty.¹⁰

In the scenarios described above, if the perpetrators targeted Oleksii, Ramiz, and José because of their political, racial, national, ethnic, cultural, or religious identity, international law is clear: such abuses could be prosecuted as a crime of persecution. From the Nuremberg Tribunal to the International Criminal Tribunal for the Former Yugoslavia to the International Criminal Court (ICC), domestic and international courts have recognized the crime of persecution as a crime against humanity.¹¹ Crimes of persecution are “the most extreme humiliations to visit on the[] spirits” of victims, for they are an attack on that which makes the victim human.¹² Under the Rome Statute—the treaty establishing the ICC and a key source of international criminal law—the crime entails the “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of group or collectivity.”¹³ The cruelty of persecution’s underlying acts and its denial of that which is often core to the victim’s humanity “shock the conscience of mankind.”¹⁴ International law thus recognizes persecution as one of the most severe and reprehensible international crimes alongside genocide and war crimes.¹⁵

Yet because the Russian, Taliban, and Colombian forces singled out Oleksii, Ramiz, José, and many others based on their real or perceived SOGI, whether courts applying international criminal law will recognize the violence against them as the crime of persecution and thus as a crime against humanity is far less certain.¹⁶

This Article makes the case for recognizing persecution based on real or perceived sexual orientation or gender identity—what we will refer to as “SOGI-based persecution”—as a crime of persecution and thus a crime against humanity. While international criminal law does not specifically enumerate SOGI as an identity protected from persecution, it certainly does not preclude such protection. Indeed, this Article shows that the history of the crime of persecution has been one of steady change, with protected classes expanding over time to protect vulnerable groups and

⁹ *Id.* ¶ 640.

¹⁰ *Id.* ¶¶ 634, 638-40; Escobar Bernoske, *supra* note 7.

¹¹ See International Military Tribunal (Nuremberg), Judgment of Oct. 1, 1946, in 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 491 (1948) (“the persecution of the Jews at the hands of the Nazi Government has been proved in the greatest detail”); Prosecutor v. Tadić, Case No. IT-94-I-T, Judgment, ¶¶ 714-18 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997) [hereinafter *Tadić* Trial] (finding Duško Tadić guilty of persecution against Bosnian Muslims and Croats); Prosecutor v. Ntaganda, ICC-01/04-02/06, Judgment (July 8, 2019) [hereinafter *Ntaganda* Trial] (convicting Bosco Ntaganda of ethnic persecution for acts committed in the Democratic Republic of Congo).

¹² David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85, 87, 101 (2004).

¹³ Rome Statute of the International Criminal Court arts. 7(2)(g), 7(3), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

¹⁴ United States v. Josef Altstoetter, in 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 1093, 1161 (1951) [hereinafter “Justice Case”].

¹⁵ Caroline Fournet & Clotilde Pégorier, ‘Only One Step Away From Genocide’: *The Crime of Persecution in International Criminal Law*, 10 INT’L CRIM. L. REV. 713, 738 (2010) (“The crime of persecutions has been defined as ‘one of the most vicious of all crimes against humanity . . . only one step away from genocide’”) (quoting Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 751 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000)).

¹⁶ As discussed in Part IV, Colombian domestic courts have pioneered a possible approach forward.

their fundamental rights. In short, the crime of persecution has long been responsive to changes in social context. The time is ripe for the law to adapt once again.

This Article begins in Part II by exploring the evolution of the crime of persecution. It surveys the development of this crime from its inception to its development through international tribunals to its ultimate incorporation into the Rome Statute. This history illustrates how the crime of persecution has expanded to protect discrete groups historically targeted in conflict or crisis. This Part also shows how gender became a protected ground and what gender means under the Rome Statute.¹⁷

Part III addresses the distinct harm inflicted on those who are persecuted because of their real or perceived sexual orientation or gender identity and the need to remedy that harm under international criminal law. Drawing on examples of SOGI-based persecution since World War II, this Part argues that SOGI-based persecution is a longstanding feature of conflict and crisis. It explores how other areas of international law, including human rights law and refugee law, have developed to recognize SOGI as prohibited grounds for discrimination and gender as encompassing of SOGI. These developments offer a foundation on which international criminal law can build.

Part IV proposes two paths forward. First, justice for those subjected to SOGI-based persecution as a crime of persecution could advance at the ICC, either through amendment or interpretation—such as advancing SOGI-based persecution as part of “gender” persecution or as distinct persecution on “other grounds.”¹⁸ Second, victims of SOGI-based persecution could seek justice in domestic courts. Here, states could learn from Colombia, whose Special Jurisdiction for Peace has interpreted the Rome Statute to recognize SOGI-based persecution under *both* gender persecution and persecution on other grounds. Other states could draw on this example. Ukraine, for example, recently ratified the Rome Statute and incorporated its provisions into domestic law.¹⁹ Indeed, Ukrainian President Volodymyr Zelenskyy has publicly expressed willingness to advance LGBTQI+ rights; prosecuting SOGI-based persecution by Russian forces as a crime of persecution offers an opportunity to do just that.²⁰ These two paths can and should be pursued in tandem, establishing both international and domestic protections from and accountability for SOGI-based persecution.

¹⁷ Rome Statute, *supra* note 13, art. 7(3).

¹⁸ *Id.*, art. 7(1)(h).

¹⁹ Проект Закону про внесення змін до Кримінального та Кримінального процесуального кодексів України у зв’язку з ратифікацією Римського статуту Міжнародного кримінального суду та поправок до нього [Draft Law on Amendments to the Criminal and Criminal Procedure Codes of Ukraine in Connection With the Ratification of the Rome Statute of the International Criminal Court and Its Amendments], Verkhovna Rada, No. 4012-IX, <https://itd.rada.gov.ua/billInfo/Bills/Card/44725> [<https://perma.cc/MFF7-8789>]. Ukraine declined to adopt the Rome Statute’s definition of gender, which, as is discussed in Part IV, may make it easier to pursue domestic accountability.

²⁰ Daniel Toren, *Ukraine Distances Itself from Russia in Advancing LGBTQ+ Equality*, WILSON CENTER (Jan. 17, 2024), <https://www.wilsoncenter.org/blog-post/ukraine-distances-itself-russia-advancing-lgbtq-equality> [<https://perma.cc/J5ZV-VNJJ>].

II. THE CRIME OF PERSECUTION

Under international criminal law, persecution is a crime against humanity, codified in Article 7 of the Rome Statute and numerous domestic laws, and reflected in the Draft Treaty on Prevention and Punishment of Crimes Against Humanity.²¹ The crime entails the “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”²² Persecution entails the commission of at least one other crime falling under the Rome Statute, such as torture, rape, murder, and enforced imprisonment, where that crime is targeted against individuals based on the group or collective identity of the victim.²³ Not all group or collective identities are protected; persecution can be charged as a crime under the Statute only if the perpetrator targeted victims based on “political, racial, national, ethnic, cultural, religious, gender . . . , or other grounds that are universally recognized as impermissible under international law.”²⁴

Persecution is understood to be so pernicious for two reasons. First, it violates one of international law’s most fundamental principles: the right to non-discrimination. Persecution is not merely a one-off act of discrimination.²⁵ It is the kind of targeted, brutal discrimination that “shock[s] the conscience of mankind.”²⁶ Second, persecution inflicts harm beyond the physical crime committed—such as rape or murder—due to “the specific intent to cause injury to a human being because he belongs to a particular community or group.”²⁷ This “voluntary, deliberate and gratuitous violation of [] dignity” denies victims that which is core to their humanity, thereby multiplying the harm of the crime.²⁸

At present, it remains contested whether SOGI-based persecution can be prosecuted as the crime of persecution. But, as this Part demonstrates, the history of the crime of persecution is one of steady expansion, in which international criminal law has developed to recognize and offer protection to a greater number of identifiable groups over time. Thus, while SOGI-based persecution is not explicitly enumerated in international criminal law, it may nonetheless be recognized as a

²¹ Rome Statute, *supra* note 13, art. 7(1)(h). For examples of national codification of crimes against humanity, see Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24 (Can.); International Crimes and International Criminal Court Act 2000, pt. 2 s. 10 (N.Z.); International Criminal Court Act 2001, c. 17 § 50(1), sch. 8 (Eng.). The Draft Treaty on Crimes Against Humanity’s definition of persecution also largely mirrors the Rome Statute. See International Law Commission, Draft Articles on Prevention and Punishment of Crimes Against Humanity, arts. 2(1)(h), 2(2)(g) (2019), https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf [<https://perma.cc/P99S-FSUF>]; Leila Nadya Sadat, *Crimes Against Humanity and Customary International Law, in THE PRACTICE OF INTERPRETATION IN INTERNATIONAL LAW: UNITY, DIVERSITY, AND EVOLUTION* (forthcoming) (noting how the Rome Statute has served as the starting point for negotiations on the Draft Articles).

²² Rome Statute, *supra* note 13, art. 7(2)(g).

²³ *Id.*, art. 7(1)(h).

²⁴ *Id.*

²⁵ *Tadić* Trial, *supra* note 11, ¶ 649. A single act can, however, constitute a persecution if it is the product of a political system based on terror or persecution. *Id.*

²⁶ Justice Case, *supra* note 14, at 1161.

²⁷ Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶ 235 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

²⁸ ANTONIO CASSESE, *VIOLENCE AND LAW IN THE MODERN AGE* 112 (1988) (quoting the Report of Counsellor M. Le Gunehec, 24).

prohibited form of persecution—in particular as “gender” persecution or persecution occurring on “other grounds” universally recognized as impermissible under international law.

To help make sense of these possibilities, this Part explores the development of persecution as a crime against humanity from World War II to its modern understanding under the Rome Statute. Then, this Part turns to exploring the specific crime of “gender” persecution and how it came to be recognized under international criminal law.

A. The Evolution of the Crime of Persecution

States have long acknowledged that the singling out of vulnerable individuals is a pernicious act. In the sixteenth and seventeenth centuries, some states condemned and even threatened regimes that egregiously abused foreign civilian populations or religious minorities, with a few even arguing they had an affirmative duty to protect such groups.²⁹ While this initial conception of persecution was usually quite narrow—for instance, extending to Roman Catholic persecution of Protestant martyrs—the condemnation of state atrocity against minorities set the stage for the conception of a crime against “humanity.”³⁰

This Section addresses the development of the crime of persecution. First, it explores the origins of the crime of persecution, from the Hague Conventions to its first formal articulation in the Nuremberg Trials. Next, this Section traces how the meaning, definition, and grounds of persecution have been in flux since the crime’s inception. Finally, it concludes by looking at the codification of the crime of persecution in the Rome Statute. This history makes clear that the crime of persecution as a crime against humanity has been shifting from almost the moment of its origin. Rather than etched in stone, the crime has long been responsive to changes in social context.

I. Origins of the Crime of Persecution

The origins of “crimes against humanity” pre-date World War II. The preambles of the Hague Conventions of 1899 and 1907 acknowledged the incompleteness of the “laws of war” and declared that all individuals remained protected under the “laws of humanity” during conflict.³¹ This declaration, known as the “Martens Clause,” emphasized that even in cases not covered by the laws of war, there were still limitations on the conduct of belligerents. Violations of these laws of humanity could amount to crimes distinct and independent from war crimes, though

²⁹ BRENDAN SIMMS & D. J. B. TRIM, *HUMANITARIAN INTERVENTION: A HISTORY* 29-35 (2011).

³⁰ *Id.* at 37-39; Helen Brady & Ryan Liss, *The Evolution of Persecution as a Crime Against Humanity*, in *HISTORICAL ORIGINS OF INTERNATIONAL CRIMINAL LAW* 429, 436 (Morten Bergsmo, et al. eds., 2015).

³¹ Hague Convention IV with Respect to the Laws and Customs of War on Land (with Annexed Regulations), Oct. 18, 1907, 36 Stat. 2277; Hague Convention II with Respect to the Laws and Customs of War on Land (Second Convention), July 29, 1899, 32 Stat. 1803.

how such violations would be remedied was not clear.³² These protections, moreover, applied only in times of conflict.³³

The term “crime against humanity” first appeared as a concept under international law in 1915.³⁴ That year, France, Great Britain, and Russia issued a joint declaration condemning Turkey’s massacres of Armenians as “crimes against humanity and civilisation” and pledged to hold members of the Ottoman government personally responsible for such crimes.³⁵ The Peace Treaty of Sèvres, signed between the Allied Powers and Turkey, granted Allied Powers the right to try Ottoman violations of the laws and customs of war.³⁶ The Allied Powers, however, ultimately abandoned this effort in the Treaty of Lausanne, which omitted all mention of criminal accountability.³⁷

The victors of World War I also considered advancing accountability for German crimes against humanity at the Versailles Peace Conference. The Conference created the Commission on the Responsibilities of Authors of the War and the Enforcement of Penalties, which addressed crimes committed by Germany and its allies, including “violations of the . . . laws of humanity.”³⁸ The charges the Commission considered included crimes against civilians—not just combatants.³⁹ Though the Commission recommended a high tribunal to try violations of “the laws of humanity,” no such body formed.⁴⁰

The evolution of crimes against humanity continued into World War II. In 1942, an Inter-Allied conference declared that a principal battle aim was the punishment of German war crimes, including acts of violence “inflicted upon the civilian populations [that] have nothing in common with the conception of an act of war or of a political crime.”⁴¹ The following year, the United Nations established the War Crimes Commission to collect evidence of war crimes.⁴² The Commission’s legal committee fiercely debated the importance of recognizing and trying what they

³² Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT’L L. 289, 297-98 (1994).

³³ See *Martens Clause*, ONLINE CASEBOOK, https://casebook.icrc.org/a_to_z/glossary/martens-clause [<https://perma.cc/Z6CR-7S23>] (last visited Oct. 4, 2024).

³⁴ GERHARD WERLE & FLORIAN JEBBERGER, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 375 (4th ed. 2020).

³⁵ Declaration of 28 May 1915, reprinted in UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 35 (1948); see also Jennifer Balint, *The Ottoman State Special Military Tribunal for the Genocide of the Armenians: ‘Doing Government Business,’* in THE HIDDEN HISTORIES OF WAR CRIMES TRIALS 77, 83 (Kevin Heller & Gerry Simpson eds., 2013).

³⁶ Treaty of Peace Between the Allied and Associated Powers and Turkey, arts. 226-30, Aug. 10, 1920, BRIGHAM YOUNG UNIVERSITY WWI DOCUMENT ARCHIVE, https://wwi.lib.byu.edu/index.php/Section_I_Articles_1_-_260 [<https://perma.cc/9LVP-A7YR>].

³⁷ Balint, *supra* note 35, at 84; Treaty of Peace, Signed at Lausanne, July 24, 1923, 1924 L.N.T.S. 13, <https://treaties.un.org/doc/publication/unts/lon/volume%2028/v28.pdf> [<https://perma.cc/JYH6-R9K3>].

³⁸ Document No. 43: Report of the Commission on the Responsibility of the Authors of the [First World] War and on Enforcement of Penalties, Mar. 29, 1919, in INTERNATIONAL LAW STUDIES, VOL. 60: DOCUMENTS ON PRISONERS OF WAR 158, 161 (Howard S. Levine ed., 1979).

³⁹ *Id.* at 162.

⁴⁰ *Id.* at 162-63.

⁴¹ Declaration of St. James’s Place on Punishment for War Crimes, Jan. 13, 1942, in M.E. Bathurst, *The United Nations War Crimes Commission*, 39 AM. J. INT’L L. 565, 566 (1945).

⁴² *Id.* at 568-70.

called “crimes against humanity,” including those committed by a government against its own people.⁴³

When the war ended, the Nuremberg Charter established an International Military Tribunal (hereinafter the “Nuremberg Tribunal”) with jurisdiction over crimes against humanity.⁴⁴ For the first time, such crimes were defined as:

murder, extermination, enslavement, deportation, and other inhumane acts, committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.⁴⁵

This first, formal articulation of what constituted a crime against humanity included persecution and identified three grounds on which persecution was prohibited: political belief, race, and religion. A similar definition was found in the Charter of the International Military Tribunal for the Far East (hereinafter the “Tokyo Tribunal”), though it lacked “religion” as grounds for persecution.⁴⁶ Thus, the crime of persecution was born.

While the Nuremberg and Tokyo tribunals were significant in establishing the existence of crimes against humanity and persecution as one such crime, they left several lacunas in the law on persecution. Most obviously, both tribunals’ charters recognized persecution only on political and racial (and, in the case of Nuremberg, religious) grounds.⁴⁷ Additionally, the Nuremberg Tribunal neither treated persecution as a distinct, independent crime against humanity, nor defined what exactly persecution meant under international criminal law.⁴⁸ Therefore, while the crime of persecution was prosecuted in the wake of the Second World War, its contours remained unclear.

⁴³ Kerstin von Lingen, *Defining Crimes Against Humanity: The Contribution of the United Nations War Crimes Commission to International Criminal Law, 1944-1947*, in HISTORICAL ORIGINS OF INTERNATIONAL CRIMINAL LAW 475, 487-95 (Morten Bergsmo, Wui Ling Cheah, Ping Yi eds., 2014); see also United Nations War Crimes Comm’n, Comm. II, Resolution Moved by Mr. Pell, Doc. III/1 (Mar. 18, 1944) <https://www.legal-tools.org/doc/2aa8b6/pdf> [<https://perma.cc/QK7P-T6YJ>] (submitting that “[i]t is clearly understood that the words ‘crimes against humanity’ refer, among others, to crimes committed against . . . any persons because of their race or religion”).

⁴⁴ Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 1951 U.N.T.S. 280, 286, 288 [hereinafter Nuremberg Charter].

⁴⁵ *Id.* (emphasis added). Hersch Lauterpacht advocated for the concept of “crimes against humanity” and pressed for its inclusion as a crime prosecuted at Nuremberg for the first time. See, e.g., PHILIPPE SANDS, *EAST WEST STREET* (2016) (tracing Lauterpacht’s role in the development of the idea of “crimes against humanity”).

⁴⁶ Charter of the International Military Tribunal for the Far East, art. 5, Jan. 19, 1946, reprinted in U.S. DEP’T OF STATE, *MULTILATERAL AGREEMENTS 1946-1949*, 22-23 (1970).

⁴⁷ See Luban, *supra* note 12, at 100 (“Evidently, each of these statutes was tailored to their target states, although the catalogue of victim groups in the Nuremberg Charter was already too narrow, failing to mention homosexuals, the mentally retarded, the aged, and the infirm, all of whom suffered group-based attacks by the Nazis.”).

⁴⁸ Sadat Wexler, *supra* note 32, at 309-10.

2. *The Evolving Meaning of Persecution*

Efforts to define the crime of persecution continued after the Nuremberg and Tokyo tribunals in both international and domestic courts. Indeed, while international action at the international criminal tribunals for the former Yugoslavia and Rwanda received the most attention, domestic efforts pushed the development and prosecution of the crime of persecution forward, even when international law stagnated.

Following World War II, international bodies led the initial charge to define the laws and lessons from Nuremberg and Tokyo. There were some notable successes. In 1946, the UN General Assembly affirmed the principles of international law recognized by the Nuremberg Charter.⁴⁹ Soon thereafter, states recognized the crime of genocide and adopted the Genocide Convention.⁵⁰ In doing so, they reasserted the Nuremberg Charter's rejection of discriminatory violence.⁵¹

The United Nations also attempted to codify international criminal law in a binding instrument. Specifically, states directed the International Law Commission (ILC)—a body of international law experts established by the General Assembly—to prepare a draft code of offenses against peace and security that incorporated the principles of Nuremberg.⁵² In assessing the Nuremberg Charter, the ILC identified two kinds of crimes against humanity—persecution and inhuman acts (including murder, extermination, deportation).⁵³ The ILC subsequently adopted three versions of a Draft Code of Crimes Against the Peace and Security of Mankind, the first of which was completed in 1954.⁵⁴ This first version included the Nuremberg Charter's crime of persecution, but it expanded the prohibited grounds to include cultural and social grounds.⁵⁵ The 1954 Draft Code, however, failed to gain sufficient member support for unrelated reasons.⁵⁶ Other efforts to establish an international criminal tribunal similarly floundered.⁵⁷ After hitting roadblocks on the Draft Code,

⁴⁹ G.A. Res. 95(I), at 188 (Dec. 11, 1946).

⁵⁰ G.A. Res. 96(I) at 188-89 (Dec. 11, 1946); Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

⁵¹ Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 50, art. 2.

⁵² Sixth Comm., Plans for the Formation of the Principles Recognized in the Charter of the Nürnberg Trial and in the Judgment of the Tribunal, U.N. Doc. A/C.6/180/Rev.1 (Nov. 18, 1947); G.A. Res. 177 (II) (Nov. 21, 1947).

⁵³ *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, [1950] 2 Y.B. Int'l L. Comm'n 377, U.N. Doc. A/CN.4/SER.A/1965/Add.1.

⁵⁴ *Draft Code of Offenses Against the Peace and Security of Mankind*, [1954] 2 Y.B. Int'l L. Comm'n 149, U.N. Doc. A/CN.4/SER.A/1954/Add.1 [hereinafter 1954 Draft Code]; *Draft Code of Crimes Against the Peace and Security of Mankind*, [1991] 2 Y.B. Int'l L. Comm'n 79, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2) [hereinafter 1991 Draft Code]; *Draft Code of Crimes Against the Peace and Security of Mankind*, [1996] 2 Y.B. Int'l L. Comm'n 47, art. 18, U.N. Doc. A/CN/SER.A/1996/Add. 1 (Part 2) [hereinafter 1996 Draft Code].

⁵⁵ 1954 Draft Code, *supra* note 54, art. 2(11).

⁵⁶ Stephen C. McCaffrey, Remarks at American Society of International Law, in 80 PROC. ANN. MEETING (AM. SOC'Y INT'L L.) 120, 121 (1986); see also Martin C. Ortega, *The ILC Adopts the Draft Code of Crimes Against the Peace and Security of Mankind*, 1 MAX PLANCK Y.B. U.N. L. 283, 283 (1997) ("After having reached a first draft Code in 1954 consisting of four articles, the work had to be interrupted owing to lack of agreement on the concept of aggression.").

⁵⁷ Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORN. INT'L L.J. 665, 676-83 (1996).

multilateral efforts to articulate, prevent, and prosecute crimes against humanity stalled.

While international action to develop the crime of persecution stagnated, domestic courts continued to push the law forward. Two of the most notable cases occurred in Israel and France. In 1961, an Israeli court considered charges against Adolf Eichmann. Israeli law made those who had committed crimes against humanity, including “persecution on national, racial, religious or political grounds,” under the Nazi regime punishable with death.⁵⁸ The state indicted Eichmann for the crime of persecution.⁵⁹ While the *Eichmann* court did not offer a legal definition of persecution, it clarified what could constitute persecution. The court described Nazi Germany’s persecutory actions as intending to “deprive the Jews of citizen rights, to degrade them and to strike fear into their hearts, to separate them from the rest of the inhabitants, to oust them from the economic and cultural life of the state, and to close off their sources of livelihood.”⁶⁰ Persecution, then—at least under Israeli law—was about the intentional denial of a group’s dignity and sources of livelihood.

Two decades later, France’s highest court considered the crime of persecution. The French court applied “the Nuremberg Charter as a matter of French international criminal law” in a case against the Nazi Germany officer Klaus Barbie.⁶¹ The court explained that the crime of persecution entails an act that seeks “to make a collective victim through an individual victim” because of the individuals’ shared identities.⁶² The *Barbie* court also noted that war crimes could amount to persecution when undertaken with this discriminatory intent. Additionally, *Barbie* established that a core feature of the crime of persecution is the perpetrator’s intent to deny the humanity of his or her victim.⁶³

Barbie and *Eichmann* likely influenced the ILC, which resumed efforts to define and codify persecution under a new international instrument in the 1980s and 1990s. In 1981, the General Assembly directed the ILC to resume its work on preparing a Draft Code on Crimes Against Peace and Security.⁶⁴ A few years later, the General Assembly requested the ILC to also address the question of establishing an international criminal court with jurisdiction over the crimes captured in the Draft Code. Under this empowered mandate, in 1991, the ILC provisionally adopted a new Draft Code.⁶⁵ The 1991 version categorized “persecution on social, political, racial, religious or cultural grounds” as one form of “systematic or mass violations of human rights,” alongside murder, torture, slavery, and deportation or forcible transfer of population.⁶⁶ Here, the Commission singled out persecution as requiring

⁵⁸ §§ 1(a)(2), (1)(b) Nazis and Nazi Collaborators (Punishment) Law, 5710-1950, SH 57 281, 281 (Isr.).

⁵⁹ Gideon Hausner, *Text of the Indictment Against Eichmann: Indictment Presented by Attorney General*, 63 AM. JEWISH Y.B. 120, 126 (1962); CrimC (DC Jer) 40/61 Attorney General v. Eichmann, IsrDC 45(3) ¶ 201 (1961) (Isr.) [hereinafter *Eichmann*].

⁶⁰ *Eichmann*, *supra* note 59, ¶ 56.

⁶¹ Sadat Wexler, *supra* note 32, at 336; Cour de Cassation [Cass.] [Supreme Court for Judicial Matters] crim., Nov. 25, 1986, pourvoi No. 86-92714.

⁶² Sadat Wexler, *supra* note 32, at 343.

⁶³ *Id.* at 341-43.

⁶⁴ G.A. Res. 36/106 (Dec. 10, 1981).

⁶⁵ Sadat Wexler, *supra* note 57, at 683-84.

⁶⁶ 1991 Draft Code, *supra* note 54, art. 21.

discriminatory motivation.⁶⁷ Additionally, in its commentary, the ILC defined persecution as “seek[ing] to subject individuals or groups of individuals to a life in which enjoyment of some of their basic rights is repeatedly or constantly denied.”⁶⁸ States did not adopt this Draft Code, however, before conflict intensified in the Balkans and broke out in Rwanda, bringing heightened scrutiny to the crime of persecution on other grounds, particularly ethnic grounds.

In 1992, the ILC established a working group to prepare a statute for an international criminal court, which was later endorsed by the General Assembly.⁶⁹ This statute was to be distinct from the Draft Code and take the form of a treaty⁷⁰—though negotiations and drafting indicate that the Draft Code likely inspired initial framings of the crime of persecution in the statute.⁷¹ Ultimately, this draft treaty became the Rome Statute, which brought the International Criminal Court into existence in 2002. The next Subsection addresses in detail how the Rome Statute defined and the ICC interpreted persecution.

In the meantime, the ILC prepared the third and final Draft Code in 1996. There, the ILC replaced the crime of “systematic or mass violations of human rights” with “crimes against humanity.”⁷² It defined a “crime against humanity” to include a number of acts “when committed in a systematic manner or on a large scale and instigated or directed by a Government or any organization or group.”⁷³ The list of acts now included “persecution on political, racial, religious, or ethnic grounds.”⁷⁴ Notably, between 1991 and 1996, the definition of persecution dropped “social” and “cultural” as grounds of persecution and added “ethnic,” perhaps in response to the genocides in Rwanda and the former Yugoslavia.⁷⁵ The ILC also proposed a new definition of persecution: the denial of the human rights and fundamental freedoms to which every individual is entitled without distinction as recognized in the UN Charter Articles 1 and 55 and International Covenant on Civil and Political Rights

⁶⁷ *Id.*

⁶⁸ *Id.* at 104.

⁶⁹ James Crawford, *The ILC’s Draft Statute for an International Criminal Tribunal*, 88 AM. J. INT’L. L. 140, 140 (1994).

⁷⁰ *Id.* at 141-42.

⁷¹ For example, early versions of the crime of persecution under the Rome Statute included social and cultural grounds, possibly referencing back to the 1954 Draft Code. *See generally* THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 370 (M. Cherif Bassiouni ed., 1998).

⁷² 1996 Draft Code, *supra* note 54, art. 18.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Why the ILC deleted “social” and “cultural” grounds is not clear, particularly since many of the crimes inflicted upon civilians in Rwanda and Yugoslavia could have fallen within these grounds. One possible explanation is that the ILC generally attempted to align the Draft Code with the operative elements of various conventions and instruments. *See* Jean Allain & John R.W.D. Jones, *A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes Against the Peace and Security of Mankind*, 8 EUR. J. INT’L L. 100, 101 (1997). Indeed, when removing the cultural and social grounds, the ILC cited to the Nuremberg Charter, as well as the ICTR and ICTY statutes. Yearbook of the International Law Commission, 1996, Vol. II (Part Two), U.N. Doc. A/CN.4/SER.A/1996/Add.1 at 49, (1998). Alternatively, the ILC could have been responding to concerns of UN Member States that the draft article was too vague. *See* U.N. Int’l Law Comm’n, Thirteenth Report on the Draft Code of Crimes Against the Peace and Security of Mankind, U.N. Doc. A/CN.4/466, at 43 (1995) (summarizing the views of the United States that “the crime of persecution on social, political, racial, religious, or cultural grounds’ in particular is so vague that it could mean almost anything”).

(ICCPR) Article 2.⁷⁶ This definition, if adopted, would have tied persecution not to specifically enumerated grounds, but to other protected categories under international law, such as sex.

Beyond the work of the ILC, the horrors that took place in the former Yugoslavia and Rwanda in the early 1990s prompted the Security Council to create the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).⁷⁷ As these tribunals decided cases in the late 1990s and early 2000s, they shaped how the international community and jurists thought about crimes against humanity, including the crime of persecution. Like the Nuremberg Tribunal, these tribunals had jurisdiction over the crime of persecution when committed on political, racial, and religious grounds, but the statutes neither expressly included gender as a protected ground nor defined what persecution meant.⁷⁸

In *Tadić*, the first case before the ICTY, the Tribunal noted that the crime of persecution had never been clearly defined in international criminal law.⁷⁹ Drawing heavily on the *Barbie* and *Eichmann* courts' rationales, the Tribunal found that persecution, as a crime against humanity, necessitates discrimination that is intentional, results in the infringement of an individual's fundamental rights, and occurs on specific grounds.⁸⁰ Additionally, the tribunal found that persecution can occur when individuals are targeted for their *failure* to belong to a specific group.⁸¹ While the ICTY was limited by its Statute to racial, religious, and political persecution, it contemplated that such grounds could expand along with the law. The *Tadić* trial court noted that "there are no definitive grounds in customary international law on which persecution must be based," and that the grounds have varied over time.⁸² On appeal, the ICTY went further, noting that "the experience of Nazi Germany demonstrated that crimes against humanity may be committed on discriminatory grounds other than those enumerated in Article 5 (h) [of the ICTY Statute], such as . . . sexual preference."⁸³

In *Kupreškić*, the ICTY provided further support for a flexible understanding of the crime of persecution. The Trial Chamber noted that persecution is an offense of extreme gravity⁸⁴ and that a "narrow definition of persecution is not supported in customary international law."⁸⁵ Instead, the nature of crimes against humanity and

⁷⁶ 1996 Draft Code, *supra* note 54, at 49.

⁷⁷ See Jonas Nilsson, *The Crime of Persecution in the ICTY Case-Law*, in *THE LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 219, 227-46 (Bert Swart, Alexander Zahar, & Göran Sluiter eds., 2011); S.C. Res. 827 (May 25, 1993); S.C. Res. 955 (Nov. 8, 1994).

⁷⁸ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (International Tribunal for the Former Yugoslavia) art. 5(h), May 25, 1993, S.C. Res. 827; Statute of the International Tribunal for Rwanda art. 3(h), Nov. 8, 1994, S.C. Res. 955.

⁷⁹ *Tadić* Trial, *supra* note 11, ¶¶ 694-98.

⁸⁰ *Id.* ¶ 697.

⁸¹ *Id.* ¶ 652.

⁸² *Id.* ¶ 711.

⁸³ Prosecutor v. *Tadić*, Case No. IT-94-1-A, Judgment, ¶ 285 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) [hereinafter *Tadić* Appeal].

⁸⁴ Prosecutor v. *Kupreškić*, Case No. IT-95-16-T, Judgment, ¶ 569 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

⁸⁵ *Id.* ¶ 615.

international law demanded that courts have flexibility to address the “ever-changing” forms in which attacks on humanity may occur.⁸⁶ Additionally, acts of persecution usually form part of a pattern or policy, and it is the context and “cumulative effect” of individual acts that create persecution.⁸⁷ Thus, some acts contributing to the crime of persecution need not, “in and of themselves, be so serious as to constitute a crime against humanity.”⁸⁸

Several years later, the ICTR also pushed the boundaries of persecution under international law. The ICTR reaffirmed the ICTY’s interpretation and application of persecution.⁸⁹ Like the ICTY, the ICTR noted that persecution under customary international law may not be restricted to the grounds enumerated in the ICTR statute: political, racial, and religious grounds.⁹⁰ The ICTR notably interpreted persecution to include hate speech.⁹¹ To support this step, the tribunal looked to human rights treaties, such as the ICCPR and the Convention on the Elimination of all Forms of Racial Discrimination, to understand the scope of states’ non-discrimination obligations.⁹² Additionally, the tribunal looked to domestic anti-discrimination and anti-hatred laws to emphasize the dangers and harm of inciting discriminatory hate.⁹³

In short, from the Nuremberg Tribunal through the ICTY and ICTR, the borders of the crime of persecution remained in flux. International negotiations and domestic jurisprudence slowly brought the crime into focus, while gradually expanding its scope to include new acts and groups.

3. *The Crime of Persecution in the Rome Statute*

Negotiated in the 1990s and adopted in 2002, the Rome Statute codified a definition of persecution that not only included all prior grounds but also explicitly left open room for growth. Under the Rome Statute, persecution is the “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group collectivity.”⁹⁴ The Rome Statute enumerated many prohibited grounds for persecution, including gender, and in a nod to the 1996 Draft Code, left room for persecution on “other grounds that are universally recognized as impermissible under international law.”⁹⁵ Targeting on any recognized ground is sufficient to meet the bar for persecution, but a combination of more than one may

⁸⁶ *Id.* ¶¶ 622-23.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Prosecutor v. Ruggiu, Case No. ICTR 97-32-I, Judgment, ¶¶ 19-24 (June 1, 2000); Prosecutor v. Nahimana, Case No. ICTR 99-52-T, Judgment, ¶¶ 1069-72 (Dec. 3, 2003) [hereinafter “*Nahimana Trial*”].

⁹⁰ Prosecutor v. Nyiramasuhuko, ICTR 98-42-A, Judgment, ¶¶ 2135-36 (Dec. 14, 2015).

⁹¹ *Nahimana Trial*, *supra* note 89, at ¶¶ 1076-77. *But see* Prosecutor v. Nahimana, ICTR 99-52-A, Judgment, ¶¶ 985-88 (Nov. 28, 2007) (finding generally that hate speech *alone* cannot amount to persecution, though in this case, the hate speech constituted underlying acts of persecution).

⁹² *Nahimana Trial*, *supra* note 89, ¶ 1074.

⁹³ *Id.* ¶ 1075.

⁹⁴ Rome Statute, *supra* note 13, art. 7(2)(g).

⁹⁵ *Id.* art. 7(1)(h).

also form the basis for discrimination.⁹⁶ The next Section explains that the inclusion of gender as a prohibited basis for persecution was an important step forward, albeit one that left many questions unanswered.

Under the Rome Statute, the crime of persecution must be committed in connection with another crime under the Rome Statute.⁹⁷ The logic underlying this requirement, while criticized as unnecessarily restricting the application of international criminal law,⁹⁸ is that the crime of persecution serves two functions. First, it acknowledges the fundamental right to non-discrimination. Second, it highlights the added and especially pernicious harm that an individual or group suffers when targeted based on immutable or deeply held characteristics. The *Barbie* court, for instance, noted that the wrongs of persecution lie not merely in the infliction of wounds or death, but “are aggravated by the voluntary, deliberate and gratuitous violation of the dignity of all men and women: these are victimized only because they belong to a group other than that of their persecutors, or do not accept their dominion.”⁹⁹

The crime of persecution as recognized by the ICTY and ICTR and codified in the Rome Statute thus recognizes the additional harm done to individuals or groups when they are so targeted. It provides a vehicle for international law to condemn, in no uncertain terms, the discriminatory nature of the conduct. It also reassures victims and tells society that the traits and beliefs which define them—either as individuals or as a group—do not make them less worthy of personhood and the rights that come with it.

B. Gender Persecution

Having established that the crime of persecution has been changing and expanding since its conception, this Article now turns to look at the development of a specific prohibited ground for persecution: gender. Gender persecution only crystalized as a distinct basis for the crime of persecution with the Rome Statute. Like the general crime of persecution, international law’s understanding of gender discrimination and gender persecution has evolved over time. Moreover, the crime of gender persecution has emerged as a possible path for addressing and adjudicating SOGI-based persecution under international criminal law. With an eye to drawing lessons for the recognition of SOGI-based persecution, this Section explores the evolution of international law’s understanding of sex and gender, from postwar international criminal law through the Rome Statute.

1. The Emergence of Gender as a Protected Ground

Throughout recorded history, individuals, especially women and girls, were systematically targeted and deprived of their fundamental human rights because of their gender or their perceived failure to comply with gender norms. Despite the

⁹⁶ *Ntaganda* Trial, *supra* note 11, ¶ 1009.

⁹⁷ INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES, art. 7(1)(h), element 4.

⁹⁸ AMNESTY INT’L, INTERNATIONAL LAW COMMISSION: THE PROBLEMATIC FORMULATION OF PERSECUTION UNDER THE DRAFT CONVENTION ON CRIMES AGAINST HUMANITY 12 (2018).

⁹⁹ CASSESE, *supra* note 28, at 112 (quoting the Report of Counsellor M. Le Guehec).

gravity of harm, this suffering largely went unrecognized and unremedied. Over time, however, international law as a field gradually recognized the existence of gender-based discrimination, particularly against women and girls, and sought to address such harm.

While the nascent law of war prohibited certain actions often perpetrated against women and girls or demanded certain protections for such groups, the Nuremberg and Tokyo tribunals did not address war crimes perpetrated specifically or disproportionately against women and girls.¹⁰⁰ Gender was missing from both charters' definition of the crime of persecution. Thus, prosecutors brought no cases of gender persecution. Additionally, while both charters included crimes that were written broadly enough to encompass sexual violence, such as ill-treatment or slave labor, neither tribunal charged any defendant with rape, despite evidence presented in trials of widespread and systemic sexual violence.¹⁰¹ This meant that many of the worst crimes visited on women and girls during the war went unrecognized and unremedied.

In World War II, both the Allied and Axis powers weaponized sexual and gender-based violence as a tool of war. Japan used rape to terrorize and control, such as in the Rape of Nanjing, where Japanese soldiers raped an estimated 20,000-80,000 Chinese women.¹⁰² Japan also forced an estimated 200,000 women and girls from occupied or colonized territories into sexual slavery and prostitution.¹⁰³ Similarly, while Nazi Germany prohibited sexual relations with Jewish women through race laws, German soldiers nonetheless raped Jewish women en masse.¹⁰⁴ Allied Powers also perpetrated mass sexual violence. In just two weeks in 1945, members of the Soviet Army raped 110,000 women in Berlin, Germany. Throughout the liberation and occupation of Germany, Soviet soldiers raped an estimated 1.9 million German women.¹⁰⁵ Despite the scale of gender-based violence in the war, emergent

¹⁰⁰ See Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, arts. 19, 37, 44, 47 (1863) (recognizing women and children noncombatants were particularly vulnerable and prohibiting the use of rape in war); Hague Convention (II) with Respect to the Laws and Customs of War on Land, art. 46, July 29, 1899, 32 Stat. 1803 (demanding respect for family honor and rights); Hague Convention (IV) with Respect to the Laws and Customs of War on Land, art. 46, Oct. 18, 1907, 36 Stat. 2277 (demanding respect for family honor and rights); Geneva Convention Relative to the Treatment of Prisoners of War, arts. 3, 4, July 27, 1929, 47 Stat. 2021 (providing that "prisoners of war are entitled to respect for their persons and honor[, and w]omen shall be treated with all consideration due to their sex" and permitting differential treatment among prisoners according to sex).

¹⁰¹ Alison Cole, *International Criminal Law and Sexual Violence*, in *RETHINKING RAPE* 47, 49 (Clare McGlynn & Vanessa E. Munro eds., 2010). Note, however, that the Control Council Law No. 10 included rape as a crime against humanity. Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, art. 2, reprinted in TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, 250 (1949).

¹⁰² See IRIS CHANG, *THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II* (1997).

¹⁰³ Alexis Dudden, *A Guide to Understanding the History of the 'Comfort Women' Issue*, UNITED STATES INSTITUTE OF PEACE (Sept. 16, 2022), <https://www.scribd.com/document/867457799/A-Guide-to-Understanding-the-History-of-the-Comfort-Women-Issue-United-States-Institute-of-Peace> [<https://perma.cc/W8S6-9D4D>].

¹⁰⁴ DAVID TREVIÑO, *Nazis*, in *ENCYCLOPEDIA OF RAPE* 139, 139-40 (Merril D. Smith ed., 2004).

¹⁰⁵ Atina Grossmann, *A Question: The Rape of German Women by Occupation Soldiers*, 72 *OCTOBER* 42, 46 (1995).

international criminal law ignored—and as a result failed to redress—the unique harms suffered by and targeted at women and girls.

International human rights law moved to recognize gender-based discrimination after the conclusion of World War II. The 1948 Universal Declaration of Human Rights, the 1966 ICCPR, and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) prohibited sex-based discrimination.¹⁰⁶ Initially, these treaties only addressed “sex” discrimination. Sex referred to the “biological differences between men and women,”¹⁰⁷ thereby tying rights to physical characteristics. Led by the CEDAW Committee—the body charged with interpreting CEDAW—international human rights law soon recognized that sex discrimination and its resulting harm also encompassed “gender.”¹⁰⁸ Gender, the CEDAW Committee explained, refers to “socially constructed identities, attributes, and roles for women and men and the cultural meaning imposed by society on to biological differences.”¹⁰⁹ This meaning is “affected by political, economic, cultural, social, religious, ideological and environmental factors and can be changed by culture, society and community.”¹¹⁰

The broadening of human rights law’s understanding of sex and gender allowed the field to better recognize harms of, and advance reparations for, gender-based discrimination. For instance, in 1992, the CEDAW Committee noted that gender-based violence particularly threatened women’s right to equal protection under international humanitarian law in armed conflict.¹¹¹ Additionally, wars, armed conflicts, and territorial occupation lead to serious violations of women’s rights (such as prostitution, trafficking, and sexual assault).¹¹² The CEDAW Committee called for protective and punitive measures to address such violations in war and ensure that states and belligerents protected women’s distinct vulnerabilities.¹¹³ This concern for gender-based violence against women in conflict was reflected one year later in the Vienna Declaration and Programme of Action and the General Assembly’s Declaration on the Elimination of Violence Against Women.¹¹⁴ Additionally, while the World Conference on Women declined to adopt a clear definition of gender, it stated explicitly that women are distinctly and particularly harmed in war because of their status in society and their sex.¹¹⁵

¹⁰⁶ International Covenant on Civil and Political Rights, arts. 2-3, Dec. 16, 1966, 999 U.N.T.S. 171; G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 2 (Dec. 10, 1948); Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

¹⁰⁷ Comm. on the Elimination of Discrimination Against Women (CEDAW Comm.), Gen. Rec. No. 28, ¶ 5, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010).

¹⁰⁸ *See id.* (finding that “the Convention covers gender-based discrimination against women”); CEDAW Comm., Gen. Rec. No. 19, ¶ 7, U.N. Doc. CEDAW/C/GC19 (1992) (noting that gender-based violence is included within sex discrimination).

¹⁰⁹ CEDAW Comm., Gen. Rec. No. 33, ¶ 7, U.N. Doc. CEDAW/C/GC/33 (Aug. 3, 2015).

¹¹⁰ CEDAW Comm., *supra* note 107.

¹¹¹ CEDAW Comm., *supra* note 108.

¹¹² *Id.* ¶ 16.

¹¹³ *Id.*

¹¹⁴ World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶¶ 18, 38, U.N. Doc. A/CONF.157/23 (June 25, 1993); G.A. Res. 48/104, Declaration on the Elimination of Violence Against Women (Dec. 20, 1993); Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, U.N. Doc. A/CONF.177/20 (Sept. 15, 1995).

¹¹⁵ Fourth World Conference on Women, *supra* note 114.

As international human rights law moved to better and more comprehensively address gender-based discrimination and violence, the Yugoslav wars and the Rwandan genocide forced international criminal law to reckon with the devastating crimes, abuses, and persecution targeted at women and girls in conflict. In both conflicts, armed forces used sexual violence as a tool and spoil of war. In just three months in 1994 in Rwanda, an estimated 100,000 to 250,000 women were raped.¹¹⁶ In Bosnia, Serbian forces raped an estimated 20,000 to 50,000 women, with many raped multiple times to force impregnation.¹¹⁷

The Yugoslav wars, in particular, drew international attention to treatment of women in the conflict.¹¹⁸ In 1992, the Security Council condemned the “massive, organized and systematic detention and rape of women” as an act of unspeakable brutality.¹¹⁹ The UN special rapporteur for the situation in Yugoslavia called for treating fear of sexual or other gender-related persecution as grounds for asylum under refugee law.¹²⁰ He also linked rape and persecution of women to the Geneva Conventions, which called for special protections for women and against attacks on their honor.¹²¹ Finally, the special rapporteur supported demands for prosecuting rape as a crime against humanity.¹²² Further efforts by UN organs echoed these calls and emphasized the systematic nature of abuses against women in the former Yugoslavia.¹²³ Taken together, these UN efforts began to establish the idea that women could be persecuted based on their gender.

Against this international outcry and international human rights law’s growing recognition of gender-based discrimination, the ICTR and ICTY pushed international criminal law to catch up. While both tribunals’ statutes precluded the recognition of gender persecution, as noted in Section II.A, the ICTR and ICTY nonetheless became the first international criminal tribunals to address questions of

¹¹⁶ *Outreach Programme on the 1994 Genocide Against the Tutsi in Rwanda and the United Nations: Supporting Survivors*, UNITED NATIONS (last visited Sept. 13, 2024), <https://www.un.org/en/preventgenocide/rwanda/supporting-survivors.shtml> [https://perma.cc/D3PF-SD9Q].

¹¹⁷ Elizabeth A. Kohn, *Rape as a Weapon of War: Women’s Human Rights During the Dissolution of Yugoslavia*, 24 GOLDEN GATE U. L. REV. 199, 199-200 (1994).

¹¹⁸ Despite the hundreds of thousands of women and girls affected, sexual violence in Rwanda received far less international attention than similar crimes in the Balkans. For instance, the U.N. Security Council acknowledged that many women had been killed in Rwanda, but it did not condemn specific acts of gender-based violence against them. *See* S.C. Res. 918 (May 17, 1994). Some have argued that the focus on gendered suffering in the Yugoslav wars *but not* in the Rwandan genocide resulted, at least in part, from the fact that the former conflict subjected European, white, and “developed country” women to fundamental violations of their human rights. *See, e.g.*, Kathleen M. Pratt & Laurel E. Fletcher, *Time for Justice: The Case for International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia*, 9 BERKELEY WOMEN’S L.J. 77, 81 (1994).

¹¹⁹ S.C. Res. 798 (Dec. 18, 1992). As evidence of the differing attention paid to the situation of women in Rwanda versus the former Yugoslavia, from 1993 to 1994, the U.N. Security Council merely acknowledged that many women had been killed in Rwanda but did not condemn specific acts of gender-based violence against them. *See* S.C. Res. 918 (May 17, 1994).

¹²⁰ Tadeusz Mazowiecki (Special Rapporteur of the Commission on Human Rights), *Rep. on the Situation of Human Rights in the Territory of the Former Yugoslavia*, ¶ 88, U.N. Doc. E/CN.4/1993/50 (Feb. 10, 1993).

¹²¹ *Id.* ¶ 89.

¹²² *Id.* Annex II, ¶ 72.

¹²³ *See, e.g.*, Comm’n on Human Rights Res. 1993/8 (Feb. 23, 1993); G.A. Res. 48/143 (Dec. 20, 1993).

gender-based harm. In *Akayesu*, the ICTR issued the first ever conviction for rape as a crime against humanity and ruled that rape can be a tool of genocide.¹²⁴ In issuing its conviction, the ICTR noted that “[T]utsi women were subject to sexual violence because they were Tutsi.”¹²⁵ Similarly, in the *Nahimana* case, the ICTR noted that Tutsi women were particularly and uniquely “targeted for persecution,” which resulted in sexual attacks against them.¹²⁶ Women were not only killed because of their ethnicity, but they were also subjected to additional forms of violence and discrimination because of their gender.

For its part, the ICTY conducted several factual analyses that reflected an understanding of gender—and treatment of the different sexes—as a social construction. Specifically, the ICTY focused on how women not only experienced different kinds of violence than men but also suffered the effects of conflict differently. In *Krstić*, for instance, both the Trial and Appeal Chambers addressed the differing roles for and expectations of men and women in society. The *Krstić* court suggested that evidence of Bosnian Serb forces transferring women, instead of killing them like men, revealed a different understanding of women’s and men’s cultural positions in the former Yugoslavia.¹²⁷ Additionally, the ICTY acknowledged that the Srebrenica massacre, which intentionally targeted men, reflected differing roles and norms for men and women in society.¹²⁸

Thus, just as domestic and international tribunals jointly advanced the development of the crime of persecution, international human rights law pushed international criminal law to recognize and address gender-based crimes.

2. *Defining Gender Under the Rome Statute*

The Rome Statute establishing the ICC was the result of almost a decade of negotiations. The final draft responded to the increasing demands for gender-sensitive approach to international criminal law. As discussed in Subsection II.A.2, the ILC began drafting the Rome Statute in 1992. In 1994, the ILC adopted the first Draft Statute on an International Criminal Court, which would later develop into the Rome Statute.¹²⁹ This initial draft, like the ICTY and ICTR statutes, did not explicitly address gender or gender-based discrimination. For instance, the 1994 Draft Statute defined crimes against humanity, but the definition appeared to exclude rape.¹³⁰ The ILC noted in its commentary, however, that “crimes against humanity” was a term of

¹²⁴ Prosecutor v. Akayesu, ICTR-96-4-T, Judgment ¶¶ 685-734 (Sept. 2, 1998).

¹²⁵ *Id.* ¶ 734.

¹²⁶ *Nahimana* Trial, *supra* note 89, ¶ 1079.

¹²⁷ Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶¶ 30-31 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

¹²⁸ Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment ¶¶ 26-31 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001); Valerie Oosterveld, *The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 HARV. HUM. RTS. J. 55, 72 (2005).

¹²⁹ Draft Statute for an International Criminal Court, with Commentaries (1994), in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1994, VOL. II (PART TWO) 26 (2005), https://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1994.pdf [<https://perma.cc/DJ5P-HVN2>].

¹³⁰ *Id.* at 40 (defining “Systematic or mass violations of human rights” without reference to rape).

art and that there were “unresolved issues about the definition of the crime.”¹³¹ The ILC commentary also stated the definition of crimes against humanity “encompasses inhumane acts of a very serious character involving widespread or systematic violations aimed at the civilian population in whole or in part.”¹³² Additionally, the 1994 Draft Statute did not include gender or sex as prohibited grounds from persecution.

In 1998, a United Nations Diplomatic Conference convened to consider the Draft Statute on an International Criminal Court. The draft that emerged is notable in several respects. First, it included a proposal to include gender persecution.¹³³ At this stage, the Draft Statute offered no definition of gender. It did, however, define persecution as “the willful and severe deprivation of fundamental rights contrary to international law [carried out with the intent to persecute on specified grounds].”¹³⁴ Second, the Draft Statute included an article stating that such crimes should not be interpreted to limit or prejudice existing or developing rules of international law.¹³⁵ This article, which survived as Article 10, reflected an intent for the definition of persecution in the Rome Statute to be a baseline—not a ceiling.

Reacting to the 1998 Draft, states were generally supportive of maintaining gender persecution as a crime of persecution,¹³⁶ but they were divided over what gender meant. Some states opposed the use of the term “gender” altogether, indicating they would only consider using it if it were defined narrowly, as a male-female binary.¹³⁷ Azerbaijan, for instance, protested that an expansive definition of gender might cause a conviction by a national court for homosexual acts to fall under the jurisdiction of the ICC as gender persecution.¹³⁸ Other states sought to ensure that the Rome Statute not only use the term gender but also explicitly acknowledge that

¹³¹ *Id.*

¹³² *Id.*

¹³³ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Rep. of the Preparatory Committee on the Establishment of an International Criminal Court*, 25-26, U.N. Doc. A/CONF.183/2/Add.1 (Apr. 14, 1998) (“persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural or religious [or gender] [or other similar] grounds [and in connection with other crimes within the jurisdiction of the Court];”).

¹³⁴ *Id.* at 27.

¹³⁵ *Id.* at 25.

¹³⁶ See, e.g., U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Crim. Ct., *Summary Record of the 3rd Meeting of the Committee of the Whole*, ¶¶ 163, 169, U.N. Doc. A/CONF.183/C.1/SR.3 (June 17, 1998); U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Crim. Ct., *Summary Record of the 4th Meeting of the Committee of the Whole* ¶ 26, U.N. Doc. A/CONF.183/C.1/SR.4 (July 17, 1998).

¹³⁷ See, e.g., U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Crim. Ct., *Summary Record of the 27th Meeting of the Committee of the Whole*, ¶ 22, U.N. Doc. A/CONF.183/C.1/SR.27 (July 8, 1998) (Bahrain suggesting an open-ended definition was not desirable and citing to a narrow definition contained in the document A/CONF.183/C.1/L.44); U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Crim. Ct., *Recommendation of the Coordinator Regarding Article 5*, ¶ 2, n. 15, U.N. Doc. A/CONF.183/C.1/L.44 (July 7, 1998) (“‘Gender’ refers to male or female”). See also Oosterveld, *supra* note 128, at 63, n. 48, 64 (noting that countries, including Bahrain, called for eliminating the term “gender” or limiting the definition to “the two sexes, male and female”).

¹³⁸ U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Crim. Ct., *Summary Record of the 25th Meeting of the Committee of the Whole*, ¶ 61, U.N. Doc. A/CONF.183/C.1/SR.25 (July 8, 1998).

gender referred to socially constructed understandings of the roles of men and women.¹³⁹

Ultimately, the Rome Statute included the term “gender” and defined it in a way that attempted to appease both sides of the debate and maintain constructive ambiguity. The treaty described gender as “the two sexes, male and female,”¹⁴⁰ in a nod to those desiring a narrow construction.¹⁴¹ But it expressly stated that those sexes existed “within the context of society,”¹⁴² acknowledging the constructed nature of gender. In short, the drafters adopted both sides’ drafting proposals. While initial progressive reaction was one of disappointment—worrying that a binary definition of gender could exclude persecution of LGBTQI+ individuals¹⁴³—several factors indicate that it need not be read so narrowly. First, as will be discussed in Section III.B, before the drafters introduced gender persecution into the Rome Statute, other international treaty bodies had interpreted “sex” through social and contextual analysis to include sexual orientation.¹⁴⁴ Second, the drafters considered and *declined* to adopt stricter definitions of gender that would have explicitly excluded SOGI. Thus, the Rome Statute neither precluded nor mandated an expansive definition of gender, leaving open the door to interpretative clarification.

Once the Rome Statute entered into force, the ICC was slow to address gender-based crimes, offering little initial clarity on how gender would be interpreted. In 2014, however, the Office of the Prosecutor issued its first policy paper on sexual and gender-based crimes. In no uncertain terms, the ICC Prosecutor stated that the Rome Statute’s definition of gender “acknowledges the social construction of gender, and the accompanying roles, behaviors, activities, and attributes assigned to women and men, and to girls and boys.”¹⁴⁵ The Prosecutor also pledged to apply and interpret gender per Article 21(3) of the Rome Statute in accordance with internationally recognized human rights.¹⁴⁶ While this policy paper did not explicitly state that gender persecution included SOGI-based persecution, the Prosecutor acknowledged that gender intersects with other factors such as sexual orientation and other identities, which can give rise to multiple forms of discrimination and social

¹³⁹ Oosterveld, *supra* note 128, at 64-65.

¹⁴⁰ Rome Statute, *supra* note 13, art. 7(3).

¹⁴¹ The Vatican played a key role in crafting Article 7(3)’s definition of gender, reportedly due to concerns that gender could include “sexual orientation.” See Elizabeth Odio Benito, *La Perspectiva y el Mandato de Género en el Estatuto de Roma* [The Perspective and Mandate of Gender in the Rome Statute], 59 REVISTA IIDH 245, 260 (2014); Oosterveld, *supra* note 128, at 65.

¹⁴² *Id.*

¹⁴³ Brenda Cossman, *Gender Performance, Sexual Subjects and International Law*, 15 CAN. J.L. & JURIS. 281, 284 (2002); Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT’L L. 379, 394 (1999); Oosterveld, *supra* note 128, at 55-56.

¹⁴⁴ See Hum. Rts. Comm., *Toonen v. Australia*, Comm’n No. 488/1992, ¶ 8.7, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994) (noting that the ICCPR’s references to sex includes sexual orientation).

¹⁴⁵ OFFICE OF THE PROSECUTOR, POLICY PAPER ON SEXUAL AND GENDER-BASED CRIMES 3 (2014). To be sure, the Prosecutor does not have the final say on the Rome Statute’s meaning and application; that power lies with the Court. The ICC will, however, consider the Prosecutor’s arguments, and the Prosecutor can play a role in shaping the law by bringing certain charges. Moreover, other courts, such as the Special Jurisdiction for Peace in Colombia, have directly relied upon the interpretations issued by the Office of the Prosecutor. Subcaso Casanare 055, *supra* note 8, ¶ 635.

¹⁴⁶ OFFICE OF THE PROSECUTOR, *supra* note 145, at 12.

inequalities.¹⁴⁷ Moreover, the policy paper defined gender-based crimes as those committed against persons, whether male or female, because of either their sex and/or socially constructed gender roles.¹⁴⁸

In 2022, the Office of the Prosecutor issued a follow-up policy paper on the crime of gender persecution. Here, the ICC Prosecutor went even further to interpret gender to include SOGI. This policy paper defined the “context of society” as “the group of social constructs and criteria used to define gender. These include, for example, sexual orientation, gender identity and gender expression.”¹⁴⁹ Moreover, the Office of the Prosecutor clarified that gender “refers to sex characteristics and social constructs and criteria used to define maleness and femaleness, including roles, behaviours, activities and attributes,” which can vary within and across societies and over time.¹⁵⁰ Finally, the Office of the Prosecutor stated that “[g]ender persecution is committed against persons because of sex characteristics and/or because of the social constructs and criteria used to define gender.”¹⁵¹ These criteria need not be determined by society at large, but specifically as defined by the perpetrator.¹⁵² The Office of the Prosecutor explained that the very nature of gender-based crimes is to target, regulate, or punish groups who are perceived to transgress accepted gender roles, expression, criteria, behaviors, activities, and attributes.¹⁵³

One year later, the Office of the Prosecutor doubled down on this inclusive interpretation of gender in an updated policy paper on gender-based violence.¹⁵⁴ The 2023 policy paper emphasized that gender is a social construct and that includes constructs about sexual orientation, gender identity, and gender expression.¹⁵⁵ Accordingly, gender-based violence includes harmful acts perpetrated because of a person’s actual or perceived sexual orientation, gender identity and expression, or sex characteristics.¹⁵⁶ As a result, the Office of the Prosecutor argued that LGBTQI+ individuals could be the victim of *any* gender-based crime under the Rome Statute, including, but not limited to, persecution.¹⁵⁷

* * *

With this history of the crime of persecution in mind, we turn now to considering persecution based on sexual orientation or gender identity (SOGI-based persecution). SOGI-based persecution has its own decades-long history under international law. Understanding this history—and how SOGI-based persecution has become increasingly recognized as a distinctive harm—is a critical step toward establishing accountability for SOGI-based persecution through the international crime of persecution.

¹⁴⁷ *Id.* at 16.

¹⁴⁸ *Id.* at 2.

¹⁴⁹ OFFICE OF THE PROSECUTOR, *supra* note 1, at 3.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 16.

¹⁵³ *Id.* at 4.

¹⁵⁴ OFFICE OF THE PROSECUTOR, POLICY PAPER ON GENDER-BASED CRIMES (2023).

¹⁵⁵ *Id.* at 10.

¹⁵⁶ *Id.* at 12-13.

¹⁵⁷ *Id.* at 12-13, 23 fn. 59.

III. PERSECUTION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY (SOGI)

The previous Part showed how the crime of persecution has evolved over the course of the last several decades, changing in response to shifting social and cultural understandings of persecution. This Part now turns to exploring how SOGI-based persecution might fit into this arc of history. It begins by showing how people of diverse sexual orientations and gender identities have experienced both law and conflict. It argues that they have long been the victims of both discrimination and persecution, even if the law has not always recognized it. As with gender-based persecution of women and girls, persecution based on sexual orientation and gender identity has, we show, been broadly recognized by other bodies of international law. This sets the stage for the recognition of SOGI-based persecution as protected grounds for the crime of persecution.

A. *Historical Persecution and Discrimination*

The debate over whether SOGI-based persecution fits within the crime of persecution is relatively new, but SOGI-based persecution certainly is not. Historically, the protection and experiences of people of diverse gender identities and sexual orientations has often been ignored in armed conflict, crises, and post-conflict justice.¹⁵⁸ Similarly, the modern international legal system—built in the aftermath of World War II—barely explicitly recognized the rights of women, let alone those of diverse gender identities and sexual orientations. Nonetheless they have been subjected to targeted violence. This Section aims to highlight the enduring and pernicious nature of SOGI-based persecution.

Detailed evidence of SOGI-based persecution is especially limited pre-World War II not because it did not occur but because history rarely recorded it.¹⁵⁹ Nonetheless, there is ample evidence of violence directed against individuals based on their SOGI. The Middle Assyrian Empire, for example, castrated homosexual men.¹⁶⁰ In the Mongolian Empire, sodomy was punishable by death.¹⁶¹ During Europe’s late Middle Ages, widespread SOGI-based persecution often became an official state policy. State and religious actors targeted those committing

¹⁵⁸ See generally Alon Margalit, *Still a Blind Spot: The Protection of LGBT Persons During Armed Conflict and Other Situations of Violence*, 100 INT’L. REV. RED CROSS 237 (2018); OUTRIGHT INTERNATIONAL, *LGBTQ LIVES IN CONFLICT AND CRISIS: A QUEER AGENDA FOR PEACE, SECURITY, AND ACCOUNTABILITY*, 2 (2023).

¹⁵⁹ See, e.g., JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY* 17-24 (1980) (detailing how persecution of LGBTQI+ has often been invisible or historically erased); Lisa Davis, *Dusting Off the Law Books: Recognizing Gender Persecution in Conflicts and Atrocities*, 20 NW. J. HUM. RTS., 1, 2 (2021) (“Rarely documented when they happen, perpetrators are hardly ever held accountable for these crimes. As a result, their crimes are often excluded from consideration by international and domestic tribunals, and in effect, are left out of history.”).

¹⁶⁰ *Ancient History Sourcebook: The Code of the Assura, c. 1075 BCE*, FORDHAM UNIVERSITY, <https://origin.web.fordham.edu/Halsall/ancient/1075assyriancode.asp> [<https://perma.cc/S574-JM9Q>].

¹⁶¹ V. A. Riasanovsky, *Mongol Law—A Concise Historical Survey*, 23 WASH. L. REV. & ST. B. J. 166, 169 (1948). In modern Mongolia, the “masculinity” of the Mongolian Empire is invoked to argue that homosexuality is a foreign import—unknown previously in the country. See Franck Billé, *Nationalism, Sexuality, and Dissidence in Mongolia*, in ROUTLEDGE HANDBOOK OF SEXUALITY STUDIES IN EAST ASIA 162, 167 (2014).

“homosexual acts,” particularly male-male sex or sodomy.¹⁶² Accusations of sodomy were levied against those seen as heretics or traitors,¹⁶³ such as in the Spanish Inquisition where there were nearly 500 known trials for alleged male-male sex.¹⁶⁴ The Spanish Empire exported state-led persecution of homosexuality to Latin America, even justifying colonization on the basis of indigenous Americans engagement in homosexual acts.¹⁶⁵

In World War II, the Nazi government systematically persecuted individuals based on sexual orientation or gender identity. Nazi Germany forcibly castrated hundreds of gay men as penal punishments or as sexual “reeducation.”¹⁶⁶ Nazi forces also deported an estimated 10,000–15,000 perceived gay men to concentration camps.¹⁶⁷ At Buchenwald, Nazi doctors forcibly implanted “artificial male sex glands” (briquettes of hormones) in experiments to “cure” gay men of their homosexuality.¹⁶⁸ Nazi officials similarly arrested lesbians and transgender persons and sent them to prisons and concentration camps, where they were subjected to sexual assault and other targeted abuse.¹⁶⁹ German forces also targeted LGBTQI+ cultural centers and institutions, such as by burning all works of the Institute of Sexology—a global pioneer in advocating for LGBTQI+ rights.¹⁷⁰ Despite this well documented abuse, the Nuremberg Tribunal did not explicitly address crimes against persons based on their sexual orientation or gender identity, nor did the Allied Powers recognize LGBTQI+ prisoners as Nazi victims.¹⁷¹ Moreover, West Germany retained certain Nazi anti-homosexual laws for decades, continued to enforce them, and even upheld them as constitutionally valid.¹⁷² In 2023, the German parliament officially commemorated LGBTQI+ victims of the Nazi regime for the first time.¹⁷³

¹⁶² BOSWELL, *supra* note 159, at 276-80.

¹⁶³ *Id.* at 283-84.

¹⁶⁴ Cristian Berco, *Social Control and Its Limits: Sodomy, Local Sexual Economies, and Inquisitors During Spain’s Golden Age*, 36 SIXTEENTH CENTURY J. 331, 334 (2005).

¹⁶⁵ Zeb Tortorici, *Against Nature: Sodomy and Homosexuality in Colonial Latin America*, 10 HISTORY COMPASS 161, 162-169 (2012) (surveying literature on the subject); Janet Burke & Ted Humphrey, *The New Black Legend of Bartolomé de Las Casas*, CHURCH LIFE J. (Oct. 13, 2023) <https://churchlifejournal.nd.edu/articles/the-new-black-legend-of-bartolome-de-las-casas/> [<https://perma.cc/K739-8XBY>] (defending the morality of Spanish colonization because indigenous Americans “are idolatrous, libidinous, and commit sodomy”).

¹⁶⁶ GÜNTER GRAU, *THE HIDDEN HOLOCAUST?* 246-47, 265 (Günter Grau & Claudia Shoppmann eds., 2012).

¹⁶⁷ *Gay People*, HOLOCAUST MEMORIAL DAY TRUST (last visited Sept. 6, 2024) <https://www.hmd.org.uk/learn-about-the-holocaust-and-genocides/nazi-persecution/gay-people/> [<https://perma.cc/672B-L66G>].

¹⁶⁸ GRAU, *supra* note 166, at 281-92.

¹⁶⁹ *See* Davis, *supra* note 159, at 29-36.

¹⁷⁰ *6 May 1933: Looting of the Institute of Sexology*, HOLOCAUST MEMORIAL DAY TRUST, <https://www.hmd.org.uk/resource/6-may-1933-looting-of-the-institute-of-sexology/> [<https://perma.cc/H2R7-K4ED>] (last visited Feb. 6, 2026).

¹⁷¹ Alycia T. Feindel, *Reconciling Sexual Orientation: Creating a Definition of Genocide that Includes Sexual Orientation*, 13 MICH. ST. J. INT’L L. 197, 199, 206-07 (2005).

¹⁷² Robert G. Moeller, *Private Acts, Public Anxieties, and the Fight to Decriminalize Male Homosexuality in West Germany*, 36 FEMINIST STUDIES 528, 528-30 (2010).

¹⁷³ Nadine Schmidt, *German Parliament Officially Commemorates LGBTQ Victims of Nazi Regime for First Time*, CNN (Jan. 27, 2023) <https://www.cnn.com/2023/01/27/europe/germany-nazi-lgbt-victims-intl/index.html> [<https://perma.cc/GU6X-XHVB>]. In 2017, gay men were recognized as victims and compensation was provided to those convicted under Paragraph 175, which criminalized sexual

Beyond Nazi Germany, SOGI-based persecution has occurred both in times of war and relative peace. Argentina's military dictatorship systematically targeted LGBTQI+ individuals.¹⁷⁴ In fact, the state-led violence was so severe—including murder, torture, sexual violence, and abduction—that an Argentine trial court recently held that transgender women were victims of crimes against humanity under the dictatorship.¹⁷⁵ Uruguay similarly acknowledged its military dictatorship persecuted transgender individuals and established a reparations mechanism for victims.¹⁷⁶ In apartheid South Africa, state authorities subjected some presumptively gay male military conscripts to shock therapy, and reports also suggest a practice of coerced sex-change operations in some cases to “cure” individuals of their perceived non-heterosexual preferences.¹⁷⁷

Even as international recognition of LGBTQI+ individuals and their rights have expanded,¹⁷⁸ SOGI-based persecution has remained a part of conflict and crisis and at times an explicit tool of war. The Inter-American Commission on Human Rights, for instance, documented how LGBTQI+ individuals in the Americas are still subject to both lethal and non-lethal violence, including rape and other acts of sexual violence, particularly in armed conflict.¹⁷⁹ The UN Secretary General and Human Rights Watch have highlighted how armed groups in Iraq, Syria, and elsewhere target individuals on the basis of their actual or perceived SOGI to control populations and intimidate civilians.¹⁸⁰ In Afghanistan, non-governmental organizations have found that the Taliban is surveilling LGBTQI+ Afghans, “hunting them down, and subjecting them to violence and humiliation.”¹⁸¹ In Myanmar, the UN Special

relations between men. Lisa Davis, *Post-Conflict Reparations: Methods for Addressing Discrimination*, 46 U. PA. J. INT'L L. 947, 977-78 (2025); *Germany Quashes Gay Men's Convictions and Offers Compensation*, BBC (June 23, 2017) <https://www.bbc.com/news/world-europe-40380064> [<https://perma.cc/K8VX-FRU5>].

¹⁷⁴ Anastasia Moloney, *LGBT+ Survivors of Argentina's Dictatorship Win 'Historic' Apology*, REUTERS (Dec. 13, 2018) <https://www.reuters.com/article/us-argentina-lgbt-rights/lgbt-survivors-of-argentina-dictatorship-win-historic-apology-idUSKBN1OC22E/> [<https://perma.cc/7WEP-S2D7>].

¹⁷⁵ *La Justicia Argentina Reconoce a Personas Trans Como Víctimas de Delitos de Lesa Humanidad en un Fallo Histórico* [The Argentine Justice System Recognizes Trans Persons as Victims of Crimes Against Humanity in a Historic Ruling], EL PAÍS (Mar. 27, 2024) <https://elpais.com/argentina/2024-03-27/la-justicia-argentina-reconoce-a-personas-trans-como-victimas-de-delitos-de-lesa-humanidad-en-un-fallo-historico.html> [<https://perma.cc/B5BY-D987>].

¹⁷⁶ Ley Integral Para Personas Trans [Comprehensive Law for Trans Persons], Law No. 19.684, Nov. 2018, D.O. 7 (Uru.), arts. 10, 11.

¹⁷⁷ Robert Kaplan, *The Aversion Project – Psychiatric Abuses in the South African Defence Force During the Apartheid Era*, 91 S. AFR. MED. J. 16, 16 (2001); Robert Kaplan, *Treatment of Homosexuality During Apartheid*, 329 BMJ 1415, 1415-16 (2004).

¹⁷⁸ See *infra* Section III.B.

¹⁷⁹ Inter. Am. Comm'n H. R., *Violence Against LGBTI Persons in the Americas*, OAS/Ser.L/V/II.rev.1, doc. 36, ¶¶ 25-30, 52 n. 126 (2015). The report, however, does not make recommendations on whether these acts of violence should be considered war crimes or crimes against humanity.

¹⁸⁰ U.N. Secretary General, *Conflict-Related Sexual Violence*, ¶¶ 6, 20, 30, 61, 84, U.N. Doc. S/2015/203 (Mar. 23, 2015); HUM. RTS. WATCH & IRAQUEER, “EVERYONE WANTS ME DEAD” (2022) (documenting attempted murder, abductions, torture and threats against LGBTQI+ Iraqis by armed groups); HUM. RTS. WATCH & HELEM, “THEY TREATED US IN MONSTROUS WAYS” (2020) (documenting violence against men and boys, often because of their SOGI, in Syria).

¹⁸¹ OUTRIGHT INTERNATIONAL, *A MOUNTAIN ON MY SHOULDERS* 6 (2023). As discussed below, the International Criminal Court's Pre-Trial Chamber has approved arrest warrants for the crime of gender persecution based in part on SOGI-based persecution. See *infra* Subsection IV.A.2.a.

Rapporteur has documented how the country's junta targets LGBTQI+ individuals by weaponizing their SOGI "to inflict hypersexualized forms of rape, torture, harassment, and other forms of sexual abuse."¹⁸² Similarly, the ICC Chambers, in approving an investigation into the situation in Bangladesh involving Rohingya refugees from Myanmar, noted that transgender women and intersex persons were reportedly targeted for rape and sexual violence.¹⁸³ In both the Myanmar and Afghan conflicts, advocates have specifically called for the ICC to address persecution against LGBTQI+ people as war crimes or crimes against humanity.¹⁸⁴

B. Recognition of SOGI in International Law

International criminal law does not exist in a vacuum, and courts are permitted to take notice of broader developments in international law when interpreting criminal law provisions. When interpreting the Rome Statute, for example, the ICC judges are not limited to international criminal law, but are rather required to apply applicable treaties and rules of international law.¹⁸⁵ Moreover, the ICC's application and interpretation of the Rome Statute must be consistent with internationally recognized human rights.¹⁸⁶ Thus, while international criminal law has not yet explicitly recognized the persecution of LGBTQI+ individuals as a distinct crime of persecution, other bodies of international law have paved the path to recognize SOGI rights—just as they previously did for women's rights.

Accordingly, this Section will focus on two core developments in international law. First, this Section will assess the development of international human rights law's modern consensus on SOGI rights and the impermissibility of SOGI-based discrimination. This Section will also assess the understanding of gender under human rights law. Second, this Section will highlight how international refugee law has already defined persecution to include SOGI-based persecution. These developments provide strong support for recognizing SOGI-based persecution as a crime of persecution.

1. SOGI Under Human Rights Law

As with international criminal law, when international human rights law first developed, the law did not explicitly recognize SOGI rights. While the Universal Declaration of Human Rights and other human rights documents adopted in the post-World War II era all contained language stating that human rights applied without discrimination, the documents did not mention SOGI explicitly.¹⁸⁷ Often, they did not mention "gender" either. International human rights law, however, has developed

¹⁸² Tom Andrews (Special Rapporteur on the Situation of Human Rights in Myanmar), *Courage Amid Crisis: Gendered Impacts of the Coup and the Pursuit of Gender Equality in Myanmar*, ¶ 66, U.N. Doc. A/HRC/56/CRP.8 (July 1, 2024).

¹⁸³ Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, Decision on the Authorisation of an Investigation, ¶ 86 (Nov. 14, 2019).

¹⁸⁴ Andrews, *supra* note 182, ¶ 236; OUTRIGHT INTERNATIONAL, *supra* note 181, at 11.

¹⁸⁵ Rome Statute, *supra* note 13, art. 21(1)(b).

¹⁸⁶ *Id.*, art. 21(3).

¹⁸⁷ Debra L. DeLaet, *Don't Ask Don't Tell: Where is the Protection Against Sexual Orientation Discrimination in International Human Rights Law*, 7 L. & SEXUALITY 31, 31-53 (1997).

over the past forty years to recognize that LGBTQI+ individuals are entitled to equal enjoyment of rights and that SOGI-based discrimination is impermissible.

The European Court of Human Rights was the first international institution to recognize LGBTQI+ rights under an international human rights treaty. In *Dudgeon v. United Kingdom*, the European Court held that criminalizing private, consensual same-sex acts violated the right to privacy under the European Convention on Human Rights.¹⁸⁸ Hailed as a landmark judgment, the case led to the transformation of law in Europe and beyond.¹⁸⁹ Soon after, the Human Rights Committee of the ICCPR (“ICCPR Committee”) found that sodomy laws in Australia violated the right to privacy.¹⁹⁰ The ICCPR Committee then went further, noting that the right to non-discrimination on the basis of sex under Article 26 of the ICCPR includes sexual orientation.¹⁹¹ While these decisions have persuasive, not binding, authority, they opened the door for other human rights bodies to read “sex” similarly broadly.

In the 2000s, other major international human rights treaties were interpreted to recognize and prohibit SOGI-based discrimination. In 2006, human rights advocates released the nonbinding Yogyakarta Principles, which argued that all persons, regardless of SOGI, were entitled to the full enjoyment of their human rights, and that SOGI rights were already included in international human rights treaties.¹⁹² Subsequently, the Committee on Torture interpreted non-discrimination to include gender, sexual orientation, and transgender identity and recognized LGBTQI+ individuals as particularly at risk of torture or ill-treatment.¹⁹³ In the same breath, the Committee on Torture emphasized that both men and women may be subject to torture and other inhuman treatment because of their actual or perceived non-conformity with socially determined gender roles.¹⁹⁴ In fact, since 2000, all other major human rights treaty bodies have recognized SOGI-based discrimination as prohibited under international human rights law.¹⁹⁵

¹⁸⁸ *Dudgeon v. United Kingdom*, App. No. 7525/76, ¶¶ 61-63 (Oct. 22, 1981), <https://hudoc.echr.coe.int/eng?i=001-57473> [<https://perma.cc/6ALG-MJLJ>].

¹⁸⁹ The case, and the subsequent decisions of the European Court of Human Rights that relied on *Dudgeon*, led the United Kingdom and other European countries to decriminalize homosexuality. *The 40th Anniversary of a Key European Court of Human Rights Case That Led to the Discriminalisation of Homosexuality—A Turning Point for LGBTI Persons*, COUNCIL OF EUROPE (Oct. 22, 2021), <https://www.coe.int/en/web/sogi/-/40th-anniversary-of-a-leading-european-court-of-human-rights-case-that-led-to-the-decriminalisation-of-homosexuality-a-turning-point-for-lgbti-persons> [<https://perma.cc/LDN2-SQDP>]. Outside of Europe, other courts cited *Dudgeon* as support for decriminalizing homosexuality within their countries. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

¹⁹⁰ *Toonen*, *supra* note 144, ¶¶ 8.2-8.6, 9.

¹⁹¹ *Id.* ¶ 8.7.

¹⁹² YOGYAKARTA PRINCIPLES (2006). Though nonbinding, these principles have significant persuasive value and have influenced the development of SOGI protections even beyond human rights law. See *infra* Subsection III.B.2.

¹⁹³ Comm. Against Torture, Gen. Comment No. 2, ¶ 21, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008).

¹⁹⁴ *Id.* ¶ 22.

¹⁹⁵ See, e.g., Comm. on Eco., Soc., & Cult. Rts., Gen. Comment No. 20, ¶ 32 U.N. Doc. E/C.12/GC/20 (July 2, 2009) (broadly prohibiting discrimination based on sexual orientation and gender identity); CEDAW Comm., Gen. Rec. No. 28, *supra* note 107, ¶ 18; CEDAW Comm., Gen. Rec. No. 35, ¶¶ 12, 29, U.N. Doc. CEDAW/C/GC/35 (July 26, 2017); CEDAW Comm., *Rosanna Flamer-Caldera v. Sri Lanka*, Comm’n 134/2018, ¶ 9.2, U.N. Doc. CEDAW/C/81/D/134/2018 (Mar. 24, 2022) (finding that criminalization of same-sex sexual activity by women and state harassment due to SOGI violates the right to non-discrimination); Comm. on the Rts. of the Child, Gen. Comment No. 15, ¶ 8, U.N. Doc.

Just as the international treaty bodies have found SOGI to be protected grounds, so too have other international and regional human rights bodies. The Inter-American and African regional human rights systems recognized the impermissibility of discrimination based on SOGI and expressed concern about systematic attacks and abuses against LGBTQI+ individuals.¹⁹⁶ In 2011, the Human Rights Council (Council) passed a landmark resolution, acknowledging the existence of and condemning violence against individuals based on their SOGI. The Council reaffirmed this view five years later and established an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.¹⁹⁷ The UN Office of the High Commissioner for Human Rights has also repeatedly affirmed the rights of LGBTQI+ individuals under international human rights law and the obligations of states to protect LGBTQI+ individuals from violence, torture, and ill-treatment and to prohibit and address SOGI-based discrimination.¹⁹⁸

Beyond recognizing SOGI rights on their own, international human rights bodies have explicitly recognized SOGI as *part* of gender. As discussed in Part II, international human right law has interpreted gender as a flexible, social construct. When defining this concept, for instance, the CEDAW Committee noted that gender discrimination is “inextricably linked” with sexual orientation and gender identity.¹⁹⁹ The CEDAW Committee has also recognized that discrimination based on gender stereotypes, stigma, cultural norms, and gender-based violence *includes* discrimination against LGBTQI+ identities.²⁰⁰ Finally, the CEDAW Committee has stated that international criminal law—including the Rome Statute—must be interpreted consistent with CEDAW and without adverse distinction as to gender.²⁰¹

As demonstrated by this brief survey of international human rights law, the discipline has formed a consensus on SOGI rights and protections. SOGI-based discrimination is widely prohibited under international human rights law. Moreover,

CRC/C/GC/15 (Apr. 17, 2013); Comm. on the R. of Persons with Disabilities, Gen. Comment No. 6, ¶ 22, U.N. Doc. CRPD/C/GC/6 (Apr. 26, 2018); Comm. on the Elimination of Racial Discrim., Gen. Rec. No. 36, ¶¶ 13, 18, U.N. Doc. CERD/C/GC/36 (Dec. 17, 2020) (recognizing discrimination against sexual orientation and gender identity as intersecting with racial discrimination); Comm. on the Protection of the Rts. of All Migrant Workers and Members of Their Families, Gen. Comment No. 3, ¶¶ 21, 42 U.N. Doc. CMW/C/GC/3-CRC/C/GC/22 (Nov. 16, 2017); Comm. on Enforced Disappearances, Gen. Comment No. 1, ¶ 8, U.N. Doc. CED/C/GC/1 (Oct. 26, 2023).

¹⁹⁶ Alon Margalit, *Still a Blind Spot: The Protection of LGBT Persons During Armed Conflict and Other Situations of Violence*, 100 INT’L. REV. RED CROSS 237, 243-45 (2018); Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 239, ¶ 91 (Feb. 24, 2012) (finding that SOGI is a protected category from discrimination); African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], Res. 275, ¶ 2, ACHPR/Res.275(LV)2014 (Nov. 15, 2022) (condemning systematic attacks by African state and non-state actors against individuals based on their real or perceived SOGI); Olivera Fuentes v. Peru, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 484, ¶¶ 88-94 (discussing the myriad of SOGI rights protected under the American Convention and noting historical and systemic discrimination against LGBTQI+ people in Latin America); Afr. Comm’n H.P.R., Res. 555, ¶¶ 4-5, 10 ACHPR/Res.552(LXXIV)2023 (Mar. 31, 2023) (calling on African states to prohibit and address discrimination against inter-sex individuals).

¹⁹⁷ Human Rights Council Res. 32/2, U.N. Doc. A/HRC/32/2 (July 15, 2016).

¹⁹⁸ See U.N. High Comm’r for Hum. Rts., *Born Free and Equal*, U.N. Doc. HR/PUB/12/06 (2019).

¹⁹⁹ CEDAW Comm., Gen. Rec. No. 28, *supra* note 107, ¶ 18.

²⁰⁰ CEDAW Comm., Gen. Rec. No. 33, *supra* note 109, ¶ 8.

²⁰¹ CEDAW Comm., Gen. Rec. No. 30, ¶ 23, U.N. Doc. CEDAW/C/GC/30 (Nov. 1, 2023).

SOGI is recognized as a protected ground from discrimination, and states violate international law by targeting, discriminating against, or otherwise persecuting individuals on the basis of their real or perceived SOGI. Finally, international human rights law widely recognizes gender as a construct that includes SOGI.

2. *SOGI-Based Persecution in Refugee Law*

Given the developments in human rights law and the understanding of gender as a social construct, it is worth looking briefly at refugee law. Like international criminal law, international refugee law specifically includes the concept of persecution. In fact, the drafters of the Rome Statute drew inspiration from refugee law in defining and crafting the definition of persecution under the Rome Statute.²⁰² While some international criminal jurisprudence has declined to directly apply refugee law to criminal law,²⁰³ Valerie Oosterveld argues that the ICC could nonetheless consider refugee law's understanding of gender and SOGI in the context of persecution.²⁰⁴ Doing so could inform the interpretation of gender persecution under the Rome Statute.

As in the early stages of international criminal law,²⁰⁵ refugee law did not initially recognize gender as a distinct ground protected from persecution. The 1951 Refugee Convention defined refugees as individuals, in part, with a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”²⁰⁶ Neither sex nor gender were initially enumerated as protected grounds.

Over time, refugee law grew to recognize gender—first in narrow terms, then expansively. In 1985, the Executive Committee on the International Protection of Refugees acknowledged for the first time that women may be part of a “particular social group” within the definition of persecution.²⁰⁷ The Executive Committee argued that the reason women were persecuted was that they “transgressed the social mores of the society in which they live.”²⁰⁸ In 1990, the Executive Committee acknowledged the particular plight of refugee women and tasked the UN High Commissioner for Refugees (UNHCR) to develop guidelines on the protection of

²⁰² Valerie Oosterveld, *Gender, Persecution, and the International Criminal Court: Refugee Law's Relevance to the Crime Against Humanity of Gender-Based Persecution*, 17 DUKE J. COMP. & INT'L L. 49, 50-51 (2006).

²⁰³ See, e.g., *Tadić* Trial, *supra* note 11, ¶ 694 (noting that the ICTY could not directly apply asylum and refugee law's definition of persecution); *Kupreškić*, *supra* note 84, ¶ 589 (finding that the definition of persecution under refugee law cannot be used to convict someone under international criminal law).

²⁰⁴ See Valerie Oosterveld, *Gender at the Intersection of International Refugee Law and International Criminal Law*, 12 J. INT'L CRIM. JUSTICE 953, 954 (2014) (arguing for harmonizing international refugee and criminal law's coherence on gender); Oosterveld, *supra* note 202 (arguing the ICC should look to international refugee law to interpret the crime of gender persecution).

²⁰⁵ See *infra* Part II.

²⁰⁶ Convention Relating to the Status of Refugees, art. 1(a), July 28, 1951, 189 U.N.T.S. 137.

²⁰⁷ Exec. Comm. on the Int'l Protection of Refugees, No. 39 (XXXVI) Refugee Women and International Protection (1985), in CONCLUSIONS ADOPTED BY THE EXECUTIVE COMMITTEE ON THE INTERNATIONAL PROTECTION OF REFUGEES 1975-2009 (CONCLUSION No. 1-109), 50 (2009).

²⁰⁸ *Id.*

refugee women.²⁰⁹ The Executive Committee later went even further, calling upon the High Commissioner to “recognize as refugees women whose claim to refugee status is based upon well-founded fear of persecution...including persecution through sexual violence or gender-based violence.”²¹⁰

In the 2000s, the UNHCR clarified the interpretation of gender persecution under the 1951 Refugee Convention. In 2000, the UNHCR defined gender as a social construct.²¹¹ The UNHCR also outlined that gender persecution is not necessarily motivated by the victim’s sex. Rather, gender persecution rests on the perpetrator’s ideology; the perpetrator persecutes because of a victim’s deviation from an attributed gender role.²¹² In 2002, the UNHCR updated its guidance on gender-related persecution. Here, it refined its definition of gender to be “the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another.”²¹³ The UNHCR also noted that gender acquires this socially constructed meaning over time, and that gender persecution can be experienced by both women and men.²¹⁴

In 2002, the UNHCR interpreted gender persecution to include persecution on account of sexual orientation.²¹⁵ The UNHCR noted that individuals are persecuted because of their SOGI, and that SOGI-based persecution can therefore be the basis for refugee claims.²¹⁶ Moreover, such targeting often occurs because the “claimant has refused to adhere to socially or culturally defined roles or expectations of behavior attributed to his or her sex.”²¹⁷

Building on the growing recognition of international SOGI rights, domestic protections afforded to LGBTQI+ individuals, and flexible interpretations of gender, the UNHCR clarified further its stances on SOGI-based persecution. In 2008, the UNHCR noted that it is well established that LGBTQI+ persons are entitled to all human rights on a basis of equality.²¹⁸ In 2012, the UNHCR stated that individuals can experience persecution due to their actual or perceived SOGI.²¹⁹ This persecution includes targeted killings and attacks, sexual and gender-based violence, torture, arbitrary detention, forced institutionalization, forced sex-reassignment surgery,

²⁰⁹ Exec. Comm. on the Int’l Protection of Refugees, No. 64 (XLI) Refugee Women and International Protection (1990), *in* CONCLUSIONS ADOPTED BY THE EXECUTIVE COMMITTEE ON THE INTERNATIONAL PROTECTION OF REFUGEES 1975-2009 (CONCLUSION No. 1-109), 85, 85-86 (2009).

²¹⁰ Exec. Comm. on the Int’l Protection of Refugees, No. 77 (XLVII) General (1996), *in* CONCLUSIONS ADOPTED BY THE EXECUTIVE COMMITTEE ON THE INTERNATIONAL PROTECTION OF REFUGEES 1975-2009 (CONCLUSION No. 1-109), 115, 116 (2009).

²¹¹ U.N. HIGH COMM’R FOR REFUGEES, GENDER-RELATED PERSECUTION 1 (2000). While this document was later supplanted in 2002 (*see* note 207 *infra*), these findings remained consistent across the two documents.

²¹² *Id.*

²¹³ U.N. High Comm’r for Refugees, Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, 2, U.N. Doc. HCR/GIP/02/01 (May 7, 2002).

²¹⁴ *Id.*

²¹⁵ *Id.* at 4-5.

²¹⁶ *Id.* at 4.

²¹⁷ *Id.*

²¹⁸ U.N. HIGH COMM’R FOR REFUGEES, GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO SEXUAL ORIENTATION AND GENDER IDENTITY, ¶ 9 (2008).

²¹⁹ U.N. High Comm’r for Refugees, Guidelines on International Protection No. 9, ¶¶ 1, 41, U.N. Doc. HCR/GIP/12/09, Oct. 23, 2012.

forced electroshock therapy, and others.²²⁰ Moreover, the UNHCR stated that SOGI is innate and immutable, and that forcing individuals to change or forsake their SOGI assaults fundamental human dignity.²²¹

IV. THE PATH FORWARD

The crime of persecution has evolved over the course of the eight decades since the crime was first charged in an international court at Nuremberg in the wake of the atrocities of World War II. Ever since, the scope of the crime of persecution has evolved to address changing understandings of the forms in which attacks on humanity may occur. As Part III demonstrates, the international law context makes clear that the time is ripe to recognize SOGI-based persecution as a crime of persecution. This Part considers how this goal might be best achieved.

A. International Criminal Court

One path for ensuring accountability for SOGI-based persecution as a crime of persecution is through the International Criminal Court. Here, there are two avenues for securing accountability for SOGI-based persecution: amending the Rome Statute to expressly include SOGI-based persecution as an enumerated form of persecution or interpreting the existing language in the Statute to encompass such persecution within “gender” persecution or persecution on “other grounds.” This Section argues that both avenues would achieve the goal of providing accountability for SOGI-based persecution, though proceeding through interpretation of the existing Statute is more likely to succeed.

1. Amendment

Amendment of the Rome Statute to include SOGI-based persecution could take one of three paths. First, an amended Rome Statute could explicitly include SOGI as protected grounds from persecution. Second, State Parties could remove the treaty’s definition of gender entirely, allowing the ICC to interpret “gender” in line with other international bodies. Third, the Rome Statute’s definition of gender could be amended to expressly include SOGI.

In many ways, amendment of the Rome Statute would be the ideal path forward. An amendment explicitly identifying SOGI as grounds for the crime of persecution would remove ambiguity about whether gender persecution is intended to include SOGI-based persecution.²²² It would also avoid, if not help to resolve, debates around whether “gender” is tied to a narrow, male-female binary or is a broader, socially constructed concept that captures LGBTQI+ rights.²²³

²²⁰ *Id.* ¶¶ 2, 20-22.

²²¹ *Id.* ¶ 47.

²²² See Darryl Robinson, *Defining “Crimes Against Humanity” at the Rome Conference*, 93 AM. J. INT’L L. 43, 54 (1999) (discussing amendment as a way to expand the enumerated grounds of persecution).

²²³ Reem Alsalem (Special Rapporteur on Violence Against Women and Girls), *Position Paper on the Definition of “Women” in International Human Rights Treaties, in Particular the Convention on the*

Amendment would also have the immediate benefit of encouraging Rome Statute States Parties to adjust their own laws on the crime of persecution in order to take full advantage of the principle of “complementarity” embodied in the Statute.²²⁴ The Statute provides that a case is inadmissible where:

The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

- a. The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the States genuinely to prosecute;
- b. The person concerned has already been tried for conduct which is the subject of the complaint.²²⁵

In short, domestic courts have the first opportunity to investigate and prosecute acts that are criminalized under the Statute—but they are only able to do so if domestic law provides jurisdiction. The Statute thus encourages States Parties to ensure that their domestic law allows them to prosecute all acts that are criminalized in the Statute. A change in the scope of the Statute to include SOGI-based persecution would therefore likely drive States Parties to do the same in their domestic law, thus ensuring domestic jurisdiction over SOGI-based persecution.

However, amending the Statute is challenging. A proposed amendment is adopted by consensus or a two-thirds majority vote in a meeting of the Assembly of States Parties or by a review conference called by the Assembly.²²⁶ Any amendment to Article 7, which defines crimes against humanity, shall enter into force *only* for those States Parties that have specifically accepted the amendment.²²⁷ There are currently seven active proposals to amend the Rome Statute—the latest a proposal by Vanuatu to amend Article 8 include ecocide.²²⁸ Some proposed amendments have

Elimination of All Forms of Discrimination Against Women 2 (2024) (citing the Rome Statute’s binary definition of gender). *But see* Human Rights Council Working Group on Discrimination Against Women and Girls, Substantive Gender Equality: Guidance Document of the Working Group on Discrimination Against Women and Girls, U.N. Doc. A/HRC/WG.11/42/1, at 2-3 (Mar. 14, 2025).

²²⁴ See generally OFFICE OF THE PROSECUTOR, INTERNATIONAL CRIMINAL COURT, INFORMAL EXPERT PAPER: THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE (2003), <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf> [<https://perma.cc/QL9U-69GX>] (explaining the principle of “complementarity” under the Rome Statute).

²²⁵ Rome Statute, *supra* note 13, art. 17.

²²⁶ *Id.* art. 121(3) (“The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.”).

²²⁷ *Id.* art. 121(5) (“Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party’s nationals or on its territory.”).

²²⁸ International Criminal Court Assembly of States Parties, *Report of the Working Group on Amendments*, ICC-ASP/23/26 (Dec. 1, 2024), https://asp.icc-cpi.int/sites/default/files/asp_docs/ICC-ASP-23-26-ENG.pdf [<https://perma.cc/J49A-TEGT>].

been under consideration for over a decade.²²⁹ This track record suggests that a formal proposed amendment could languish.²³⁰

In addition to the time and political barriers, amendment is also only prospective—and, again, limited to the States that specifically accept the amendment. Despite the ongoing systematic deprivation of human rights by reason of individuals' SOGI in countries like Afghanistan, Syria, Russian-occupied territory in Ukraine, and others, the amended persecution would only cover SOGI-persecution *after* a State Party adopts the amendment.

In short, even if ultimately successful, amending the Statute is a lengthy process with limited effect. It requires at least a two-thirds vote of the Assembly of States Parties or a review conference and even then it would only take effect for the States that specifically adopted it. Given these difficulties and given that there is a strong argument that persecution already encompasses SOGI-based persecution, this path appears less promising than relying on interpretation of the existing text.

2. Interpretation

An alternative path to providing accountability for SOGI-based persecution under the Rome Statute is to use the authority granted by the States Parties to the Court to interpret the existing text. Here, we examine two alternative approaches to such an interpretive reform: prosecuting SOGI-based persecution as “gender” persecution or as persecution on “other grounds.” Both are promising, but both also face substantial hurdles. Notably, if either approach succeeds, it would drive the same domestic law changes described above: States seeking to take advantage of complementarity will be motivated to amend their domestic law—or interpret their existing domestic law—to match the new interpretation of the Statute’s terms. Indeed, many States that are party to the Rome Statute expressly require that their domestic courts take into account relevant judgments or decisions of the ICC.²³¹ A new interpretation could thus drive change not only in international law but also in the domestic law of the 125 States Parties to the Statute.

a. SOGI-Based Persecution as Gender Persecution

As noted in Subsection II.B.2, the ICC Prosecutor has set the stage for interpreting SOGI-based persecution as gender persecution.²³² The Prosecutor’s 2022

²²⁹ See, e.g., Mexico: Proposal of Amendment, C.N.725.2009.TREATIES-6 (Oct. 29, 2009), <https://treaties.un.org/doc/Publication/CN/2009/CN.725.2009-Eng.pdf> [<https://perma.cc/SZ4M-D827>].

²³⁰ For example, proposed amendments to the crime of aggression have not moved forward, despite significant support and years of debate and discussion. See *Press Release: Assembly of States Parties Held a Three-Day Special Session on the Review of Amendments of the Crime of Aggression*, INTERNATIONAL CRIMINAL COURT (July 10, 2025), <https://www.icc-cpi.int/news/assembly-states-parties-held-three-day-special-session-review-amendments-crime-aggression> [<https://perma.cc/3VE7-EY2R>].

²³¹ See, e.g., International Criminal Court Act 2001, c. 17 § 50(5) (Eng.) (“In interpreting and applying the provisions of the articles referred to in subsection (1) the court shall take into account any relevant judgment or decision of the ICC.”).

²³² It should be noted that the ICC Prosecutor’s policy does not represent binding international law. The ICC has yet to articulate a position on whether gender persecution includes SOGI-based persecution and the legal rationale for that interpretation.

“Policy on the Crime of Gender Persecution” and 2023 “Policy on Gender-Based Crimes” would extend gender persecution to reach SOGI-based persecution. Both expressly state that gender persecution is “committed against persons because of sex characteristics and/or because of social constructs and criteria used to define gender.”²³³ Both policies explain that “[g]roups and individuals targeted for gender persecution include, for example, women, girls, men, boys, and LGBTQI+ persons, and subsets of these groups.”²³⁴ Where a perpetrator believes that men should only have sexual and romantic relations with women, for instance, and attacks LGBTQI+ individuals to punish them or force compliance with the perpetrator’s gender expectations, such attacks could qualify as gender persecution. The Prosecutor’s interpretation also extends gender persecution to include intersex, non-binary, or transgender individuals.²³⁵

The Prosecutor has also brought and tried charges of gender persecution. In 2010, the Prosecutor first attempted to try the crime of gender persecution, but the ICC declined to confirm the underlying charges.²³⁶ Almost a decade later, the Pre-Trial Chambers confirmed separate charges of gender persecution against women and girls²³⁷ and against men and boys.²³⁸ Thus far, the ICC has only once rendered a final decision on the crime of gender persecution. In 2024, the ICC issued a judgment in the *Al Hassan* case, finding for the first time that gender persecution had been committed by members of Ansar Dine and Al-Qaeda in Timbuktu, Mali. The Trial Chamber acquitted Al Hassan himself of gender persecution because it could not find beyond a reasonable doubt that the crime was committed while he was working for the Islamic Police.²³⁹ While initially criticized for not holding Al Hassan accountable, the Trial Chamber’s decision nonetheless offers crucial insights into the ICC’s interpretative approach to gender persecution—indicating that it may adopt the Prosecutor’s interpretation that gender persecution includes SOGI-based persecution.

Notably, the Trial Chamber took a flexible approach to what an identifiable group or collectivity means for gender persecution. A group’s identity can be on the basis of neutral criteria, rather than on discriminatory grounds. Specifically, “it is not necessary for the identifiable targeted group to be defined by the discriminatory grounds listed in Article 7(1)(h) of the Statute, but rather these grounds enumerate the prohibited reasons for targeting the group.”²⁴⁰ The group may also be identified in positive or negative manner, in the sense that perpetrators may target a group for

²³³ OFFICE OF THE PROSECUTOR, *supra* note 154, at 28; OFFICE OF THE PROSECUTOR, *supra* note 1, at 6.

²³⁴ *Id.*

²³⁵ OFFICE OF THE PROSECUTOR, *supra* note 1, at 16.

²³⁶ *New ICC Arrest: Leader of Movement Involved in Massive Rapes in the DRC Is Apprehended in Paris*, INTERNATIONAL CRIMINAL COURT (Oct. 11, 2010), <https://www.icc-cpi.int/news/new-icc-arrest-leader-movement-involved-massive-rapes-drc-apprehended-paris> [<https://perma.cc/BS8Z-ZH9F>]; Prosecutor v. Callixte Mbarushimana, ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶ 267 (Dec. 16, 2011).

²³⁷ Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed, ICC-01/12-01/18, Corrected Version of Decision on the Confirmation of Charges, ¶ 707 (Nov. 13, 2019).

²³⁸ Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman, ICC-02/05-01/20, Decision on the Confirmation of Charges, ¶¶ 80, 116 (July 9, 2021); Prosecutor v. Mahamat Said Abdel Kani, ICC-01/14-01/21, Decision on the Confirmation of Charges (Dec. 9, 2021).

²³⁹ Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed, ICC-01/12-01/18, Trial Judgment, ¶¶ 1580, 1661-63, 1785 (June 26, 2024).

²⁴⁰ *Id.* ¶ 1206.

“not belonging to a certain group or collectivity.”²⁴¹ Additionally, the victims need not actually consider themselves to be part of an identifiable group. In the *Al Hassan* case, the Trial Chamber found it sufficient for purposes of both gender and religious persecution that Ansar Dine targeted a group it perceived as “not real Muslims.”²⁴²

Additionally, the Trial Chamber held that actual targeting must be carried out with the intent to discriminate against targeted persons on grounds enumerated in the Rome Statute, such as gender.²⁴³ In the case of gender, the Trial Chamber found that Ansar Dine members targeted local women and girls because of their gender and deprived them of their fundamental rights because of the particular roles, expectations, and conduct that Ansar Dine believed was appropriate for their gender.²⁴⁴ The Trial Chamber also rejected as a defense “the existence of systematic discrimination against women embedded in Malian society.”²⁴⁵

The Trial Chamber’s decision in *Al Hassan* was seen by some as a lost opportunity to define gender-discrimination to include SOGI-based discrimination.²⁴⁶ Yet it did not foreclose a broad and inclusive interpretation of gender persecution. The judgment made clear that in finding gender persecution, the Court would look to the societal roles, expectations, and conduct that the defendant believed was appropriate for the gender of the victim. In doing so, the Trial Chamber laid a foundation to find that LGBTQI+ individuals constitute an identifiable group and that their persecution for failure to comply with existing gender norms could constitute gender persecution.²⁴⁷

In considering the question, the Court can, and we argue should, take note of international human rights law and international refugee law. Both UN treaty bodies and regional human rights systems have universally recognized that discrimination, targeting, or abuse of individuals because of their real or perceived SOGI violates their human rights. Human rights bodies have consistently interpreted “gender” within their operative treaties to include SOGI. In refugee law, as explained in Subsection III.B.2., the UNHCR interpreted gender persecution to include SOGI-based persecution. The Rome Statute defines gender as existing “within the context of society.”²⁴⁸ Moreover, the Rome Statute provides that the treaty must be consistent with other principles of international refugee law. The Statute thus provides a roadmap for the Court to take account of this broader context.

²⁴¹ *Id.*

²⁴² *Id.* ¶ 1559.

²⁴³ *Id.* ¶ 1210.

²⁴⁴ *Id.* ¶ 1566.

²⁴⁵ *Id.* ¶ 1573.

²⁴⁶ See Rosemary Grey & Valerie Oosterveld, *Al Hassan: The International Criminal Court’s First Judgement on Gender Persecution (Part 1)*, OPINIOJURIS (Aug. 2, 2024), <https://opiniojuris.org/2024/08/02/al-hassan-the-international-criminal-courts-first-judgment-on-gender-persecution-part-1/> [<https://perma.cc/CW5B-3DML>].

²⁴⁷ See Rosemary Grey & Valerie Oosterveld, *Al Hassan: The International Criminal Court’s First Judgement on Gender Persecution (Part 2)*, OPINIOJURIS (Aug. 2, 2024), <https://opiniojuris.org/2024/08/02/al-hassan-the-international-criminal-courts-first-judgment-on-gender-persecution-part-2/> [<https://perma.cc/4NMC-CFQ9>] (“affirmation of this interpretation in the *Al Hassan* case puts the Office of the Prosecutor in an even stronger position to make full use of the crime of gender persecution going forward, including the persecution of LGBTQI+ people”).

²⁴⁸ Rome Statute, *supra* note 13, art. 7(3).

The ICC Prosecutor has already taken steps in this direction. Ramiz, whose persecution was described in the opening of this Article, is one of many LGBTQI+ Afghans who have been subjected to widespread and systematic sexual and physical violence.²⁴⁹ In 2025, in an important development for addressing SOGI-based persecution, the Prosecutor filed applications for arrest warrants with the Pre-Trial Chamber for the supreme leader of the Taliban and the chief justice of the “Islamic Emirate of Afghanistan” for gender persecution, including persecution of LGBTQI+ Afghans.²⁵⁰ The application for an arrest warrant for the supreme leader, Haibatullah Akhundzada, for example, states that under Akhundzada’s leadership, the Taliban targeted persons “they considered not to conform with their ideological expectations of gender identity or expression.”²⁵¹ It continued: “This included members of the LGBTQI+ community, who were singled out for certain types of persecution.” The Pre-Trial Chamber approved this application in July 2025, though the details remain under seal.²⁵² This could prove an important step toward accountability for SOGI-based persecution and create a template for future investigations and prosecutions.

There are also opportunities to develop this interpretation of gender persecution in the context of the current ICC investigation in Ukraine. Russian leaders have encouraged the persecution of LGBTQI+ Ukrainians.²⁵³ The ICC Prosecutor is already pursuing charges against Russian officials, including those like Vladimir Putin that have been explicit about their opposition to LGBTQI+ rights. Ukraine has responded to Russia’s SOGI-based persecution by increasing its support for LGBTQI+ individuals. For instance, President Zelenskyy has supported efforts to advance greater domestic rights for LGBTQI+ Ukrainians, such as same-sex unions, while the Ukrainian Foreign Ministry has embraced LGBTQI+ rights as a symbol of

²⁴⁹ Billy Stockwell, ‘My Whole Body Was Praying for My Death’: *LGBTQ Afghans Say They Face Abuse in Detention As Taliban Crackdown Intensifies*, CNN (Nov. 19, 2024, 12:01 AM), <https://edition.cnn.com/2024/11/19/asia/afghanistan-taliban-lgbtq-detention-intl/index.html> [<https://perma.cc/LFK4-6MNA>].

²⁵⁰ Situation in the Islamic Republic of Afghanistan, ICC-02/17, ¶¶ 88-99, Prosecution’s Application Under Article 58 for a Warrant of Arrest Against Haibatullah Akhundzada, (Jan. 23, 2025) [hereinafter Prosecution’s Application for a Warrant of Arrest Against Akhundzada]; Situation in the Islamic Republic of Afghanistan, ICC-02/17, ¶¶ 88-99, Prosecution’s Application Under Article 58 for a Warrant of Arrest Against Abdul Hakim Haqqani, (Jan. 23, 2025).

²⁵¹ See Prosecutor’s Application for a Warrant of Arrest Against Akhundzada, *supra* note 250, ¶ 13.

²⁵² See Press Release: *Situation in Afghanistan: ICC Pre-Trial Chamber II Issues Arrest Warrants for Haibatullah Akhundzada and Abdul Hakim Haqqani*, INTERNATIONAL CRIMINAL COURT (July 8, 2025) (reporting that the Chamber found that “there are reasonable grounds to believe that Mr Haibatullah Akhundzada and Mr Abdul Hakim Haqqani have committed by ordering, inducing or soliciting the crime against humanity of persecution, under article 7(1)(h) of the Rome Statute, on gender grounds against girls, women and other persons non-conforming with the Taliban’s policy on gender, gender identity or expression; and on political grounds against persons perceived as ‘allies of girls and women’”). See also Situation in the Islamic Republic of Afghanistan, ICC-02/17, <https://www.icc-cpi.int/afghanistan> [<https://perma.cc/TYY3-2LRN>] (providing overview of the investigation and links to relevant documents).

²⁵³ Though the European Court of Human Rights has not yet considered Russian targeting of LGBTQI+ Ukrainians, it has considered Russian SOGI-based persecution more generally. The European Court noted how Russia undertook a “campaign of persecution of persons on the basis of their perceived or actual sexual orientation” in Chechnya, subjecting individuals to threats of extermination, arbitrary and unlawful arrests, detentions, torture, enforced disappearances, and extrajudicial decisions. *Lapunov v. Russia*, App. No. 28834/19, ¶¶ 6-12, 68-75 (Sept. 12, 2023), <https://hudoc.echr.coe.int/eng?i=001-226449> [<https://perma.cc/XF9M-R2YC>].

Ukraine’s “Western-ness.”²⁵⁴ This situation could provide an opportunity for the ICC Prosecutor to investigate SOGI-based persecution, for individuals may be more willing to cooperate given the signals of support from the Ukrainian government. As a result, the ICC Prosecutor may be able to build a case against Russian perpetrators, paving the way for the recognition of SOGI-based persecution as gender persecution.

A similar opportunity may exist in the ICC investigations into the situations in Bangladesh/Myanmar.²⁵⁵ Though Myanmar is not a party to the Rome Statute, its neighbor, Bangladesh, is. With the approval of the Pretrial Chamber, the Office of the Prosecutor opened an investigation into crimes committed on the territory of the People’s Republic of Bangladesh—an investigation that led to an application for an arrest warrant against Senior General and Acting President Min Aung Hlaing, Commander-in-Chief of the Myanmar Defence Services.²⁵⁶ The arrest warrant is for “criminal responsibility for the crimes against humanity of deportation and persecution of the Rohingya, committed in Myanmar, and in part in Bangladesh.”²⁵⁷ Moreover, in authorizing the investigation into the situation in Bangladesh/Myanmar, the Pretrial Chamber noted that submitted supporting material indicated Burmese forces had targeted third-gender persons, transgender women, and intersex persons for rape and sexual violence.²⁵⁸ Given evidence of SOGI-based persecution as part of the broader persecution of the Rohingya, such persecution could form the basis of charges against President Hlaing and others responsible for the persecution of the Rohingya.

As noted at the outset of this Section, interpreting “gender” persecution to include SOGI-based persecution would produce results beyond the individual cases in which it is employed. If the Court were to recognize that SOGI-based persecution constitutes persecution under the Statute and thus a crime against humanity, that could have a widespread impact on how states interpret their own domestic statutes enacted to mirror the Rome Statute definition, transforming the scope of accountability almost instantly.²⁵⁹

²⁵⁴ Daniel Toren, *Ukraine Distances Itself From Russia in Advancing LGBTQ+ Equality*, WILSON CTR. (Jan. 17, 2024), <https://www.wilsoncenter.org/blog-post/ukraine-distances-itself-russia-advancing-lgbtq-equality> [<https://perma.cc/PW45-KWL5>]; *Ukrainian Government Held the First Ever Event Dedicated to Protection of People’s Rights*, NASH SVIT CTR. (Feb. 15, 2024), <https://gay.org.ua/en/blog/2024/02/15/ukrainian-government-held-the-first-ever-event-dedicated-to-protection-of-lgbtq-peoples-rights/> [<https://perma.cc/P4AE-PYJN>].

²⁵⁵ There may be a similar possibility for the investigation into the situation in the Democratic Republic of Congo. The Southern Africa Litigation Center has identified violence against members of the LGBTQI+ community as a feature of that conflict that requires redress. U.N. Indep. Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, Submission: Report on Peace, Security, Sexual Orientation and Gender Identity, Input Submitted by Southern Africa Litigation Centre, U.N. Doc. A/77/235 (Mar. 2022) <https://www.ohchr.org/en/calls-for-input/2022/report-independent-expert-protection-against-violence-and-discrimination-based> [<https://perma.cc/97QU-Y8K9>].

²⁵⁶ *Information for Victims: Bangladesh/Myanmar*, INT’L CRIM. CT. <https://www.icc-cpi.int/victims/bangladesh-myanmar> [<https://perma.cc/5KSW-D2JK>].

²⁵⁷ *Id.*

²⁵⁸ Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation Into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, Pre-Trial Chamber III, ¶ 86 (Nov. 14, 2019).

²⁵⁹ While it is always possible that a new interpretation of the Statute could prompt a State to withdraw, so far there is no evidence that States have withdrawn for such reasons. If a State withdraws

b. SOGI-Based Persecution as Persecution on “Other Grounds”

Another possible route for recognizing SOGI-based persecution under the Rome Statute is through persecution on “other grounds.” This interpretative route is relatively uncharted, but arguably offers the Court the greatest flexibility, as the provision was intentionally included to allow the crime of persecution to evolve.

Before the Rome Statute, all international tribunals could only try charges of persecution on limited, enumerated grounds. Perhaps reflective of the *Tadić* trial court’s observation that the grounds upon which persecution is based is not circumscribed by international law, but instead changes over time, the Rome Statute broke from that tradition. In the Rome Statute negotiations, many states advocated for an open-ended list of grounds for the definition of persecution.²⁶⁰ This proposal faced harsh opposition, however, and the drafters struck a compromise: the provision on persecution included specific categories but also included a catch-all “other grounds universally recognized as impermissible under international law.” The term was specifically designed so that “if any other prohibited grounds of discrimination become clearly established in international law, they can automatically be incorporated without amending the statute.”²⁶¹

Whether “other grounds” could include SOGI—as *Tadić* explicitly suggested—is untested. Neither the Rome Statute’s negotiating history nor ICC case law define “other grounds” or “universally recognized,” though they provide some general guidance. Article 21 directs the ICC to apply “applicable treaties and the principles and rules of international law” as a secondary source of law.²⁶² The Court may also look to “general principles of law”—but only if the Rome Statute and international law fail to address a question.²⁶³ Additionally, per Article 21(3), interpretation of law pursuant to the Statute must be consistent with “internationally recognized human rights.”²⁶⁴ “[T]he original intention behind this paragraph may have been to limit the court’s powers in the application and interpretation of the relevant law,”²⁶⁵ but in practice it has arguably had the opposite effect. For instance, the ICC has noted that Article 21(3) stipulates that *all* law applicable under the Statute, including the Statute itself, “must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Statute; every aspect of it.”²⁶⁶ Thus, when evaluating what constitutes other grounds, the Court *may* look to treaties, other tribunals, and state practice, and it *must* interpret in accordance with international human rights standards.

Article 7(1)(h) also establishes a “universally recognized” standard, which is a high standard but likely not so demanding as customary international law. The

after a case has been brought, that withdrawal would not deprive the Court of jurisdiction in the case. *See* Rome Statute, *supra* note 13, art. 127.

²⁶⁰ Robinson, *supra* note 222, at 54.

²⁶¹ *Id.*

²⁶² Rome Statute, *supra* note 13, art. 21(1)(b).

²⁶³ *Id.* art. 21(1)(c).

²⁶⁴ *Id.* art. 21(3).

²⁶⁵ Mahnouch H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT’L L. 22, 29 (1999).

²⁶⁶ Prosecutor v. Lubanga, ICC-01/04-01/06 (OA4), Judgment on the Appeal of Mr. Thomas Lubanga Dylio 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, ¶ 37 (Dec. 14, 2006).

Rome Statute outlines several standards against which the ICC is to evaluate and, if appropriate, apply international law as part of its interpretative efforts. As discussed above, Article 21(3) refers to “internationally recognized human rights,” while Article 7(1)(h) refers to “universally recognized” international law. Some scholars view the use of both as evidence that “universally recognized” is a higher standard than “internationally recognized”—requiring more than mere codification in one treaty, for example.²⁶⁷ But to be universally recognized *does not* require meeting the threshold of customary international law—which requires a showing of a general and consistent state practice and *opinio juris*.²⁶⁸ Indeed, the Rome Statute drafters considered, but rejected, “customary international law” as the basis for “other grounds.”²⁶⁹ Accordingly, some experts have suggested that “‘universally recognised’ should be understood as ‘widely recognised’, and not within the meaning that all States have to recognize a particular ground as impermissible.”²⁷⁰ The distinctions covered by the ICCPR and Universal Declaration on Human Rights, they argue, are sufficiently recognized to fall within the scope of “other grounds.”²⁷¹ Thus, “universally recognized” grounds likely require more than being recognized in one treaty but certainly does not require a showing of state practice and *opinio juris*.

While the ICC has not yet interpreted “other grounds,” four developments suggest that the term could encompass SOGI. First, as discussed in Part III, international law has not merely *recognized* SOGI rights. Rather, all major international human rights bodies have universally found that SOGI-based discrimination is prohibited under their operative treaties. International refugee law has also recognized and condemned SOGI-based persecution. Moreover, despite vocal opposition by a handful of states, in 2025, the UN Human Rights Council voted—for the fourth time—to establish and maintain an independent expert on discrimination based on SOGI.²⁷²

Second, regional human rights systems have interpreted similar language in their enabling conventions to include SOGI. The European Convention on Human Rights prohibits discrimination on “any ground such as sex. . . or other status,” and the American Convention prohibits discrimination for reasons of “any other social condition.”²⁷³ When asked to determine whether SOGI fell within these other grounds, the courts answered that it does.²⁷⁴ Both regional bodies interpreted “other

²⁶⁷ *Id.*; George E. Edwards, *International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy*, 26 YALE J. INT’L L. 323, 373-78 (2001).

²⁶⁸ Some scholars have argued that “universally recognized” is interchangeable with customary international law. See Yao Li, *Persecution in International Criminal Law and International Refugee Law*, 6 ZIS 300, 308-09 (2020).

²⁶⁹ Edwards, *supra* note 267, at 377 n. 232.

²⁷⁰ See THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 225-26. (Otto Triffterer & Kai Ambos, eds., 3d. ed. 2016).

²⁷¹ *Id.* at 226.

²⁷² Daniele Paletta, *UN Renews Crucial Human Rights Expert Mandate on Sexual Orientation and Gender Identity*, ILGA (July 7, 2025), <https://ilga.org/news/iesogi-mandate-renewed-2025/> [<https://perma.cc/7BCZ-5BDN>].

²⁷³ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14, Nov. 4, 1950, 213 U.N.T.S. 221; American Convention on Human Rights: “Pact of San José, Costa Rica,” art. 1.1, Nov. 22, 1969, 1144 U.N.T.S. 123.

²⁷⁴ Clift v. United Kingdom, App. No. 7205/07, ¶¶ 55-63 (July 13, 2010), <https://hudoc.echr.coe.int/eng?i=001-99913> [<https://perma.cc/DC5B-EPNY>] (noting that “other status” indicated the enumerated list was not meant to be exhaustive); Salgueiro da Silva Mouta v. Portugal,

status” or “other social condition,” to include not just sex, but also SOGI. The African Charter on Human and Peoples’ Rights similarly bars discrimination on “sex...or other status.”²⁷⁵ While the question of whether other status under the African Charter includes SOGI remains contested, the African Commission noted that Article 2 seeks to “ensure equality of treatment for individuals irrespective of sexual orientation.”²⁷⁶ Thus, regional human rights systems’ jurisprudence strongly supports the conclusion that SOGI-based discrimination is prohibited under international law.

Third, since the drafting of the Rome Statute, over 100 states have amended laws around SOGI to decriminalize same-sex behavior or afford affirmative protections to persons based on their SOGI.²⁷⁷ Several countries have even recognized SOGI-based persecution as grounds for asylum in their domestic law.²⁷⁸ When incorporating the provisions of the Rome Statute into its domestic law, the Philippines added sexual orientation as a protected ground.²⁷⁹ This state practice, while not yet perfectly universal, arguably reflects the emergence of customary international law to prohibit SOGI-based discrimination, particularly in light of the international law consensus.

Finally, the ICC seemingly recognized that SOGI-based *discrimination* is prohibited under international law. When deciding on reparations in the *Lubanga* case, the ICC noted that it cannot make “adverse distinction on the grounds of...sexual orientation.”²⁸⁰ The Court’s only justification for this conclusion was that sexual orientation is captured by Article 21(3).²⁸¹ To be sure, the ICC was not

App. No. 33290/96 ¶¶ 23-28 (Dec. 21, 1999) (finding that sexual orientation is undoubtedly covered by Article 14 under the “any grounds such as”); *Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 239, ¶¶ 85-91 (Feb. 24, 2012) (finding that SOGI is protected under “any other social condition”).

²⁷⁵ African Charter on Human and Peoples’ Rights, art. 2, June 27, 1981, 1520 U.N.T.S. 217.

²⁷⁶ *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication No. 245/2002, Afr. Comm’n H.P.R., ¶ 169 (May 15, 2006) <https://achpr.au.int/en/decisions-communications/zimbabwe-human-rights-ngo-forum-v-zimbabwe-24502> [<https://perma.cc/D9TQ-UY46>]. It should be noted, however, that the African Commission’s position on SOGI rights has varied, leading some to describe the “status of sexual orientation under the African Charter [a]s far from settled.” Annika Rudman, *The Protection Against Discrimination Based on Sexual Orientation Under the African Human Rights System*, 15 AFR. HUM. RTS. L. J. 1, 8 (2015).

²⁷⁷ See Anthony J. Colangelo, *The Emerging Crime of Persecution Based on Sexual Orientation*, 22 NW. J. HUM. RTS. 215, 231 (2024) (detailing changes in state law to either decriminalize crimes based on sexual orientation or to specifically prohibit discrimination based on sexual orientation).

²⁷⁸ See, e.g., Ley Orgánica de Movilidad Humana, no. 938, arts. 2, 98, febrero 6, 2017, REGISTRO OFICIAL (SUPLEMENTO) (Ecuador); Refugee Act, 1996 (Act No. 17/1996) (Ir.) <https://www.irishstatutebook.ie/eli/1996/act/17/enacted/en/print.html> [<https://perma.cc/328P-F5M9>]; Asylum Law, 2016 (Act No. 01-1308/2) <https://www.refworld.org/legal/legislation/natlegbod/2016/en/104945> [<https://perma.cc/SQN7-9MUF>] (Montenegro).

²⁷⁹ Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, Rep. Act No. 9851, § 6(h), 106 OG No. 9, 1120 (March 1, 2010) (defining crimes against humanity as including “persecution against any identifiable group or collectivity on . . . gender, sexual orientation or other grounds that are universally recognized as impermissible under international law”).

²⁸⁰ *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision Establishing the Principles and Procedures to be Applied to Reparations, ¶ 191 (Aug. 7, 2012).

²⁸¹ *Id.* The court also cited Principle 25 of the United Nation’s Basic Principles and Guidelines on the Right to a Remedy and Reparation. G.A. Res. 60/147, ¶ 25 (Mar. 21, 2006) (“The application and interpretation of these Basic Principles and Guidelines must be...without any discrimination of any kind or on any ground, without exception.”)

interpreting “other grounds universally recognized” under Article 7(1)(h), but it was recognizing that SOGI-based discrimination was impermissible under international law.

As evidence of the vitality of an “other grounds” approach to recognizing SOGI-based persecution, the Prosecutor has embraced “other grounds” to advance accountability for age-based persecution. Unlike SOGI, no enumerated grounds under Article 7(1)(h) could possibly encompass age. In policy papers on gender persecution and children, the Office of the Prosecutor argued that persecutory acts targeting children on the basis of their age could be charged as persecution on “other grounds” by reading Articles 7(1)(h) and 21(3) together.²⁸² Under this theory, in 2024, the Prosecutor brought charges of age-based persecution against Joseph Kony for his targeting of children.²⁸³ While the ICC has not issued a decision confirming or denying charges of age-based persecution, that the Prosecutor is attempting to seek accountability for persecution on other grounds is promising for SOGI-based persecution.

B. Domestic Accountability

States need not wait for the international bodies to address SOGI-based persecution. They can pursue accountability on their own, helping to support the development of international law in the process. Indeed, one state, Colombia, has already taken the lead. Here we examine the lessons to be drawn from Colombia and discuss how other states could follow its lead. In doing so, states would not only provide much-needed accountability for SOGI-based persecution, but they could also help lay the groundwork for greater accountability at the regional and international levels.

1. Lessons from Colombia

Colombia has suffered one of the longest civil wars in modern history. In 2016, the two largest participants in the conflict, the Colombian government and the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia*, or “FARC”), signed a historic peace agreement.²⁸⁴ While conflict in Colombia remains ongoing,²⁸⁵ Colombia’s peace process with the FARC has been at the vanguard of addressing SOGI-based persecution in conflict. Most important for this Article’s purposes, Colombia’s Special Jurisdiction for Peace (*Jurisdicción Especial Para La Paz*, or “JEP”) is the first internationalized criminal tribunal to

²⁸² OFFICE OF THE PROSECUTOR, *supra* note 1, ¶¶ 10, 33 n. 41; OFFICE OF THE PROSECUTOR, POLICY PAPER ON CHILDREN ¶¶ 21, 35 n. 47 (2023).

²⁸³ Prosecutor v. Kony, ICC-02/04-01/05, Document Containing the Charges ¶ 20-25 (Jan. 19, 2024).

²⁸⁴ Nick Miroff, *Colombian Government and FARC Rebels Announce Peace Deal*, WASH. POST (Aug. 24, 2016, at 10:47 PM), https://www.washingtonpost.com/world/colombia-government-and-farc-rebels-ready-to-announce-peace-deal/2016/08/24/32ac13b6-d796-4d70-b2f9-da75d9e43bbb_story.html [<https://perma.cc/XX44-JJNE>].

²⁸⁵ *The Human Cost of Armed Conflicts in Colombia*, INTERNATIONAL COMMITTEE OF THE RED CROSS (Apr. 3, 2024) <https://www.icrc.org/en/document/human-cost-armed-conflicts-Colombia> [<https://perma.cc/VTK7-T4PH>].

adjudicate SOGI-based persecution as a crime of persecution.²⁸⁶ Colombia is also a state party to the Rome Statute, and its domestic proceedings expressly took account of the crime of persecution as defined in the Statute.²⁸⁷ Colombia's experience thus offers direct lessons for interpreting SOGI-based persecution as a crime of persecution, and thus a crime against humanity, under international law.

In 2012, the Juan Manuel Santos administration began efforts to end Colombia's civil war.²⁸⁸ Women—let alone LGBTQI+ individuals—were not initially part of these negotiations. After significant lobbying by women's organizations, the parties launched a negotiating subcommittee on gender, which elevated the importance of addressing sexual violence, gender-based crimes, and the rights of women and gender-diverse individuals in the peace process.²⁸⁹ In 2016, the two parties signed the Havana Agreement.²⁹⁰ After a failed plebiscite and renegotiations,²⁹¹ the Final Agreement for the Termination of the Conflict and Construction of a Stable and Lasting Peace (“Final Agreement”) was reached in November 2016.²⁹² The Colombian Congress voted unanimously to approve the Final Agreement.²⁹³ In December, Colombia's highest court upheld the validity and

²⁸⁶ Though the JEP is a domestic tribunal, it has relied heavily on the Rome Statute as the applicable law. Both the Peace Agreement ending the conflict, as well as the JEP's enabling legislation, directed it to apply the Rome Statute and jurisprudence of the ICC. *Acuerdo Final Para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera* [Final Agreement for the Termination of the Conflict and Construction of a Stable and Lasting Peace], pmbi., 147, Colom.-FARC, Nov. 24, 2016 [hereinafter “Final Agreement”]; L. 01/2017, art. 1., abril 4, 2017, GESTOR NORMATIVO (Colom.); L. 1957/19, junio 6, 2019, GESTOR NORMATIVO (Colom.).

²⁸⁷ Indeed, the JEP played an important role in the ICC Prosecutor's decision to close the investigation into the Colombia situation. See OFFICE OF THE PROSECUTOR, REPORT ON THE SITUATION IN COLOMBIA 12 (2023), <https://www.icc-cpi.int/sites/default/files/2023-11/2023-11-30-otp-report-colombia-eng.pdf> [<https://perma.cc/7VKJ-S2KH>] (“For the purposes of its admissibility assessment in the Situation of Colombia, the Office considered the ongoing and progressive nature of relevant domestic proceedings and the prospects for domestic efforts to prioritise the investigations and prosecutions of relevant and genuine cases concerning these categories of conduct.”). There is of course nothing in the Statute that prohibits states from adopting a *more* comprehensive approach to accountability than provided in the Statute.

²⁸⁸ For Santos' account of negotiating peace, see JUAN MANUEL SANTOS, *THE BATTLE FOR PEACE: THE LONG ROAD TO ENDING A WAR WITH THE WORLD'S OLDEST GUERRILLA ARMY* (2021).

²⁸⁹ Gimena Sánchez-Garzoli, *Women Are Key to Making Peace Last in War-Torn Colombia*, WASHINGTON OFFICE ON LATIN AMERICA (Jan. 18, 2015), <https://www.wola.org/analysis/women-are-key-to-making-peace-last-in-war-torn-colombia/> [<https://perma.cc/3PWM-LNE6>]; Roxanne Krystalli, *The Colombian Peace Agreement Has a Big Emphasis on the Lives of Women. Here's How*, WASH. POST (Aug. 19, 2016, at 1:00 PM), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/08/19/the-colombian-peace-agreement-gives-gender-issues-a-central-role-heres-why-this-is-so-important/> [<https://perma.cc/4LZD-7PDV>].

²⁹⁰ Miroff, *supra* note 284.

²⁹¹ Nick Miroff, *Colombians Vote Against Historic Peace Agreement with FARC Rebels*, WASH. POST (Oct. 2, 2016, at 8:18 P.M.), https://www.washingtonpost.com/world/colombians-vote-on-historic-peace-agreement-with-farc-rebels/2016/10/02/8ef1a2a2-84b4-11e6-b57d-dd49277af02f_story.html [<https://perma.cc/U78N-KNHH>]. Note, President Santos attributes the defeat, in part, to opposition to its provisions on LGBTQI+ individuals and gender. See SANTOS, *supra* note 288.

²⁹² Final Agreement, *supra* note 286, preamble.

²⁹³ Joshua Partlow & Nick Miroff, *Colombia's Congress Approves Historic Peace Deal with FARC Rebels*, WASH. POST (Nov. 30, 2016, 9:40 PM), https://www.washingtonpost.com/world/the_americas/colombian-congress-approves-historic-peace-deal/2016/11/30/9b2fda92-b5a7-11e6-939c-91749443c5e5_story.html [<https://perma.cc/ZV7D-BDXM>].

constitutionality of Congress's vote, meaning that the war with the FARC formally ended.²⁹⁴

The Final Agreement established the framework for Colombia's peace process, including ensuring a gender- and LGBTIQ+-sensitive approach.²⁹⁵ Both the government and FARC pledged to respect, guarantee, and promote human rights, place special emphasis on the protection of women, and to "guarantee an effective administration of justice in cases of gender-based violence, free from stereotypes of LGBTI persons."²⁹⁶ The Final Agreement also called for the establishment of a Comprehensive System of Truth, Justice, Reparation, and Non-Repetition made up of three core institutions: the Truth Commission; a victim's search unit; and the JEP. The Comprehensive System was required to have an equity- and gender-based approach, intended to adapt and respond to the victimization of each population, including the LGBTIQ+ population.²⁹⁷ The Truth Commission initially identified 369 individuals who suffered over 700 violent events *because* of their SOGI.²⁹⁸

While all three institutions have played a role in addressing SOGI-based persecution, the JEP's path has been the most groundbreaking for criminal law. The JEP is a transitional, temporary, independent, and autonomous legal regime. The tribunal serves as the preferred forum for trying conduct committed before 2016 due directly or indirectly to the conflict, giving it jurisdiction over fifty years of crimes.²⁹⁹ The tribunal began work in March 2018, though final approval of its statutory law remained pending until 2019.³⁰⁰ When passed, the JEP statute ordered the JEP chamber charged with identifying cases to specifically examine SOGI discrimination.³⁰¹ In total, the JEP has divided its work into eleven different "macro cases" that vary by nature of crimes, geographic regions, and communities. Across these cases, the JEP has adopted a progressive interpretation of gender and persecution that recognizes and creates a pathway to justice for LGBTIQ+ victims.³⁰²

²⁹⁴ *¿Qué Significa la Aprobación del Llamado "Fast Track" Que Acelera los Acuerdos de Paz en Colombia?* [What Does the Approval of the So-Called "Fast Track" that Accelerates the Peace Agreements in Colombia Mean?] BBC (Dec. 13, 2016) <https://www.bbc.com/mundo/noticias-america-latina-38308902> [<https://perma.cc/FS2L-GYTM>].

²⁹⁵ Final Agreement, *supra* note 286.

²⁹⁶ *Id.* at 79 ("garantizar una administración de justicia efectiva en casos de violencia de género, libre de estereotipos sobre las personas LGBTI").

²⁹⁷ *Id.* at 126, 128.

²⁹⁸ COMISIÓN PARA EL ESCLARECIMIENTO DE LA VERDAD, LA CONVIVENCIA Y LA NO REPETICIÓN [COMMISSION FOR THE CLARIFICATION OF TRUTH, COEXISTENCE, AND NON-REPETITION] [TRUTH COMMISSION], *MI CUERPO ES LA VERDAD: EXPERIENCIAS DE MUJERES Y DE PERSONAS LGBTIQ+ EN EL CONFLICTO ARMADO* [MY BODY IS THE TRUTH: EXPERIENCES OF WOMEN AND LGBTIQ+ PERSONS IN THE ARMED CONFLICT] 244-45 (Col. 2022). The Truth Commission emphasized that these figures were likely undercounts, in part due to the difficulty and stigmas around reporting. *Id.* The Victim's Unit Registry, for instance, has identified over 6,000 crimes. See Marcela Sánchez, *UN Security Council Briefing on Colombia*, WORKING GROUP ON WOMEN, PEACE, AND SECURITY (Apr. 19, 2024), <https://www.womenpeacesecurity.org/resource/un-security-council-briefing-colombia-marcela-sanchez/> [<https://perma.cc/2MF3-PSEN>].

²⁹⁹ L. 01/2017, art. 5., Apr. 4, 2017, GESTOR NORMATIVO; Final Agreement, *supra* note 286, at 144-45.

³⁰⁰ L. 1957/19, June 6, 2019, GESTOR NORMATIVO.

³⁰¹ *Id.* art. 19.

³⁰² It is important to note, however, that at the time of writing, the JEP has not issued final rulings in any case involving persecution against LGBTIQ+ individuals.

In 2019, the JEP received its first evidence of SOGI-based persecution and systematic discriminatory violence against LGBTQI+ persons during the armed conflict for macro case 02.³⁰³ The JEP did not immediately rule on the admissibility of such claims or accredit LGBTQI+ victims to macro case 02. In 2021, however, the JEP accredited five LGBTQI+ individuals as victims in macro case 05—the first such accreditation of LGBTQI+ victims.³⁰⁴ In its decision, the Chamber of Recognition of Truth, Responsibility, and Determination of the Facts and Conduct addressed the JEP’s competence to hear cases of LGBTQI+ persecution.³⁰⁵

Drawing from its statutory and Final Agreement mandates, the Chamber looked to the work of the ICCPR and International Covenant on Economic, Social, and Cultural Rights (ICESCR) Committees, cases decided by the Inter-American Court, and Colombian law to deduce that “discrimination against members of the [LGBTQI+] community on the basis of sexual orientation or gender identity is prohibited” under international, regional, and domestic law.³⁰⁶ Citing the work of UN special rapporteurs, UN agencies, and the Inter-American Commission, the Chamber outlined how violence against LGBTQI+ individuals can constitute a grave violation of their human rights, such as when done as part of “social cleansing.”³⁰⁷ While the Chamber held that the JEP could *not* hear cases related to all violations of human rights, it ruled the JEP could hear violations that amounted to crimes against humanity.³⁰⁸ Invoking the Rome Statute, the Chamber concluded that persecution against the LGBTQI+ community could fall within the crime against humanity of persecution as either gender persecution *or* on the basis of other grounds universally recognized as impermissible under international law.³⁰⁹ Notably, the interlocutory decision did not specify *which* route the JEP would take—only that there were two paths prosecutors could pursue. Thus, the Chamber found the JEP was competent to hear cases of LGBTQI+ persecution.³¹⁰

A key step forward took place in response to the persecution and murder of José Rubiel Llanos Arias, discussed in the opening of this Article. A year after the aforementioned interlocutory decision, the JEP answered whether it would pursue SOGI-based persecution as gender persecution or as a distinct category recognized

³⁰³ Carolina Ávila Cortés, *JEP Recibe Primer Informe Sobre Persecución a Población LGBT en el Conflicto Armado* [The JEP Receives the First Report on Persecution of the LGBT Population in the Armed Conflict] EL ESPECTADOR (Mar. 29, 2019, 9:00 A.M.) <https://www.elespectador.com/colombia-20/jep-y-desaparecidos/jep-recibe-primer-informe-sobre-persecucion-a-poblacion-lgbt-en-el-conflicto-armado-articulo/> [https://perma.cc/RGT9-2HHH]; *Colombia Diversa y Caribe Afirmativo Entregan Informes Sobre Violencia Sexual a la JEP* [Colombia Diversa and Caribe Afirmativo Submit Reports About Sexual Violence to the JEP], JURISDICCIÓN ESPECIAL PARA LA PAZ (2019) <https://www.jep.gov.co/Sala-de-Prensa/Paginas/Colombia-Diversa-y-Caribe-Afirmativo-entregaron-informes-sobre-violencia-sexual-a-la-JEP.aspx> [https://perma.cc/UEN5-H5ZH].

³⁰⁴ *Comunicado 045 de 2021: JEP Acredita a Integrantes de Comunidad LGBTI Como Víctimas en el Sur del País*, JURISDICCIÓN ESPECIAL PARA LA PAZ (Apr. 16, 2021), <https://www.jep.gov.co/Sala-de-Prensa/Paginas/JEP-acredita-a-integrantes-de-comunidad-LGBTI-como-v%C3%ADctimas-en-el-sur-del-pa%C3%ADs.aspx> [https://perma.cc/TA7Z-BF9Z].

³⁰⁵ JEP, Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas, abril 14, 2021, Caso 05, Auto 066 de 2021, Expediente 2018340160501256E (Colom.).

³⁰⁶ *Id.* at 8-10.

³⁰⁷ *Id.* at 10-12.

³⁰⁸ *Id.* at 12.

³⁰⁹ *Id.* at 15-16.

³¹⁰ *Id.* at 25.

under international law. As part of the “false positives” trials,³¹¹ the JEP charged retired Sergeant Wilfrido Domínguez Márquez with gender persecution for his role in the capture, execution, and cover-up of José’s murder.³¹² Domínguez had ordered the persecution as part of an effort to search and “clean [the area] of undesirable persons,” especially gay men.³¹³ Domínguez and others pejoratively described gay men as “detestable faggots” who “groped children,” leveling similar slurs at José as they beat him.³¹⁴

In considering the charges against Domínguez, the Chamber expanded upon its justifications for addressing gender persecution. The Chamber grounded its analysis in the evolution of persecution as a crime against humanity from Nuremberg to the Rome Statute.³¹⁵ It also focused exclusively on gender persecution, arguing that through position papers, the ICC Office of the Prosecutor had “broadened the concept of gender, understanding it as the ‘social construction of gender’ . . . [opening] the door for sexual orientation or gender to be considered grounds for discrimination that could be prosecuted under the crime of persecution.”³¹⁶

In 2023, the JEP Chamber issued another landmark decision in macro case 02 (the same macro case for which evidence was brought in 2019), finding that there were sufficient grounds to conclude persecution against persons with diverse sexual orientations had occurred.³¹⁷ In this decision, the Chamber relied heavily on the Office of the ICC Prosecutor’s policy papers on gender-based crimes and gender persecution and the *Al Hassan* case to emphasize that gender is a social construct and that gender persecution includes LGBTQI+ persecution.³¹⁸ However, the Chamber also clarified that it *still* believed SOGI-based persecution could fall within persecution on “other grounds universally recognized as impermissible under international law.”³¹⁹

Colombia’s peace process and the JEP thus concluded that SOGI-based persecution was not only prohibited by international law, but also that it fell within the Rome Statute’s definition of the crime of persecution. Additionally, Colombia charts two possible paths forward for addressing SOGI-based persecution—both of which it regarded as equally valid under international criminal law: gender persecution or persecution on other grounds. In the words of the Office of the ICC

³¹¹ From 2002 to 2008, Colombian armed forces kidnapped and executed more than 6,400 civilians and falsely reported them as Marxist guerillas killed in combat—a scandal known as the “false positives” case. See John Otis, *Colombia’s Tribunal Exposes How Troops Kidnapped and Killed Thousands of Civilians*, NPR (June 28, 2022, 5:05 AM) <https://www.npr.org/2022/06/28/1103324447/colombia-war-crimes-tribunal> [<https://perma.cc/S8N7-RQAE>].

³¹² Subcaso Casanare 055, *supra* note 8.

³¹³ *Id.* ¶¶ 634, 638-40 (“limpiar Tauramena de personas indeseables . . . maricas detestables”).

³¹⁴ *Id.* ¶¶ 638-40, n. 528.

³¹⁵ *Id.* ¶¶ 623-33.

³¹⁶ *Id.* ¶ 635 (“el *policy paper* de 2014 de la Oficina de la Fiscalía de la CPI amplió el concepto de género y lo entendió como la “construcción social de género”. Así, se abrió la puerta para que la orientación sexual o el género constituyeran motivos de discriminación que pudieran ser juzgados bajo el crimen de persecución.”).

³¹⁷ JEP, Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas, julio 5, 2023, Caso 02, Auto No. 03 de la SRVR, Expediente 9002762-92.2018.0.00.0001/0002 (Colom.), ¶ 1428.

³¹⁸ *Id.* ¶ 1488.

³¹⁹ *Id.* ¶ 1491.

Prosecutor, the JEP can serve “as an example for those seeking new ways to deliver impactful, comprehensive justice.”³²⁰

2. *How States Can Build on Colombia’s Example*

States can build on Colombia’s example by moving forward with domestic prosecutions of SOGI-based persecution alongside other forms of persecution. States can do this, first, by exercising territorial jurisdiction over the crime of persecution as provided for in their domestic criminal law. Ukraine offers an ideal case for this innovation. Russia has engaged in extensive persecution of LGBTQI+ persons during the illegal Russian invasion of Ukraine. Russian leaders, including Vladimir Putin, have intensified a legal and ideological campaign to target, dehumanize, and punish LGBTQI+ individuals and organizations at home and abroad.³²¹ Indeed, there are many known instances of Russian crimes against LGBTQI+ Ukrainians, including those committed against Oleksii, as described in the opening of this Article. Given this well-documented record, the situation in Ukraine offers a clear opportunity to advance international criminal law’s jurisprudence on SOGI-based persecution.

Ukraine became the newest party to the Rome Statute in August 2024. When it acceded to the Rome Statute, Ukraine passed a law implementing the Rome Statute into Ukrainian domestic criminal law. The “Law on the Ratification of the Rome Statute of the International Criminal Court and its amendments” became effective after its adoption by the Verkhovna Rada (Ukraine’s Parliament) on August 21, 2024, paving the way for Ukraine to join the ICC.³²² As part of the domestic ratification process, Ukraine adopted legislation to amend its criminal code and criminal

³²⁰ OFFICE OF THE PROSECUTOR, *supra* note 287, at 18.

³²¹ See Vladimir Putin, *Presidential Address to Federal Assembly*, PRESIDENT OF RUSSIA (Feb. 23, 2023), <http://en.kremlin.ru/events/president/news/70565> [<https://perma.cc/NMH4-BDQ9>] (claiming LGBTQI+ individuals threaten Russian national identity); *Russia: Supreme Court Bans “LGBT Movement” as “Extremist,”* HUM. RTS. WATCH (Nov. 30, 2023, 8:00 AM), <https://www.hrw.org/news/2023/11/30/russia-supreme-court-bans-lgbt-movement-extremist> [<https://perma.cc/LYL7-TP2W>]; Sergey Katsuba, *The Decade of Violence: A Comprehensive Analysis of Hate Crimes Against LGBTQ in Russia in the Era of the “Gay Propaganda Law” (2010-2020)*, 19 VICTIMS & OFFENDERS 395 (2024); *Russia: Expanded ‘Gay Propaganda’ Ban Progresses Toward Law*, HUM. RTS. WATCH (Nov. 25, 2022, 9:30 AM), <https://www.hrw.org/news/2022/11/25/russia-expanded-gay-propaganda-ban-progresses-toward-law> [<https://perma.cc/7EEC-NJXZ>]; *Putin Signs Law Expanding Russia’s Rules Against ‘LGBT Propaganda,’* REUTERS (Dec. 5, 2022, 11:39 AM), <https://www.reuters.com/world/europe/putin-signs-law-expanding-russias-rules-against-lgbt-propaganda-2022-12-05/> [<https://perma.cc/KZE3-M9BA>]; Darya Tarasova, Gul Tuysuv, & Jen Deaton, *Police Raid Gay Venues in Russia After Top Court Bans ‘International LGBTQ Movement,’* CNN (Dec. 4, 2023, 1:07 AM), <https://www.cnn.com/2023/12/04/europe/police-raid-gay-venues-russia-intl-hnk/index.html> [<https://perma.cc/QUN3-ER3E>]; *Russia: Officials Target Drag Show in First-Ever LGBTI-Related ‘Extremism’ Case*, AMNESTY INT’L (Mar. 19, 2024), <https://www.amnesty.org/en/latest/news/2024/03/russia-officials-target-drag-show-in-first-ever-lgbti-related-extremism-case/> [<https://perma.cc/EE9B-5FYS>]; Greg Owen, *Russia Is Building an Electronic Registry of LGBTQ+ Citizens*, LGBTQ NATION (Jan. 31, 2025), <https://www.lgbtqnation.com/2025/01/russia-is-building-an-electronic-registry-of-lgbtq-citizens/> [<https://perma.cc/EK7K-QEQG>].

³²² *Ukraine Becomes the 125th State Party to the ICC Rome Statute*, COAL. FOR THE INT’L CRIM. CT., (Jan. 22, 2025), <https://www.coalitionfortheicc.org/ukraine-becomes-125th-ICC-state-party#:~:text=22%20January%202025,to%20join%20the%20ICC%20Statute> [<https://perma.cc/DEJ7-SARJ>].

procedure,³²³ together with the ratification bill. When President of Ukraine Volodymyr Zelenskyy signed the amending legislation on October 22, 2024, following its adoption by the Ukrainian Parliament, it became law, thus completing the domestic ratification process.

To bring Ukrainian domestic law into conformity with the Rome Statute, the new law added “crimes against humanity” to the Ukrainian criminal code at Article 442-1. The amendments to the criminal code largely matched the definitions of crimes against humanity in the Rome Statute, including defining persecution to include persecution on the ground of gender.³²⁴ However, the Ukrainian law omitted the definition of gender included in the Rome Statute.³²⁵ In addition, as part of Ukraine’s commitments under its Association Agreement with the European Union, the Ministry of Internal Affairs also cooperated with lawmakers to draft a law that would explicitly recognize sexual orientation and gender identity as protected grounds from discrimination.³²⁶ As a result, Ukraine could prosecute Russians involved in SOGI-based persecution against Ukrainians in Ukraine under the new statute. It could do so, moreover, without having to contend with the definition of gender in the Rome Statute.

Myanmar offers a similar opportunity for domestic prosecution, though any real progress is almost certainly contingent on a change in government. There is ample evidence of gender-based crimes committed against Rohingya, including SOGI-based persecution.³²⁷ The National Unity Government (NUG), which is currently vying with the military junta, the Tatmadaw, for control of the country, submitted a Declaration to the International Criminal Court accepting the Court’s exercise of jurisdiction with respect to the situation in Myanmar back to 2002.³²⁸ The

³²³ Проект Закону про внесення змін до Кримінального та Кримінального процесуального кодексів України у зв’язку з ратифікацією Римського статуту Міжнародного кримінального суду та поправок до нього [Draft Law on Amendments to the Criminal and Criminal Procedure Codes of Ukraine in Connection with the Ratification of the Rome Statute of the International Criminal Court and Amendments Thereto] (Oct. 9, 2024), <https://itd.rada.gov.ua/billInfo/Bills/Card/44725> [<https://perma.cc/PC86-3ZVJ>].

³²⁴ *Id.* (Стаття 442 1.1: “переслідування будь-якої групи або спільноти, яка може бути ідентифікована, тобто обмеження прав людини за політичними, расовими, національними, етнічними, культурними, релігійними, статевими або іншими підставами (ознаками) дискримінації, визначеними міжнародним правом як неприпустимі” [Article 442 1.1: “persecution of any identifiable group or community, i.e. restriction of human rights on political, racial, national, ethnic, cultural, religious, sexual or other grounds (marks) of discrimination defined by international law as unacceptable”]).

³²⁵ *Id.* Omitting the definition of gender does not restrict accountability for the crime of persecution; if it has any effect, it would be to expand it. States parties are always free to enact laws that are *more* protective than those provided for in the Rome Statute. The Statute establishes a floor, not a ceiling.

³²⁶ *New Bill in Ukrainian Parliament Aims to Toughen Penalties for Hate Crimes*, RUBRYKA (Aug. 4, 2025, 5:52 PM) <https://rubryka.com/en/2025/08/04/zakonoprojekt-za-zlochyny-na-gruntineterpymosti/> [<https://perma.cc/2CVN-CUL3>].

³²⁷ U.N. Indep. Investigative Mechanism for Myanmar, *Efforts to Investigate and Punish Sexual and Gender-Based Crimes Committed Against Rohingya: Evidence Analysis* (2024), https://imm.un.org/wp-content/uploads/2024/03/SGBC-Report_EN.pdf [<https://perma.cc/QB38-WVJK>].

³²⁸ Ralph Wilde, *Can the National Unity Government (NUG) of Myanmar Represent that State for the Purposes of Accepting the Jurisdiction of the International Criminal Court?*, OPINIOJURIS (Aug. 17, 2022), <http://opiniojuris.org/2022/08/17/can-the-national-unity-government-nug-of-myanmar-represent-that-state-for-the-purposes-of-accepting-the-jurisdiction-of-the-international-criminal->

Court has not yet acted on that Declaration, likely due to the lack of clarity of the legal authority of the NUG to represent Myanmar as a matter of international law. However, that could change.³²⁹ Were the NUG to gain control over more of the territory of the country and hold it for some period of time, it is likely that it would be recognized as the government of Myanmar for international purposes.³³⁰ If that were to happen, the ICC might accept the declaration, giving the court jurisdiction over crimes committed in the country.

Regardless of whether an investigation moves forward at the ICC, a change in government would set the stage for domestic accountability for crimes that have taken place under the military junta, among them SOGI-based persecution. The NUG has adopted the “Myanmar Federal Democracy Charter,” a framework constitution intended to act as a guide for the drafting of a new national constitution and creation of a transitional government.³³¹ This Charter calls for the participation of women and lists non-discrimination on the basis of gender and sexual orientation as a founding value.³³² Moreover, the NUG has recognized that the “regime forces have been hunting the LGBT people,” such as by raiding homes, targeting LGBTQI+ groups, and arresting LGBTQI+ individuals.³³³

As in Colombia, an effort at accountability for crimes committed during the civil war could and should include SOGI-based persecution, thus providing accountability for citizens of Myanmar and contributing to the development of international law. Promisingly, the NUG has already called for special protections for LGBTQI+ individuals and their participation in peace processes.³³⁴

Thus far, we have considered opportunities for states to provide accountability for SOGI-based persecution based on territorial jurisdiction. But there is also a case for states to advance the development of the law through exercising universal jurisdiction over SOGI-based persecution. Indeed, in February 2025, an Argentine court ordered arrest warrants against Myanmar’s president and head of the military junta, Senior Gen. Min Aung Hlaing, along with more than twenty other government and former government officials (including, controversially Myanmar’s deposed civilian leaders, State Counsellor Aung San Suu Kyi and President Htin Kyaw) for crimes committed against the Rohingya Muslim minority, including genocide and crimes against humanity.³³⁵ It did so under the principle of universal

court/#:~:text=This%20Saturday%2C%2020%20August%202022,the%20basis%20of%20Article%2012 [https://perma.cc/75L5-2D2H].

³²⁹ Justin Cole, Alaa Hachem & Oona A. Hathaway, *Recognition Rules: The Case for a New International Law of Government Recognition*, 100 N.Y.U. L. REV. 785 (2025).

³³⁰ *Id.* 817-33.

³³¹ FEDERAL DEMOCRACY CHARTER, PART-I [CONSTITUTION] 2021 (Myan.).

³³² *Id.* at ch. 4, pt. 3, ¶¶ 22, 25.

³³³ MINISTRY OF WOMEN, YOUTH, AND CHILDREN AFFAIRS, ABUSE OF LGBTQI COMMUNITIES WIDESPREAD IN POST-COUP MYANMAR 1-2 (2022) (Myan.).

³³⁴ *Id.* at 8.

³³⁵ RFA Burmese, *Argentine Court Calls for Arrest Warrant for Myanmar Junta Chief*, BENAR NEWS (February 14, 2025), <https://www.benarnews.org/english/news/bengali/argentina-court-myanmar-junta-chief-rohingya-02142025075157.html> [https://perma.cc/UW9C-5M26]; Ewelina U. Ochab, *Argentine Court Issues Arrest Warrants in Rohingya Genocide Case*, FORBES (Feb. 14, 2025), <https://www.forbes.com/sites/ewelinaochab/2025/02/14/argentine-court-issues-arrest-warrants-in-rohingya-genocide-case/> [https://perma.cc/N6GP-Y2VL]; Asymmetrical Haircuts, *How Argentina Deals With Sexual Crimes Against the Rohingya*, JUST. INFO

jurisdiction. Universal jurisdiction allows a country's courts to prosecute certain serious international crimes, including crimes against humanity, even if the crime has no connection to that state.³³⁶

There are many states that could potentially pursue universal jurisdiction cases for SOGI-based persecution. A study by Amnesty International found that as of September 2012, at least 92 states had included at least one crime against humanity as a crime under their domestic law and at least 80 had provided for universal jurisdiction over such crimes.³³⁷ That number has undoubtedly grown in the nearly fifteen years since that study was done. That means there are a significant number of countries that could contribute to the development of the law through prosecuting SOGI-based persecution. Relying on universal jurisdiction, however, faces additional hurdles—including challenges of gaining custody of the perpetrator, concerns about legality (particularly if the country in which the crime was committed defines the crime differently than does the prosecuting state), and concerns about comity and infringing on the sovereignty of the state in which the act took place. For these reasons, states considering exercising universal jurisdiction generally proceed cautiously in doing so.

V. CONCLUSION

Almost since the moment of its inception, the crime of persecution has evolved to include new protected grounds. After World War II, the crime was originally limited to political, racial, or religious grounds in the Nuremberg Tribunal (and only political and racial grounds in the Tokyo Tribunal). Five decades later, the Trial Chamber of the ICTY recognized that a “narrow definition of persecution is not supported in customary international law.”³³⁸ The authors of the Rome Statute codified that insight, expanding the crime of persecution to include persecution on “political, racial, national, ethnic, cultural, religious, gender . . . , or other grounds that are universally recognized as impermissible under international law.”³³⁹

Among the new grounds expressly protected in the Rome Statute was persecution based on gender. Gender was included in significant part because of growing recognition that gender has long been a basis for discrimination and persecution, and it was long past time for the law to recognize it as such. Now the international community faces the question of whether the crime of persecution

(May 9, 2025), <https://www.justiceinfo.net/en/145103-how-argentina-deals-with-sexual-crimes-against-the-rohingya.html> [<https://perma.cc/UH5M-KWVK>].

³³⁶ *What is Universal Jurisdiction?* CTR. FOR JUST. & ACCOUNTABILITY, <https://cja.org/what-we-do/litigation/legal-strategy/universal-jurisdiction/> [<https://perma.cc/X9AY-ZG44>].

³³⁷ AMNESTY INT'L, UNIVERSAL JURISDICTION: A PRELIMINARY SURVEY OF LEGISLATION AROUND THE WORLD—2012 UPDATE 13 (2012), <https://www.amnesty.org/en/documents/ior53/019/2012/en/> [<https://perma.cc/ET3Z-9LN4>]. *But see* Ryan Goodman, *Counting Universal Jurisdiction States: What's Wrong with Amnesty International's Number*, JUST SEC. (Dec. 13, 2013), <https://www.justsecurity.org/4581/amnesty-international-universal-jurisdiction-preliminary-survey-legislation-world/> [<https://perma.cc/SS8C-8UNW>]. There has been a longstanding effort in the United States to enact crimes against humanity legislation, but it has thus far proven unsuccessful. David Scheffer & Kristin Smith, *Congress Should Close the "Crimes Against Humanity" Loophole*, JUST SEC. (Feb. 17, 2023), <https://www.justsecurity.org/85135/congress-should-close-the-crimes-against-humanity-loophole/> [<https://perma.cc/74M2-KULV>].

³³⁸ Kupreškić, *supra* note 84, ¶ 615.

³³⁹ *Id.* ¶ 578 (quoting Rome Statute, *supra* note 13, art. 7(1)(h)).

encompasses SOGI-based persecution. This Article has argued that it is time to recognize SOGI-based persecution under international criminal law because persecution based on sexual orientation or gender identity represents a denial of rights every bit as fundamental as persecution based on political, racial, and religious identity.

The International Criminal Court is poised to take this critical step and, indeed, it has many opportunities before it to formalize the interpretation of gender-based persecution to include SOGI-based persecution. Yet States need not wait on the Court. They can follow Colombia's example and interpret the crime of persecution to include SOGI-based persecution. Domestic legislators and domestic courts can act now to not only provide accountability for SOGI-based persecution committed through their own legal systems but also influence the evolution of international law. By prosecuting SOGI-based persecution as a crime of persecution, States can further strengthen the case that such persecution is internationally condemned. In doing so, States can serve as engines of equality and rights-protection at a moment when those very rights are too often under attack.