

NOTES

CRIES FROM A DOG CAGE: THE CASE FOR THE PUBLIC AND INTENTIONAL INCLUSION OF SEXUAL ORIENTATION AND GENDER IDENTITY IN THE INTERNATIONAL CRIMINAL COURT'S GENDER-BASED PERSECUTION ANALYSIS

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ABSTRACT

The world is experiencing a precipitous rise in the legitimization of anti-LGBTQ+ sentiment, stigmatization, and hate crimes. Sixty-seven jurisdictions criminalize same-sex intimacy, eleven impose the death penalty, and fourteen criminalize the gender identity and/or expression of transgender people. Although some have labeled the worldwide targeting of the LGBTQ+ community a “genocide in all but name,” protections for LGBTQ+ people within the international legal system are sorely lacking. As such, this Note argues that sexual orientation and gender identity should be intentionally and publicly incorporated into the International Criminal Court (the Court)’s systematic approach to sexual and gender-related crimes as part of the Court’s new policy initiative to advance accountability for gender persecution. As it stands, instances of persecution on the grounds of sexual orientation and gender identity have never been successfully prosecuted. This failure may be partly due to the fact that “sexual orientation and gender identity” is not an explicitly enumerated ground for persecution recognized by the Court’s implementing document, the Rome Statute.

Rather than creating a new explicitly enumerated ground to encompass the vitally needed protection, this Note argues that “gender,” as defined in Article 7, paragraph 3 of the Rome Statute, is already sufficiently broad to encompass sexual orientation and gender identity. Moreover, such inclusion is necessary if the Court is to provide a complete, accurate, and systematic approach to dealing with serious gender-related crimes. Situations in Afghanistan and Ukraine are

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then used to showcase both the applicability and need for the inclusion of such analysis. First, with Afghanistan, this Note highlights how the LGBTQ+ community is currently subject to persecution on the basis of sexual orientation and gender identity. Second, in Ukraine, this Note examines how the principle of positive complementarity may help to prevent persecution based on the same. In summary, this Note seeks to expand protections for the worldwide LGBTQ+ community and hopes to spur a much-needed counterbalance to the precipitous rise in anti-LGBTQ+ sentiment, stigmatization, and hate crimes.

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I. INTRODUCTION

In 2016, a man walked into a popular gay nightclub in Orlando, Florida and murdered forty-nine people before pledging his allegiance to the Islamic State.¹ In 2017, 100 gay men were tortured or killed as part of an “anti-gay purge” in the southern Russian republic of Chechnya.² From Uganda’s Anti-Homosexuality Act³ and Russia’s “Gay Propaganda” law⁴ to Poland’s “LGBT-free zones”⁵ and the rash of “Don’t Say Gay” legislation sweeping the United States,⁶ the world has recently seen a precipitous rise in the legitimization of anti-LGBTQ+ sentiment and stigmatization. Currently, sixty-five jurisdictions criminalize same-sex sexual contact, with twelve imposing the death penalty

1. See Elizabeth McLaughlin, *Under ISIS: Where Being Gay is Punished by Death*, AM. BROAD. CORP. NEWS (June 13, 2016, 5:46 PM), <https://abcnews.go.com/International/isis-gay-punished-death/story?id=39826182>.

2. See Annika Burgess, *What Russia’s Invasion Means for LGBTQI People in Ukraine*, AUSTL. BROAD. CORP. NEWS (Mar. 27, 2022, 4:24 PM), <https://www.abc.net.au/news/2022-03-28/lgbtq-rights-russia-invasion-kyiv-queer-activism/100932590>.

3. See Uganda: *Anti-Homosexuality Act’s Heavy Toll*, HUM. RTS. WATCH (May 14, 2014, 11:57 PM), <https://www.hrw.org/news/2014/05/14/uganda-anti-homosexuality-acts-heavy-toll>.

4. See HUMAN RIGHTS WATCH, NO SUPPORT: RUSSIA’S “GAY PROPAGANDA” LAW IMPERILS LGBT YOUTH 5 (2018).

5. See Lucy Ash, *Inside Poland’s ‘LGBT-Free Zones,’* BBC NEWS (Sept. 21, 2020), <https://www.bbc.com/news/stories-54191344>.

6. See Trudy Ring, *16 States Pushing ‘Don’t Say Gay’ Bills and Censorship Laws Right Now*, ADVOC. (Mar. 29, 2022), <https://www.advocate.com/law/2022/3/29/16-states-pushing-dont-say-gay-bills-and-censorship-laws-right-now#media-gallery-media-2>.

and fourteen criminalizing gender identity and expression of transgender people.⁷ This is all despite the fact that the prohibition on cruel, inhumane, and degrading treatment is non-derogable,⁸ and laws criminalizing homosexuality frequently allow the severe mistreatment of LGBTQ+ persons to be conducted with impunity.⁹

As such, in many jurisdictions throughout the world, LGBTQ+ people are fighting what some have labeled a “genocide in all but name.”¹⁰ However, the intent to destroy the LGBTQ+ community in whole or in part cannot qualify as genocide as sexual orientation and gender identity do not fall within one of the crime’s specifically enumerated national, ethnic, racial, or religious protected groups.¹¹ In fact, despite the 1946 United Nations General Assembly Resolution broadly describing genocide as the “denial of the right of existence of entire human groups,”¹² the drafters of the subsequent Genocide Convention intentionally excluded political, economic, and social groups.¹³

While debate may be had over the need to expand the list of protected groups within the Genocide Convention, the threat to the LGBTQ+ community worldwide is of immediate concern. One potentially more direct avenue through which to address the issue is the International Criminal Court (the Court), whose mission is to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community.¹⁴ The Court’s jurisdiction includes genocide, crimes against humanity, war crimes, and the crime of aggression.¹⁵ Importantly, the crime against humanity of persecution

7. *Map of Countries that Criminalise LGBT People*, HUM. DIGNITY TR., <https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/> (last visited Oct. 7, 2023).

8. Comm. Against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, ¶ 3, CAT/C/GC/2, (Jan. 24 2008) [hereinafter *General Comment No. 2*].

9. See Christina Warner, *The ICC, The Rome Statute and Crimes Against the LGBT Community*, COUNS. (June 25, 2021), <https://www.counselmagazine.co.uk/articles/the-icc-the-rome-statute-crimes-against-the-lgbt-community>.

10. See Sebastian Kohn, *Genocide in All but Name, for the “Crime” of Being Gay*, OPEN SOC’Y JUST. INITIATIVE (Mar. 3, 2011), <https://www.justiceinitiative.org/voices/genocide-all-name-crime-being-gay>.

11. Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277.

12. See G.A. Res. 96 (I), The Crime of Genocide (Dec. 11, 1946).

13. See U.N. GAOR, 3rd Sess., 128th plen. mtg. at 663, U.N. Doc. A/C.6/SR.128 (Nov. 29, 1948); see also WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 136 (2d ed. 2016).

14. Rome Statute of the International Criminal Court preamble, July 17, 1998, 2187 U.N.T.S. 38544 [hereinafter *Rome Statute*].

15. *Id.* art. 5.

seemingly provides an opportunity to fill the lacuna left by excluding groups other than those specifically enumerated in the crime of genocide.¹⁶

Despite documented instances of persecution on the grounds of sexual orientation and gender identity,¹⁷ there has never been a successful prosecution at the Court on such grounds.¹⁸ This failure may be partly due to the fact that “sexual orientation and gender identity” is not, once again, an explicitly enumerated ground for persecution recognized by the Rome Statute (the Statute). Article 7, paragraph 1, subsection h, which prohibits persecution, highlights “political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law[.]”¹⁹ Unlike genocide, however, the grounds are not limited to those specifically enumerated; sexual orientation and gender identity can potentially fit within either the “gender” or the more general “other grounds” categories.

This Note argues that the OTP should intentionally and publicly incorporate sexual orientation and gender identity into its systematic approach to dealing with sexual and gender-related crimes. Recently, recognizing that gender-based crimes are amongst the gravest under the Statute,²⁰ the Office of the Prosecutor (OTP) at the Court launched a public consultation on a new policy initiative to advance accountability for gender persecution.²¹ The newly appointed Prosecutor, Mr. Karim A.A. Khan, was looking to compile a comprehensive policy paper to provide a systematic approach to dealing with serious gender-related crimes from the outset of the preliminary examination process through prosecutions.²² As such, Section II argues that the definition of gender, as defined in Article 7, paragraph 3 of the Statute, is sufficiently broad to encompass sexual orientation and gender identity. Section III then

16. See SCHABAS, *supra* note 13, at 201 (quoting the ICTY Appeals Chamber that persecution and genocide belong to “the same genus.” Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Judgment, ¶ 636 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005)).

17. See IRAQUEER ET AL., VIOLENCE AND DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY IN IRAQ ¶¶ 12, 15, 19 (Mar. 2019). https://outrightinternational.org/sites/default/files/UPRIraq_StakeholderSubmission_28March2019_0.pdf

18. See Warner, *supra* note 9.

19. Rome Statute, *supra* note 14, art. 7(1)(h).

20. See Press Release, International Criminal Court, The Office of the Prosecutor Launches Public Consultation on a New Policy Initiative to Advance Accountability for Gender Persecution under the Rome Statute (Dec. 20, 2021).

21. See *id.*

22. See *id.*

argues, despite a credible argument for including sexual orientation and gender identity in the “other grounds” analysis, it is better situated within the Court’s “gender” analysis. Finally, in support of these arguments, section IV examines two situations within the jurisdiction of the Court, Afghanistan and Ukraine, to demonstrate both the applicability and need for including such analysis in the Court’s effort to end gender-based persecution.

II. “GENDER,” AS DEFINED IN ARTICLE 7, PARAGRAPH 3 OF THE ROME STATUTE, IS SUFFICIENTLY BROAD TO ENCOMPASS SEXUAL ORIENTATION AND GENDER IDENTITY

The Rome Statute’s definition of “gender” may encompass sexual orientation and gender identity. Under Article 7, paragraph 3, of the Rome Statute, “gender” is defined as “the two sexes, male and female, within the context of society[,]” and no meaning may be given to “gender” “different from the above.”²³ This definition is understood to include the “social construction” of gender.²⁴ In interpreting this provision, the Court must first apply the Statute and the Elements of Crimes (the Elements).²⁵ In appropriate instances, the Court shall also rely on applicable treaties, principles, and rules of international law.²⁶

To fully understand what is meant by the definition of “gender,” as defined by Article 7, paragraph 3, the only guidance offered by either the Statute or the Elements circularly refers the reader back to the provided definition itself, along with allowing consideration of “internationally recognized human rights.”²⁷ Therefore, it is appropriate for the Court to rely on applicable treaties, principles, and rules of international law. Under recognized international law principles of treaty interpretation, “[a] treaty shall be interpreted in good faith with the ordinary meaning to be given to the terms of the treaty[.]”²⁸ However, recourse may be had to the supplementary means of interpretation, including reference to the preparatory work (*travaux préparatoires*), in instances where the ordinary meaning is ambiguous or obscure.²⁹

23. Rome Statute, *supra* note 14, art. 7(3).

24. See OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT, POLICY PAPER ON SEXUAL AND GENDER-BASED CRIMES 3 (2014).

25. The Court is also bound to apply the Rules of Procedure and Evidence. Rome Statute, *supra* note 14, art. 21(1)(a).

26. See *id.* art. 21(1)(b).

27. See *id.* art. 21(3).

28. See generally Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

29. *Id.* art. 32(a).

With this, “gender,” as defined in Article 7, paragraph 3, is sufficiently broad to encompass sexual orientation and gender identity because, in examining the *travaux préparatoires* of the Statute, the definition of “gender” was intentionally given “constructive ambiguity” by the negotiators to allow for a positive and precedent-setting approach.³⁰ However, when the Rome Statute was signed, there were three main concerns related to the definition of “gender” that may constitute arguments against the inclusion of sexual orientation and gender identity: (A) the definition conflates “gender” and “sex”; (B) the inclusion of the phrase “within the context of society” diverges from a recognition of the social construction of gender; and (C) the definition explicitly excluded sexual orientation as a grounds for persecution under Article 7. The following section will address each argument in turn.

A. “Gender,” as Defined in Article 7, Paragraph 3, Does Not Conflate Gender with Biological Sex

As argued by Valerie Oosterveld, a negotiator present at the 1998 U.N. Diplomatic Conference of Plenipotentiaries of the establishment of the International Criminal Court,³¹ the inclusion of the phrase “within the context of society” was intended to prevent the conflation of “gender” with biological sex.³² Rather than serving a determinative function, “sex” should be interpreted as the foundational or starting point for gender-based persecution analysis within the context of the Court.³³ This interpretation reflected the use of the term “gender” over “sex” within the U.N. system to account for both biological and sociological aspects and was supported by a larger negotiating bloc than its opposite.³⁴

Given the lack of consensus, however, the Court may also look to the development of applicable principles and rules of international law as

30. See Valerie Oosterveld, *The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 HARV. HUM. RTS. J. 55, 57 (2005).

31. *Id.* at 55, n.* (explaining that Ms. Oosterveld was present as a member of the Canadian delegation and focused on gender-related issues, including being involved in the formal, informal, and corridor negotiations on the definition of gender).

32. See *id.* at 72; see also ROY S. LEE, *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE—ISSUES, NEGOTIATIONS, RESULTS* 373–74 (1999) (expressing that the phrase “within the context of society” was eventually agreed upon in part to account for “gender violence” that might not constitute “sexual violence”).

33. See Oosterveld, *supra* note 30, at 72.

34. *Id.*; see also LEE, *supra* note 32, at 373–74 (stating that the need for the definition of gender to incorporate a “sociological” dimension was eventually accepted following debate).

the definition was also intended to allow for the positive development of international law.³⁵ Support for this interpretation can be found in the landmark Human Rights Committee decision *Toonen v. Australia*, which found the inclusion of sexual orientation within the reference to “sex” in Article 2, paragraph 2, of the International Covenant on Civil and Political Rights.³⁶ Further, today, such an interpretation is overwhelmingly consistent with international human rights law.³⁷

Moreover, “sex” as a starting point to determine gender-based persecution can be an extremely useful tool for the Court to combat sexual orientation and gender-identity-based persecution. While not involving international law, the recent U.S. Supreme Court case, *Bostock v. Clayton Cnty., Georgia*, provides possible analytical guidance. The case addressed whether sexual orientation and gender identity fell within the prohibition of discrimination on the basis of “sex” under Title VII of the Civil Rights Act of 1964.³⁸ In utilizing “sex” as the starting point of its analysis, the Supreme Court reasoned that if changing the employee’s sex

35. See LEE, *supra* note 33, at 374.

36. See *Toonen v. Australia*, Human Rights Committee, U.N. Doc. CCPR/C/50/D/488/1992, ¶ 8.7 (Mar. 31, 1994); see also *Atala Riffo and Daughters v. Chile*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 88 (Feb. 24, 2012) (stating that reference to “gender” includes sexual orientation).

37. See *Oosterveld*, *supra* note 30, at 73; see also, e.g., Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples, Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24, ¶¶ 68, 70, 73–75 (Nov. 24, 2017) (stating that sexual orientation and gender identity are protected categories) [hereinafter Advisory Opinion OC-24/17]; Comm. on the Elimination of Discrimination Against Women [CEDAW], General Recommendation No. 27 on Older Women and Protection of their Human Rights, ¶ 13, U.N. Doc. CEDAW/C/GC/27 (Dec. 16, 2010) [hereinafter CEDAW General Recommendation No. 27] (same); CEDAW, General Recommendation No. 28 on the Core Obligations of State Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, ¶ 18, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010) [hereinafter CEDAW General Recommendation No. 28] (same); Comm. on Economic, Social and Cultural Rights [CESCR], General Comment No. 20 on Non-Discrimination in Economic, Social, and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights, ¶ 32, U.N. Doc. E/C.12/GC/20 (July 2, 2009) [hereinafter CESCR General Comment No. 20] (same); CESCR, General Comment No. 14 on the Right to the Highest Attainable Standard of Health, ¶ 18, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter CESCR General Comment No. 14] (stating sexual orientation is a protected category); CESCR, General Comment No. 15 on the Right to Water (Arts. 11 and 12 of the Covenant), ¶ 13, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter CESCR General Comment No. 15] (same); Human Rights Comm. [HRC], Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, United States of America, ¶ 25, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006) [hereinafter HRC Consideration of Report Submitted by United States of America] (same); *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96, Judgement, ¶ 28 (Eur. Ct. H.R. Dec. 21, 1999) (same).

38. See *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1734, 1737 (2020).

would yield a different result, that employer had discriminated on the basis of sex.³⁹ For example, if a business employs two employees, identical in all ways except one is male and the other is female, and fires the male solely because he, like the female employee, is attracted to men, the employer has impermissibly discriminated on the basis of sex. The U.S. Supreme Court found the same to be true in the case of a transgender person.⁴⁰ Following similar reasoning, “sex” as a starting point within the definition of “gender,” as defined in Article 7, paragraph 3, means gender-based persecution is sufficiently broad to encompass sexual orientation and gender identity.

B. *Inclusion of the Phrase “Within the Context of Society” Does Not Diverge from a Recognition of the Social Construction of Gender*

Although there were fears that the inclusion of “within the context of society” would place a limitation on the Court’s consideration of the full range of factors affecting the social construction of gender,⁴¹ the phrase was included by the negotiators to imbue an element of flexibility into the definition, thereby allowing the Court to interpret the term on a case-by-case basis.⁴² The negotiators sought to afford the Court the ability to create a set of contextual signifiers that would function as factors within the “social construction” of gender analysis, including those as affected by sexual orientation.⁴³ Furthermore, the society considered in the definition of “gender” includes both the domestic and international societies.⁴⁴ Therefore, perpetrators cannot merely hide behind a predominantly misogynistic and homophobic domestic society to excuse their actions.⁴⁵ As such, “within the context of society” does not preclude the inclusion of sexual orientation and gender identity in gender-based persecution analysis.

39. *Id.* at 1741.

40. *Id.*

41. *See* Oosterveld, *supra* note 30, at 74.

42. *See id.*; *see also* LEE, *supra* note 32, at 374.

43. *See* Oosterveld, *supra* note 30, at 75 (identifying by the U.N. definitions, these signifiers may include “roles (including the relationship between and among men’s and women’s roles), attitudes, values, attributes, expectations, status, opportunities, socialization processes, responsibilities assigned, rights, resources, and power, as determined and/or expected within a society or culture at any given time and place, and as affected by race, class, sexual orientation, poverty level, ethnic group, age, and other factors.”).

44. *See id.* at 75–76.

45. *Id.* at 75, n.117 (noting that propaganda from such a society may act as proof of persecution on the basis of gender).

C. *Sexual Orientation as a Ground for Persecution is Not Explicitly Excluded from “Gender” as Defined in Article 7, Paragraph 3*

The final formulation of the definition of “gender” appearing in the Statute is, in part, a reflection of the desire of certain states and the Holy See that sexual orientation not be included within gender, leading some to believe that sexual orientation is excluded from the term’s final conception.⁴⁶ However, this is not necessarily true, as there was no consensus regarding the exclusion of sexual orientation, as reflected in the language of the text.⁴⁷

Rather, what the text of the Rome Statute does say weighs against such an interpretation. The definition is followed by the qualifier that “gender” shall not be read to mean anything other than what is stated.⁴⁸ It can be argued that under standard treaty interpretation, the ordinary meaning of this qualifier would be that an exclusion of sexual orientation cannot somehow be implicit in the definition. However, the opposite interpretation also follows—that the final sentence could preclude sexual orientation’s inclusion.⁴⁹ Such a reading, however, is not supported by Article 21, paragraph 3, of the Rome Statute, which states that interpretation of the Statute must be consistent with internationally recognized human rights and without any adverse distinction founded on gender as defined. As noted *supra*, there is broad support for a prohibition of discrimination based on sexual orientation and gender identity within international human rights bodies. Discrimination based on sexual orientation is inextricably linked to gender.⁵⁰ Therefore, sexual orientation is not explicitly excluded from inclusion in gender-based persecution as “gender,” as defined in Article 7, paragraph 3, is sufficiently broad to encompass sexual orientation and gender identity.

III. DELEGATION OF SEXUAL ORIENTATION AND GENDER IDENTITY IN “OTHER STATUS,” WHILE VALID, FAILS TO ADEQUATELY SUPPORT THE OFFICE OF THE PROSECUTOR (OTP)’S MISSION TO HOLD PERPETRATORS OF GENDER PERSECUTION ACCOUNTABLE

Some may argue that consideration of sexual orientation and gender identity is better housed under Article 7, paragraph 1, subsection h, as

46. *Id.* at 76.

47. *Id.* at 77.

48. Rome Statute, *supra* note 14, art. 7(3).

49. See Oosterveld, *supra* note 30, at 77.

50. See *supra* Section II.B.; see also Oosterveld, *supra* note 30, at 78.

an “other ground[] that [is] universally recognized as impermissible under international law.”⁵¹ Failure to include sexual orientation and gender identity in gender-based persecution analysis, however, can lead to an inexact conceptualization of the crime. As such, although a credible argument exists for the inclusion of sexual orientation and gender identity in “other grounds,” such a formulation likely stymies the Court’s goal of ending impunity for perpetrators of all gender-based violence. Nevertheless, sexual orientation and gender identity should be included in one or the other.

First, if the Court’s true aim is to put an end to impunity for the perpetrators of gender-based persecution, the inclusion of sexual orientation and gender identity would provide the Court with a fuller conceptualization of the crime. As Oosterveld argues, what constitutes “gender” “within the context of society” would be incomplete without an analysis of whether a society’s concept of “femaleness” and “maleness” is limited to a heteronormative construction, or is inclusive of other sexual orientations and gender identities.⁵² Furthermore, the exclusion of sexual orientation and gender identity would run the risk of the Court conflating “sexual orientation,” “sex,” and “gender.”⁵³ This would likely result in the Court defaulting to an assumption of heterosexuality when conducting its “gender” analysis and could lead to the Court potentially overlooking instances of persecution.⁵⁴

For example, consider a homosexual man forced to marry a woman following discovery of his sexual orientation. He is then forced to produce multiple offspring. An assumption of heterosexuality may cause the Court to overlook charges of torture or rape because the severity of the mental pain and suffering, necessary elements of the crime against humanity of torture,⁵⁵ or coercion, a necessary element for the crime against humanity of rape,⁵⁶ are not readily apparent. For these reasons, the inclusion of sexual orientation and gender identity within the Court’s “gender” analysis will more effectively and accurately serve the

51. Rome Statute, *supra* note 14, art. 7(1)(h).

52. Oosterveld, *supra* note 30, at 79.

53. *Id.*

54. *Id.* at 80.

55. Torture involves the infliction of severe physical or mental pain or suffering upon a person in the custody or under the control of the perpetrator that does not arise from lawful sanctions. See Int’l Crim. Ct [ICC], *Elements of Crimes*, at 5, ICC Doc. ICC/PIOS/LT/03-002/15 (2013), <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf> [hereinafter *Elements*].

56. Rape is a gender-neutral act requiring coercion and penetration by a sex organ. See *id.* at 5, 5 n.15.

Court in its mission to end impunity for the perpetrators of gender-based persecution.

Second, even if sexual orientation and gender identity are not included in the Court's gender-based persecution analysis, the Court should include it as an "other ground." Although "other grounds that are universally recognized as impermissible under international law" create a high threshold,⁵⁷ this has likely been met given the broad acceptance of the prohibition on sexual orientation and gender identity discrimination in international human rights law. The crime of "persecution is often described as a crime of discrimination[.]"⁵⁸ and most international human rights bodies have articulated a prohibition on discrimination on these grounds.⁵⁹ Further, true "universality" is likely unnecessary as other legal instruments with similar formulations are not truly "universal."⁶⁰ Such a requirement would render the designation of a new category under "other grounds" virtually impossible and the inclusion of the language in the text superfluous.⁶¹ Instead, a more useful formulation may be granting inclusion of a new category under

57. Interpretation of the law applicable to the Court must be consistent with internationally recognized human rights. *See id.* at 7.

58. *See* SCHABAS, *supra* note 13, at 198; *see also, e.g.*, Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, Judgment, ¶ 621 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000) (describing persecution as "the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law" and reaching the requisite level of gravity); Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 534 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001) (same); Prosecutor v. Naletilić et al., Case No. IT-98-34-T, Judgment, ¶ 634 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003) (noting that one of the elements that "must be proven to establish that persecution . . . has been committed" is that "[t]he perpetrator commits a discriminatory act or omission[.]"); Prosecutor v. Kordić et al., Case No. IT-95-14/2-A, Judgment, ¶ 101 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004) (stating that persecution is defined as an act or omission which "discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law[.]").

59. *See also, e.g.*, Advisory Opinion OC-24/17, *supra* note 37, ¶¶ 68, 70, 73–75 (stating that sexual orientation and gender identity are protected categories); CEDAW General Recommendation No. 27, *supra* note 37, ¶ 13 (same); CEDAW, General Recommendation No. 28, *supra* note 37, ¶ 18 (same); CESCR General Comment No. 20, *supra* note 37, ¶ 32 ("gender identity is recognized as among the prohibited grounds of discrimination"); CESCR General Comment No. 14, *supra* note 37, ¶ 18 (same); CESCR General Comment No. 15, *supra* note 37, ¶ 13; Human Rights Comm., HRC Consideration of Report Submitted by United States of America, *supra* note 37, ¶ 25 (same); *Salgueiro da Silva Mouta v. Port.*, *supra* note 37, ¶ 28 (same); Afr. Comm'n on Hum. and Peoples' Rts., General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), ¶ 20 (Mar. 4, 2017) (same).

60. *See* SCHABAS, *supra* note 13, at 198–99.

61. *See id.* at 199.

“other grounds” unless there is evidence that discrimination on those grounds is accepted in international law.⁶²

Furthermore, sexual orientation and gender identity may be included as an “other ground” because the complete elements of the crime of persecution counter any argument that “persecution” implies a greater scale and severity than “discrimination,” and, therefore, evidence of universal condemnation of “anodyne” instances of discrimination is insufficient.⁶³ Under the persecution analysis, the individual act must occur in relation to an operation, carried out in pursuance of a state or organizational policy, that involves multiple commissions of crimes against humanity.⁶⁴ The specific act must also be done “in connection with any act . . . within the jurisdiction of the court.”⁶⁵ If these elements exist, what could be qualified as a lesser instance of discrimination in another context is elevated to an act of persecution. As such, while the inclusion of sexual orientation and gender identity as an “other ground” would not completely serve the Court in its mission to end impunity for gender-based persecution, its inclusion would be valuable, nonetheless.

IV. CASE STUDIES

Accepting that sexual orientation and gender identity fall within the definition of “gender,” as defined in Article 7, paragraph 3, the following section seeks to not only showcase how inclusion within “gender” serves the Court in its mission but also to exhibit the overwhelming need of the worldwide LGBTQ+ community for such an intentional and public approach. Therefore, this Note presents two situations within the Court’s jurisdiction in which LGBTQ+ individuals face either present or potential threats. First, this Note addresses the situation in Afghanistan, where persecution on the grounds of sexual orientation and gender identity by the Taliban represents an immediate threat to LGBTQ+ survival. Second, this Note investigates the situation in Ukraine to explore how the principle of positive complementarity may help to prevent persecution on such grounds.

62. *Id.*

63. *Id.* at 198.

64. See Prosecutor v. Katanga, Case No. ICC-01/04-01/06, Judgment, ¶¶ 1097–99 (Mar. 7, 2014).

65. Rome Statute, *supra* note 14, art. 7(1)(h).

A. *Afghanistan*

Afghanistan has been a party to the Rome Statute since February 10, 2003.⁶⁶ On March 5, 2020, the Appeals Chamber authorized the Prosecutor to open an investigation into alleged crimes within Afghanistan that fall within the jurisdiction of the Court.⁶⁷ The focus of the preliminary investigation, however, has been limited to the crimes allegedly committed in the context of the armed conflict between pro-government and anti-government forces.⁶⁸ In the following section, this Note argues that there is an urgent need to expand the investigation to cover crimes that do not necessarily fall within the confines of the armed conflict.

Under Article 7, paragraph 1, subsection h, and paragraph 2, subsection g, of the Rome Statute, along with the contextual elements common to all crimes against humanity, persecution involves an “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”⁶⁹ Further, that conduct must be committed in connection to any crime within the jurisdiction of the Court.⁷⁰ As stated,⁷¹ this Note argues that sexual orientation and gender identity are an identifiable group under “gender,” as defined in Article 7, paragraph 3, who are owed fundamental rights under international law. Accepting this argument, the following section demonstrates the satisfaction of the remaining elements for a violation of the crime of persecution by laying out (1) the contextual elements common to all crimes against humanity and (2) the connection with other crimes within the jurisdiction of the Court for acts conducted within Afghanistan.

1. The Contextual Elements of Crimes Against Humanity Against the LGBTQ+ Community in Afghanistan Have Been Met

Consideration of sexual orientation and gender identity illuminates that the threshold contextual elements for the crime against humanity for persecution have been met with regard to the situation in Afghanistan.

66. *Afghanistan: Ratification and Implementation Status*, INT’L CRIM. CT., <https://asp.icc-cpi.int/states-parties/asian-states/afghanistan> (last updated Nov. 7, 2004).

67. *Situation in the Islamic Republic of Afghanistan*, INT’L CRIM. CT., <https://www.icc-cpi.int/afghanistan> (last visited May 29, 2022).

68. *Id.*

69. Rome Statute, art. 7(1)(h), (2)(g).

70. *See Elements*, *supra* note 55, at 7 (explaining the elements of Article 7(1)(h) crime against humanity of persecution).

71. *See supra* Section II.

Analysis of these elements occurs in three stages: (a) establishing the existence of an attack, (b) characterizing the attack as widespread or systematic; and (c) establishing a nexus between the attack and the knowledge of the perpetrator that there was such a nexus.⁷²

a. An Attack is Currently Being Perpetrated Against the LGBTQ+ Community in Afghanistan

Establishing an attack requires demonstrating the existence of an operation or course of conduct involving multiple commissions of acts listed in Article 7, paragraph 1, of the Statute that is primarily directed against any civilian population⁷³ and carried out in pursuance of a state or organizational policy.⁷⁴ The attack may not be an aggregation of multiple random acts.⁷⁵ Further, usage of the word “directed” signals that the intention of the attack and not the physical result are what concerns the Court,⁷⁶ i.e., the individual act of the perpetrator does not have to be directed at the targeted civilian population as a whole, but only the general attack with which the individual act shares an intentional nexus.⁷⁷ Finally, evidence of a state or organizational policy may be inferred from a pattern of acts that follow the same logic and evidence of coordinated preparatory activities involving private or public funding.⁷⁸

Following this formulation, a clear attack is currently underway against the LGBTQ+ population in Afghanistan. First, as listed *infra*, multiple commissions of acts enumerated in Article 7, paragraph 1 of the Statute have been, and are likely currently being, committed against the population.⁷⁹ Second, reporting suggests that the primary target of the attack is the civilian population, as members of the Taliban who have engaged in same-sex intimacy do not seem to be

72. Prosecutor v. Katanga, ICC-01/04-01/06, Judgment, ¶¶ 1097–99 (Mar. 7, 2014); *see also* Rome Statute, *supra* note 14, art. 7(2)(a).

73. Prosecutor v. Kunarac et al., Case No. IT-96-23/1-A, Judgment, ¶ 90, (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002).

74. Rome Statute, *supra* note 14, art. 7(2)(a).

75. Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11, Decision on the Confirmation of Charges Against Laurent Gbagbo, ¶ 209 (June 12, 2014).

76. Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶ 208, n.401 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

77. Kunarac, Case No. IT-96-23/1-A, ¶ 103.

78. SCHABAS, *supra* note 13, at 159.

79. *See infra* Section IV.B.

targeted in a similar manner.⁸⁰ Third, there is a clear state and organizational policy targeted at the LGBTQ+ community established by the long-standing and coordinated implicit and explicit legislative and judicial activity related to the community. From 1976 to 2018, the Afghan penal code implicitly criminalized sex between consenting adult males.⁸¹ Then, in 2018, the government of former President Ashraf Ghani explicitly criminalized same-sex relations.⁸² Further, under this current penal code, “honor killings” of LGBTQ+ individuals receive a reduced sentence.⁸³ In 2021, the situation only worsened with the ascendancy of the Taliban. Citing Sharia law, Taliban leaders vowed to take a hard line against LGBTQ+ Afghans,⁸⁴ with punishment for homosexuality either involving stoning or a practice known as ‘wall-toppling’ in which the accused is forced to stand behind a wall that is then collapsed upon them.⁸⁵ Further evidence of the Taliban’s coordinated preparatory activity can also be found in a manual issued by the Taliban’s Ministry of Vice and Virtue in 2020, which directs religious leaders to prohibit same-sex relations and to refer those with “strong allegations” of homosexuality to the Ministry’s district manager of adjudication and punishment.⁸⁶ Therefore, the acts listed *infra* are not an aggregation of random instances but constitute a clear attack on the LGBTQ+ population of Afghanistan.

80. HUMAN RIGHTS WATCH, “EVEN IF YOU GO TO THE SKIES, WE’LL FIND YOU”: LGBT PEOPLE IN AFGHANISTAN AFTER THE TALIBAN TAKEOVER, HUMAN RIGHTS WATCH 19 (2022), https://www.hrw.org/report/2022/01/26/even-if-you-go-skies-well-find-you/lgbt-people-afghanistan-after-taliban-takeover#_ftn30 [hereinafter HRW AFGHAN REPORT] (explaining that the Taliban does not have any issue with men who have sex with men if they have joined the Taliban).

81. *See id.* at 29.

82. *Id.* at 1.

83. *LGBT Rights in Afghanistan*, EQUALDEX, <https://www.equaldex.com/region/afghanistan> (last visited May 30, 2022); *see also* Daniel Megarry, *Here Are the 11 Countries Where Being Gay Is Punishable By Death*, GAY TIMES, <https://www.gaytimes.co.uk/life/here-are-the-11-countries-where-being-gay-is-punishable-by-death/> (last visited May 27, 2023) (noting that article 398 of Afghanistan’s Penal Code allows for reduced sentences for honor killings).

84. HRW AFGHAN REPORT, *supra* note 80, at 2.

85. Paul Ronzheimer, *This Taliban Judge Orders Stoning, Hanging, Hands Chopped of*, BILD (July 14, 2021), <https://www.bild.de/politik/international/bild-international/this-taliban-judge-orders-stoning-hanging-hands-chopped-of-77067554.bild.html#fromWall%20> (accessed Dec. 20, 2021).

86. HRW AFGHAN REPORT, *supra* note 80, at 2.

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b. The Attack is Widespread and Systematic

The requirement that the attack be widespread or systematic is disjunctive.⁸⁷ First, “widespread” is not limited to a large number of civilians but rather connotes an attack that is “massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”⁸⁸ Further, it may be achieved through the cumulation of a series of inhumane acts.⁸⁹ This formulation is important given the difficulties in assessing the true scale of an attack against a community incentivized to hide.⁹⁰ Second, “systematic” pertains to the organized nature of the acts and the improbability of their random occurrence,⁹¹ i.e., a pattern that is a “non-accidental repetition of similar criminal conduct on a regular basis.”⁹² Evidence of such a widespread or systematic attack can be found in an acknowledged policy, plan, or ideology that contemplates the destruction or persecution of a community, the use of public or private resources, and the participation of high-level governmental or military figures.⁹³ Finally, it is the attack that must be widespread or systematic and not the specific act of the accused.⁹⁴

As such, the attack directed against the LGBTQ+ community within Afghanistan is both widespread and systematic. First, the attack is

87. Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, ¶ 82 (June 15, 2009), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_04528.PDF.

88. *Id.* ¶ 83.

89. *Situation in the Republic of Côte d'Ivoire*, Case No. ICC-02/11, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, ¶ 53 (Oct. 3, 2011), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2011_18794.PDF.

90. HRW AFGHAN REPORT, *supra* note 80, at 10.

91. Prosecutor v. Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 81 (Mar. 4, 2009), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_01517.PDF; Prosecutor v. Katanga et al., Case No. ICC-01/04-01/07, Decision on the Confirmation of the Charges, ¶¶ 394–97 (Sept. 30, 2008).

92. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, ¶ 1123 (Mar. 7, 2014), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF; *see also* Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11, Decision on the confirmation of charges against Laurent Gbagbo, ¶ 223 (June 12, 2014), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2014_04863.PDF.

93. *See, e.g.*, Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶ 203 (Mar. 3, 2000), <https://ucr.irmct.org/scasedocs/case/IT-95-14#eng>.

94. Prosecutor v. Kordić et al., Case No. IT-95-14/2-A, Judgment, ¶ 94 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004); *see also* Blaškić, Case No. IT-95-14/2, ¶ 101.

widespread because, although it is hard to get a complete picture of the extent of persecution due to safety concerns leading to reporting issues,⁹⁵ the policy is the law within Afghanistan and, as demonstrated *infra*,⁹⁶ has resulted in a significant culmination of inhumane acts. Second, the attack is systematic because the attacks have a clear, organized nature pursuant to Sharia ideology and state policy. According to the Taliban Ministry of Vice and Virtue, every strong allegation of homosexuality must be directed to the ministry, where the punishment is likely death.⁹⁷ Thus, there is a clear pattern of a non-accidental repetition of similar acts that are conducted on a regular basis. Given that the requirement is disjunctive, the threshold has been met under either formulation.

c. A Nexus Between the Individual Acts and the Attack Exists and Is Known by the Perpetrators

In establishing that an act is “in furtherance of” the attack, thereby sharing a nexus, the Court considers the shared features between the act and the attack, e.g., characteristics, nature, aims, targets, alleged perpetrators, times, and locations.⁹⁸ An alleged perpetrator’s knowledge of the attack can be inferred from, *inter alia*, historical and political circumstances, the functions of the accused, the direct and indirect relationship to the political and military hierarchy, the nature of the crimes, and the degree to which the crimes are common knowledge.⁹⁹ It is not required that the perpetrator knew the full extent of the details of the attack, but only that they knew of the attack in general terms.¹⁰⁰ Finally, the personal motivation for an act is not sufficient to vitiate the nexus or knowledge requirement as it is the attack, and not the act, that must be directed at the targeted population as a whole.¹⁰¹

Although further investigation is necessary, the acts listed *infra* likely satisfy both the nexus and knowledge requirements because the attacks are all targeted at the members of the Afghan LGBTQ+ community, all the alleged perpetrators are reported to be either members of the

95. HRW AFGHAN REPORT, *supra* note 80, at 10.

96. See *infra* Section IV.A.2.

97. HRW AFGHAN REPORT, *supra* note 80, at 2.

98. Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11, Decision on the Confirmation of Charges against Laurent Gbagbo, ¶ 212 (June 12, 2014), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2014_04863.PDF.

99. Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶¶ 258–59 (Mar. 3, 2000), <https://ucr.irmct.org/scasedocs/case/IT-95-14#eng>.

100. Gbagbo, Case No. ICC-02/11-01/11, ¶ 214.

101. Prosecutor v. Kunarac et al., Case No. IT-96-23/1-A, ¶ 103.

Taliban or invoke the Taliban in order to gain power over their victims, and the policies of the Taliban and the former government are widely known and circulated throughout the country. Therefore, both the nexus and knowledge requirements are likely met.

2. The Persecution of the Afghan LGBTQ+ Community Is Being Conducted in Connection with Other Crimes within the Court's Jurisdiction

Reporting out of Afghanistan by Human Rights Watch and OutRight Action International, while incomplete, showcases an overwhelming number of crimes against humanity, thereby establishing an operation or course of conduct involving multiple commissions of acts listed in Article 7, paragraph 1.¹⁰² This section highlights a few illustrative examples to demonstrate how the inclusion of sexual orientation and gender identity within the definition of “gender” reveals that the crime of persecution is currently taking place. To that end, this Note looks at the crimes of (a) murder and extermination; (b) torture; and (c) rape.

a. The Afghan LGBTQ+ Community Is Being Murdered and Exterminated

Under Article 7, paragraph 1, subsection a, “murder” involves the intentional killing of one or more persons as part of a widespread and systematic attack against a civilian population.¹⁰³ “Murder” elevates to “extermination” when the killing constituted, or took place as part of, a mass killing of the targeted group.¹⁰⁴ “Extermination” is analogous to “genocide”¹⁰⁵ and requires an unspecified threshold number of killings.¹⁰⁶ Furthermore, the intentional infliction of conditions of life that

102. See generally HRW AFGHAN REPORT, *supra* note 80.

103. See Rome Statute, *supra* note 14, art. 7(1)(a); *Elements*, *supra* note 55, at 4.

104. Rome Statute, *supra* note 14, art. 7(2)(b); *Elements*, *supra* note 55, at 4.

105. ‘Genocide,’ as defined in the Rome Statute, encompasses “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group[.]” Rome Statute, *supra* note 14, art. 6. As such, ‘extermination’ seems to fill the lacuna of similar acts which do not meet all of the elements of ‘genocide,’ namely the specifically enumerated target groups. SCHABAS, *supra* note 13, at 175.

106. The Pre-Trial Chamber, in *Bashir*, found that the alleged killing of over a thousand civilians was sufficient for a charge of ‘extermination’. Prosecutor v. Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 97 (Mar. 4, 2009), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_01517.PDF. However, groups of twenty, twenty-one, and twenty-two were not. Prosecutor v. Hussein, Case No. ICC-02/05-01/12, Public redacted version of “Decision on the Prosecutor’s application under article 58 relating to Abdel Raheem Muhammad Hussein,” ¶ 11 (Mar. 1, 2012), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_03574.PDF.

are calculated to bring about the destruction of part of a population, e.g., deprivation of food and medicine, may constitute “extermination.”¹⁰⁷

Although reporting out of Afghanistan is sparse,¹⁰⁸ LGBTQ+ Afghans are being murdered. For example, three days after the Taliban regained power, the body of Hamid N.’s boyfriend was found after he had been missing for days.¹⁰⁹ Even though the boyfriend’s parents were unaware of the extent of the relationship between Hamid and their son, they blamed Hamid for their son’s death simply because of rumors of Hamid’s sexuality and his association with their son.¹¹⁰

These murders likely then elevate to “extermination” because they are part of a mass killing of LGBTQ+ Afghans. This elevation can be inferred from the relaxed sentencing for “honor killings,”¹¹¹ the criminalization of homosexuality,¹¹² and the official punishment of stoning or “wall-toppling,” which likely constitute the intentional infliction of conditions of life that are calculated to bring about the destruction of the LGBTQ+ population in Afghanistan. Moreover, “kill lists” are circulating of suspected LGBTQ+ people,¹¹³ and those not murdered have been forced into hiding, where they are deprived of food and medication.

Under the former government, for instance, Ali A. cut ties with his family after he was outed by his brother. Once the Taliban took over, he was forced into hiding because his father, who is close with a senior Taliban official, had once again begun to use his connections to hunt him down. While in hiding in a factory, Ali’s only form of sustenance consisted of two biscuits a day.¹¹⁴

In another instance, two transgender women, Aimal W. and Aryan D., were forced to shelter in an abandoned hostel when a Taliban force took over their city. To remain safe, the women relied on their friend Riza, the most “masculine-presenting” of their cohort, to purchase food supplies. Their caution failed to produce the desired effect,

107. *Elements*, *supra* note 55, at 4 n.9.

108. Lucas Ramón Mendos, State-Sponsored Homophobia 430 (ILGA World, 13th ed. 2019), https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019.pdf at 430.

109. All names listed in the HRW Afghan Report are fictitious given safety concerns. HRW AFGHAN REPORT, *supra* note 80, at 10.

110. *Id.* at 13.

111. PENAL CODE, art. 398 (Afg.), <https://www.refworld.org/pdfid/4c58395a2.pdf>.

112. *Id.* art. 427.

113. Louise Nordstrom, *The Taliban has a Hit List for the Afghan LGBT Community, NGO Says*, FRANCE 24 (Nov. 2, 2021), <https://www.france24.com/en/asia-pacific/20211102-the-taliban-has-a-kill-list-for-the-afghan-lgbt-community-ngo-says>.

114. HRW AFGHAN REPORT, *supra* note 80, at 11.

however. One morning, neighbors entered the hostel and attacked Riza. When Aryan attempted to intervene, one neighbor told her, “You are *izak*.¹¹⁵ You are making our community filthy. You’re not supposed to be here . . . We are going to call the [Taliban] police and they’re going to clean you from this place.” Aimal and Aryan fled with nothing. Riza, tied up and naked, was loaded into the back of a police car. When Aryan saw Riza again, she had been badly beaten and tortured into revealing the location of other trans women in the community. She had also been told by a Taliban commander that if he ever saw her in the city again, he would kill her.¹¹⁶

These instances are commonplace for the LGBTQ+ community under the Taliban, causing many to hide, flee, or else be killed.¹¹⁷ Even those who have not received direct threats are afraid to leave their homes. Some have attempted suicide. There are even reports of family members turning on LGBTQ+ persons to settle old scores or to curry favor.¹¹⁸ These conditions have seemingly been intentionally calculated to bring about the destruction of the LGBTQ+ community in Afghanistan. Therefore, instances of both “murder” and “extermination” are being perpetrated against the Afghan LGBTQ+ community.

b. Consideration of Sexual Orientation and Gender Identity Reveals that the Afghan LGBTQ+ Community Is Being Subjected to Torture

Article 7, paragraph 1, subsection f, and paragraph 2, subsection e, follow the *jus cogens* prohibition on torture.¹¹⁹ Under the Statute, torture is the intentional infliction of severe physical or mental pain and suffering upon a person under the control of the accused, excluding pain and suffering inherent or incidental to lawful sanctions.¹²⁰ Unlike the customary international law formulation of torture, there is no specific purpose requirement.¹²¹ Instead, control and severity of the

115. *Izak* is a derogatory Dari slur for gay men and transgender women. *Id.* at 13 n.17.

116. *Id.* at 17.

117. Zahra Nader & Zabea Mousawi, *What the Taliban Mean for Queer Afghans*, FOREIGN POLICY (Apr. 20, 2022) <https://foreignpolicy.com/2022/04/20/what-the-taliban-means-for-queer-afghans/>.

118. HRW AFGHAN REPORT, *supra* note 80, at 11.

119. Questions relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. Reports 422, ¶ 99 (July 20).

120. Rome Statute, *supra* note 14, art. 7(2)(e).

121. *Elements*, *supra* note 55, at 5 n.14.

mental or physical pain or suffering are the distinguishing factors.¹²² Therefore, in measuring the level of severity, the Court should look to both objective and, importantly, subjective factors.¹²³ For example, in undertaking a similar torture analysis, the International Criminal Tribunal for the former Yugoslavia took into account the physical and mental effects of the treatment upon the particular victim, as well as other characteristics that could factor into the subjective experience of the victim, including the victim's sex.¹²⁴

Given the lack of a purpose requirement that would allow for the recognition of torture as a result of discrimination on the basis of sexual orientation and gender identity,¹²⁵ the inclusion of sexual orientation and gender identity within the Court's "gender" analysis is all the more important to understand when the requisite level of severity has been reached. Consideration of such factors illuminates how the legal framework within Afghanistan likely significantly contributes to the level of fear most LGBTQ+ Afghans experience. For example, a routine checkpoint is a source of substantial fear for transgender individuals whose gender marker may not match their gender identity. Lesbian women and transgender men cannot escape because of the Taliban's prohibition on women traveling alone,¹²⁶ and the police offer little to no protection.¹²⁷ Many live in such a state of fear that they do not leave the house and have cut off contact with others in the community altogether.¹²⁸

Two particularly illustrative examples include the experiences of Brushna Y. and Mason C. Before Taliban control, Brushna Y. was living with her uncle when her cousin discovered her with her female partner. As a result, she was forced to flee to her parents in the city after her uncle immediately called for her death to restore "honor" to the family. Although they refused her uncle's demands for her death, they

122. Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, ¶ 193 (June 15, 2009), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_04528.PDF.

123. Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment, ¶ 143 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001).

124. *Id.*

125. U.N. Comm. Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, CAT/C/GC/2, para. 8–9 (2008), <https://www.refworld.org/docid/47ac78ce2.html>.

126. *Id.* at 3.

127. *See generally id.*

128. *Id.* at 13; *see also* Nader & Mousawi, *supra* note 117 (stating Afghans who cannot hide their LGBTQ+ identities fear going outside).

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engaged her to a man who did not know she was a lesbian. For a time, Brushna felt relatively protected because the former government offered some layer of protection. However, after the fall of the former government, Brushna's uncle and cousins joined the Taliban and claimed the authority to kill Brushna if her parents did not act. As a result, Brushna's parents forced her marriage, beating Brushna when she refused and pressured her and her new husband to leave the country. Despite this, a relative managed to get word to Brushna's husband that she is a lesbian, and she now suffers daily beatings while living in constant fear that she will be killed due to her sexual orientation.¹²⁹

Similarly, Mason C. was held prisoner by his family once his sexual orientation was discovered, and his uncle placed a bounty on his head. After Mason's brother was killed by his cousins while attempting to defend Mason, Mason fled by bus, only to be discovered by a relative. The uncle who had placed a bounty on Mason intercepted the bus and locked him in a dog cage for a week before Mason managed to escape with the help of his aunt. Now that the Taliban are in control, Mason's uncle is once again hunting him down. As of the publication of the report, Mason continues to be in hiding, where "[he doesn't] know anyone" and "[doesn't] trust anyone."¹³⁰

In both examples, Brushna and Mason were not only clearly under the control of their families, but that control was heightened and reinforced by the legal and organizational framework built by the Taliban. This is evident in Brushna's shift in fear following the dissolution of the former government and Mason's statement, from hiding, concerning his inability to trust anyone.¹³¹ As such, the question then becomes one of severity. While both examples may rise to the requisite level of severity even without consideration of the subjective effect that Brushna and Mason's sexual orientation had on their pain and suffering, their sexual orientation is vital to the full consideration of their experience, given that it was the reason behind the acts of torture and deprived them of the ability to seek help. Thus, absent consideration of sexual orientation, the Court runs the risk of allowing acts of torture to continue with impunity.

c. Afghan Members of the LGBTQ+ Community Are Being Raped

Within the jurisdiction of the Court, rape consists of two elements: penetration by a sexual organ and coercion or force.¹³² Penetration

129. HRW AFGHAN REPORT, *supra* note 80, at 15.

130. *Id.* at 16.

131. *Id.* at 15.

132. *See* Rome Statute, *supra* note 14, art. 7(1)(g); Elements, *supra* note 55, at 5.

involves the invasion of the body of a person and is gender-neutral,¹³³ meaning that the crime of rape includes acts where the perpetrator is the one penetrated.¹³⁴ Coercion occurs when the penetration is committed *inter alia* under “fear of violence, duress, detention, psychological oppression or abuse of power, or by taking advantage of a coercive environment.”¹³⁵

As such, members of the LGBTQ+ community are repeatedly being raped in Afghanistan.¹³⁶ For example, Ramiz S. was stopped at a checkpoint after being identified as an *izak*, a derogatory slur for a gay person. Once beaten, the men loaded Ramiz into a car and took him to another location. At the second location, four men whipped and forcefully raped Ramiz for eight hours.¹³⁷ In another instance, Baran B. was contacted via phone by a number that he did not recognize. The unidentified contact threatened Baran if Baran refused to meet. At the meeting, the man identified himself as a Taliban member, raped Baran, and threatened to kill him if he told anyone.¹³⁸

These examples contain clear instances of force and coercion. However, in instances where coercion is less clear, sexual orientation and gender identity analysis will aid in combatting impunity by helping to identify coercion, particularly in instances of forced marriage. For example, Nasrullah B., a gay man, was forced to marry at age 16. Once married, he was forced to have sex with his wife, resulting in four children.¹³⁹ While the children likely serve as proof of penetration, it is

133. Elements, *supra* note 55, at 5 n.15.

134. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, ¶ 963 (Mar. 7, 2014), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF.

135. Elements, *supra* note 55, at 5.

136. As this paper is focused on the specific plight of the LGBTQ+ community in Afghanistan, it focuses on those who have been raped because they have been targeted on the basis of their real or perceived sexual orientation and gender identity. For this reason, the paper does not elaborate on the practice of *bacha bazi* or “boy play”, a traditional practice which frequently involves the rape of pre-pubescent boys by older men, as these boys are allegedly targeted on the basis of their pre-pubescent status rather than sexual orientation or gender identity. See Emily Prey & Kinsey Spears, *What About the Boys: A Gendered Analysis of the U.S. Withdrawal and Bacha Bazi in Afghanistan*, NEWLINES INST. FOR STRATEGY & POL’Y (June 24, 2021), <https://newlinesinstitute.org/afghanistan/what-about-the-boys-a-gendered-analysis-of-the-u-s-withdrawal-and-bacha-bazi-in-afghanistan/>. However, that is not to say that the practice of *bacha bazi* should not be investigated and prosecuted by the Court.

137. The reporting uses the word “rape” to describe these acts. This paper makes the assumption that penetration occurred and, therefore, “rape” is a correct descriptor under the definition of the Court. HRW AFGHAN REPORT, *supra* note 80, at 13.

138. *Id.* at 14.

139. *Id.* at 37.

Nasrullah's sexual orientation that reveals the coercive nature of the penetration, thereby making the act criminal. As such, there is not only evidence of repeated instances of rape of LGBTQ+ individuals, but the intentional inclusion of sexual orientation and gender identity would be a vital tool in uncovering the full range of rape and aiding the Court in its mission.

B. *Ukraine and Russia*

Although not a State Party to the Rome Statute, Ukraine has twice legally accepted the Court's jurisdiction pursuant to Article 12, paragraph 3, over crimes occurring within its territory.¹⁴⁰ Therefore, pursuant to Article 12, paragraph 2, subsection a, and despite Russia's non-party status under the Rome Statute,¹⁴¹ the Court has jurisdiction over acts committed within Ukraine's territory by Russians, as well as Ukrainians.¹⁴²

As such, following the Russian invasion, a lengthy preliminary examination, and thirty-nine state referrals, on February 28, 2022, the Prosecutor opened an investigation into alleged war crimes and crimes against humanity.¹⁴³ The Prosecutor intends the investigation to encompass violations identified in the preliminary examination, as well as any new alleged crimes falling within the jurisdiction of the Court.¹⁴⁴ Therefore, this next section will (1) detail the current situation in Ukraine for the LGBTQ+ community and (2) demonstrate how intentional and public inclusion of sexual orientation and gender identity within the definition of gender can potentially deter the crime of persecution from occurring within the territory.

140. See *Statement of the Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination in the Situation in Ukraine*, ICC (Dec. 11, 2020), <https://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-ukraine>.

141. See Jaime Lopez & Brady Worthington, *The ICC Investigates the Situation in Ukraine: Jurisdiction and Potential Implications*, LAWFARE (Mar. 10, 2022), <https://www.lawfareblog.com/icc-investigates-situation-ukraine-jurisdiction-and-potential-implications>.

142. See Rome Statute, *supra* note 14, art. 12(2)(a).

143. See *Statement of the ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 State Parties and the Opening of an Investigation*, ICC (Mar. 2, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>.

144. *Id.*

1. Current Situation Facing the LGBTQ+ Community in Ukraine

Unlike Afghanistan, Ukraine has been taking strides to make the country a safer place for the LGBTQ+ community.¹⁴⁵ In fact, when several components of Ukraine's Human Rights Action Plan for the Period up to 2020 related to LGBTQ+ rights failed to be implemented by the 2021 deadline, the Ministry of Justice developed a new draft Action Plan that included measures to address the failure. For example, action 28 of the new Plan involves criminalization of sexual orientation and gender-identity-motivated crime, while action 33 would permit civil partnerships for same-sex couples.¹⁴⁶

Significantly, and directly related to crimes within the Court's jurisdiction, in 2017, Ukraine eliminated the Order of Ministry of Health No. 60 (No. 60), which constituted the former legal gender recognition procedure for transgender persons.¹⁴⁷ Under No. 60, those seeking official gender recognition had been required to take several measures that may constitute crimes under the Rome Statute. These include a mandatory 30-45 day in-patient psychiatric evaluation, numerous unnecessary and invasive medical tests, and evaluation by the State Evaluation Commission.¹⁴⁸ Of particular concern, however, was the de facto coerced sterilization. Although not explicit, the only cases approved by the State Evaluation Commission involved irreversible sterilization surgeries, and approval by the Commission was the only path to official gender recognition.¹⁴⁹ Further, both the Ministry of Health Protection of Ukraine and the Institute of Urology of the National Academy of Sciences of Ukraine understood official gender recognition to require sterilization.¹⁵⁰ This procedure is rarely medically

145. Michael K. Lavers, *Ukraine Pledges to Fight Anti-LGBTQ Discrimination*, WASH. BLADE (Sept. 1, 2021), <https://www.washingtonblade.com/2021/09/01/ukraine-pledges-to-fight-anti-lgbtq-discrimination/>.

146. See LGBT HUMAN RIGHTS NASH SVIT CTR., UNITED AGAINST VIOLENCE, *LGBTQ+ SITUATION IN UKRAINE IN 2021 2* (2022), <https://gay.org.ua/publications/Situation-of-LGBT-in-Ukraine-2021-ENG.pdf>. [hereinafter NASH SVIT REPORT].

147. See Kyle Knight, *A Glimmer of Light for Transgender People in Ukraine: Revised Legal Gender Recognition Procedure Shows Progress but Still Flawed*, HUM. RIGHTS WATCH (Jan. 27, 2017), <https://www.hrw.org/news/2017/01/27/glimmer-light-transgender-people-ukraine>.

148. *Id.*

149. *Allegation Letter Regarding the Legal Gender Recognition Procedure in Ukraine, as specified in Order No. 60 of the Ministry of Health of Ukraine*, HUM. RIGHTS WATCH (Apr. 27, 2015, 2:34 PM), <https://www.hrw.org/news/2015/04/27/allegation-letter-regarding-legal-gender-recognition-procedure-ukraine-specified>.

150. *Id.*

necessary for gender reassignment.¹⁵¹

With No. 60, Ukraine had likely violated the Statute because Article 7, paragraph 1, subsection g, prohibits enforced sterilization or the medically unnecessary deprivation of a person's biological reproductive capacity without genuine consent.¹⁵² Further, as No. 60 was the policy covering any person seeking gender reassignment and recognition within Ukraine, the practice likely reached the threshold of "widespread or systematic" under Article 7. Moreover, as those seeking reassignment were specifically targeted on the grounds of their gender identity, the acts likely also constituted the crime of persecution. Therefore, the elimination of No. 60, which removed the requirements of mandatory inpatient psychiatric evaluations, appearances before the State Evaluation Commission, and enforced sterilization, was a clear positive step in line with the Rome Statute.¹⁵³

However, despite Ukraine taking these positive steps, including the elimination of No. 60, the LGBTQ+ community in Ukraine is still at risk of persecution on the grounds of their sexual orientation and gender identity. For example, although No. 60 has been eliminated, those seeking to change their gender markers on official documentation to reflect their gender identity are still required to jump through numerous onerous hoops, including outpatient psychiatric examinations that can become inpatient hospitalization, and the phrase "irreversible medical intervention" remains in the legislation.¹⁵⁴ Further, although the new Action Plan has been proposed, any or all of the components therein may never be adopted.¹⁵⁵ The passage of any legislation granting rights to LGBTQ+ Ukrainians, particularly recognition of hate crimes,¹⁵⁶ faces strong opposition from powerful religious organizations within Ukraine, namely the All-Ukrainian Council of Churches and Religious Organizations (CCRO).¹⁵⁷ As such, in most instances, initiatives promoting LGBTQ+ rights are largely rejected absent

151. *See id.*; *see also*, Juan E. Méndez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 78 U.N. Doc. A/HRC/22/53 (Feb. 1, 2013) (highlighting that involuntary sterilization requirements run counter to the respect for the physical integrity of a person), https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf.

152. *Elements*, *supra* note 55, at 6.

153. Knight, *supra* note 147.

154. *Id.*

155. NASH SVIT REPORT, *supra* note 146, at 3.

156. *Id.* at 21.

157. *See id.* at 3.

persistent efforts.¹⁵⁸ Instead, legislation is routinely proposed to allow discrimination on the basis of sexual orientation and gender identity, disguised as “promoting family values” or “prohibiting homosexual and transgender propaganda.”¹⁵⁹

This lack of formalized protection for the LGBTQ+ community has led to a continuation of criminal acts motivated by sexual orientation or gender identity. Although the police have begun to actively protect LGBTQ+ events and spaces that are regularly targeted by extremist groups,¹⁶⁰ 141 cases of crimes motivated by sexual orientation and gender identity have been reported between 2020 and 2021,¹⁶¹ fifty-six of which involved interactions with the police and nineteen of which were violations by law enforcement or public prosecutors, themselves.¹⁶² Without proper classification as discrimination on the grounds of sexual orientation and gender identity, these acts are prone to impunity, particularly those involving law enforcement violations. For example, in July 2021, a man in a police uniform and badge responded to a conflict that arose between a landlady and her tenant. The landlady had seemingly called the police after she illegally broke into the tenant’s house, rummaged through his belongings, and found evidence of his homosexuality and positive HIV status. The man in the uniform proceeded to brutalize and beat the tenant, all the while insulting him on the basis of his sexual orientation and HIV status. Despite the tenant filing a report with the local police, no real action was ever taken.¹⁶³

Although these acts are likely inadmissible before the Court given their insufficient level of gravity and/or may be precluded by Ukraine’s alleged willingness and ability to carry out the investigation and prosecution,¹⁶⁴ there is reason to have major concern that the situation on the ground could deteriorate given Russia’s invasion of Ukraine. First, even prior to the invasion, life for the LGBTQ+ community in the Russian-supported and occupied territories in the east of Ukraine was much more precarious. In the self-proclaimed “Luhansk People’s Republic,” homosexuality has been reportedly criminalized with a prison term of two to five years.¹⁶⁵ In Donetsk, there have been

158. *See id.* at 4, 11, 20–21.

159. *See id.* at 11, 21.

160. *See id.* at 24–27.

161. *See id.* at 30.

162. *See id.* at 35.

163. *See id.* at 36–37.

164. *See* Rome Statute, *supra* note 14, art. 17.

165. Halya Coynash, *Luhansk Pro-Russia Militant ‘Republic’ Criminalizes Homosexuality*, KHARKIV HUM. RIGHTS PROT. GRP. (Nov. 7, 2014), <https://khp.org/en/1412628810>.

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numerous reports of acts of discrimination and torture, including an instance in which two gay men were abducted by representatives of the “Ministry of State Security of the Donetsk People’s Republic” after law enforcement officers of the Russian occupation authorities discovered the men on gay dating websites.¹⁶⁶ The men were taken to a secret prison where they were tortured, placed in isolation, and deprived of vital medicines.¹⁶⁷ These acts are indicative of what the LGBTQ+ community in Ukraine could face should the Russian invasion succeed.

Moreover, further evidence of concern can be found in Russia’s history of anti-propaganda legislation and vilification of homosexuality,¹⁶⁸ as well as the failure to hold those responsible accountable for the “anti-gay purge” in Chechnya, in which 100 gay men were reportedly targeted, tortured, or killed.¹⁶⁹ Significantly, U.S. intelligence has warned of credible accounts of the inclusion of LGBTQ+ persons on Russian kill lists,¹⁷⁰ and high-ranking members of the Russian Orthodox Church have partly justified the Russian invasion as a means to combat Ukraine’s liberalization towards the LGBTQ+ community.¹⁷¹ Given the potential for an imminent backslide into persecution of the LGBTQ+ community in Ukraine, it is increasingly important that the Court intentionally and publicly incorporate sexual orientation and gender identity into its gender-based persecution analysis to promote deterrence and instigate positive complementarity.

166. NASH SVIT REPORT, *supra* note 146, at 44.

167. *Id.* at 44–45.

168. *Statement by Russian and International Human Rights Organizations in Support of Russian LGBT Rights Activists under Attack*, HUM. RIGHTS WATCH (Nov. 19, 2021), <https://www.hrw.org/news/2021/11/19/statement-russian-and-international-human-rights-organizations-support-russian-lgbt>.

169. Burgess, *supra* note 2; *see also*, *Gay People Detained and Tortured in Crackdown in Chechnya, Activists Report*, AUSTL. BROAD. CORP. NEWS (Jan. 15, 2019), <https://www.abc.net.au/news/2019-01-15/report-two-killed-40-detained-in-new-gay-purge-in-chechnya/10716184>.

170. *Letter from Ambassador Bathsheba Nell Crocker, U.S. Rep. to the Off. of the U. N. and Other Int’l Org. in Geneva, to Michelle Bachelet Jeria, United Nations High Comm’r for Hum. Rts.*, WASH. POST (Feb. 20, 2022, 9:34 PM), https://www.washingtonpost.com/context/read-u-s-letter-to-the-u-n-alleging-russia-is-planning-human-rights-abuses-in-ukraine/93a8d6a1-5b44-4ae8-89e5-cd5d328dd150/?itid=lk_inline_manual_4.

171. Natalie Prieb, *Russian Orthodox Leader Says Ukraine Invasion is Part of Struggle against ‘Gay Parades’*, HILL (Mar. 8, 2022, 4:40 PM), <https://thehill.com/policy/international/597394-russian-orthodox-leader-suggests-that-ukraine-invasion-is-part-of-a/>.

2. The Court Has the Potential to Deter the Act of Persecution on the Basis of Sexual Orientation and Gender Identity in Ukraine

Outside of exercising jurisdiction over persons for the most serious crimes of international concern,¹⁷² one key normative purpose of the Court is expectation setting and to place certain tactics outside of the boundaries of acceptable behavior, i.e., to act as an instigator for a “moral community.”¹⁷³ Through the principle of complementarity, which states that cases are inadmissible before the Court if a state with jurisdiction over the matter is willing and able to carry out the investigation and persecution,¹⁷⁴ the Court is able to stimulate a more robust domestic response to crimes within the Court’s jurisdiction.¹⁷⁵ Therefore, the following section analyzes how the intentional and public inclusion of sexual orientation and gender identity in the Court’s gender-based persecution analysis may serve to help end impunity in Ukraine for potential sexual-orientation- and gender-identity-based violence through the application of (a) Hyeran Jo and Beth A. Simmons’ theory of prosecutorial and social deterrence and (b) Geoff Dancy and Florencia Montal’s theory of unintended positive complementarity.

a. Prosecutorial and Social Deterrence of State Actors

In analyzing whether the Court has the ability to deter atrocity, political scientists Hyeran Jo and Beth A. Simmons postulated a broad approach to deterrence which contains both prosecutorial and social dimensions.¹⁷⁶ On one hand, prosecutorial deterrence refers to the deterrent effects stemming from a potential perpetrator’s fear of sanctions resulting from legal prosecution.¹⁷⁷ It reasons that there is a direct correlation between an increase in the likelihood of severe penalties and a decrease in the likelihood that an individual will commit a crime.¹⁷⁸ The Court may exert prosecutorial deterrence either

172. Rome Statute, *supra* note 14, art. 1.

173. See Hyeran Jo & Beth A. Simmons, Can the International Criminal Court Deter Atrocity? 14 (Dec. 18, 2014) (unpublished manuscript) (on file with authors), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2552820.

174. Rome Statute, *supra* note 14, art. 17(1)(a); see also *What Is Complementarity*, INT’L CTR. TRANSITIONAL JUST., <https://www.ictj.org/sites/default/files/subsites/complementarity-icc/> (last visited May 27, 2023) (describing how the term “complementarity” was given to the Rome Statute system).

175. See Jo & Simmons, *supra* note 173, at 11.

176. See *id.* at 4.

177. See *id.* at 3.

178. See *id.* at 8.

directly¹⁷⁹ or indirectly through positive complementarity, i.e., using various methods to encourage states to engage their domestic legal systems to prosecute cases whenever possible.¹⁸⁰ In particular, Jo and Simmons argue that the threat of prosecution can have a positive effect on a state or organizational leader's calculations,¹⁸¹ and the study found that the threat of prosecution at the Court correlated with a reduction in civilian killing.¹⁸²

On the other hand, social deterrence refers to the normative role of the Court as a "manifestation of a movement . . . to punish international crimes and put them firmly beyond the pale."¹⁸³ Unlike prosecutorial deterrence's fear of legal consequences, social deterrence stems from the fear of the anticipated extralegal social consequence and stigmatization.¹⁸⁴ As such, social deterrence is largely conditional on the existence of salient groups or networks that matter to the potential perpetrator and who have the ability to apply sufficient social pressure.¹⁸⁵ Where such factors were present, Jo and Simmons found that human rights groups were able to capitalize on the Court's norms and hold governments accountable, thereby resulting in less intentional killing.¹⁸⁶ Further, social deterrence and prosecutorial deterrence are mutually reinforcing.¹⁸⁷ As such, the Court's interventions act as an important part of a package of efforts to end impunity.¹⁸⁸

Therefore, the inclusion of sexual orientation and gender identity within gender-based persecution analysis would potentially allow the Court to act as a powerful promoter of both social and prosecutorial LGBTQ+-specific deterrence within Ukraine. First, portions of the current political regime, led by President Volodymyr Zelenskyy, seem

179. *See id.* at 17 (citing the example of the M23 rebel group in the Democratic Republic of the Congo who expressed their willingness to follow international humanitarian law following the Court's Lubanga conviction).

180. Katharine A. Marshall, *Prevention and Complementarity in the International Criminal Court: A Positive Approach*, 17 HUM. RIGHTS BRIEF 21, 22 (2010), <https://www.corteidh.or.cr/tablas/r24177.pdf>.

181. *See* Jo & Simmons, *supra* note 173, at 11 (citing to the statements of Colombian President Andrés Pastrana and paramilitary leader Vicente Castano, expressing concern over potential prosecutions by the Court).

182. *See id.* at 19, 29.

183. *See id.*

184. *See id.* at 13.

185. *See id.* at 18.

186. *See id.* at 30.

187. *See id.* at 31.

188. *See id.* at 38.

amenable to societal deterrence.¹⁸⁹ In such a precarious time, this can be vitally important given Ukraine's nascent and incomplete framework of legal protection for LGBTQ+ persons, particularly as major factions within Russia have attempted to frame the invasion as a result of Ukraine's liberalization towards the LGBTQ+ persons, potentially opening the door to scapegoating of and animosity towards the community.¹⁹⁰

Second, the ability of the Court to have any deterrent effect on Russia's actions within Ukraine is of heightened concern. Internally, civil society organizations in Russia are largely non-existent,¹⁹¹ and Russia has cracked down harshly on any form of domestic protest.¹⁹² Therefore, given Russia's ambivalence to its commission of war crimes and crimes against humanity,¹⁹³ the Court's public consideration of sexual orientation and gender identity is all the more important to build up prosecutorial deterrence internationally. Such deterrence is only possible if the Court's actions raise the likelihood of legal consequences for perpetrators, i.e., the potential perpetrators must be aware that their actions could lead to legal sanctions.¹⁹⁴ While the effect may seem to be negligible, the threat of prosecution likely has an increased deterrent effect over impunity.¹⁹⁵

b. Unintended Positive Complementarity's Potential Effects on Low-Level Offenders

In response to many criticisms of the Court's dealings in Africa, political scientists Geoff Dancy and Florencia Montal sought to present evidence of at least one beneficial intermediate side effect of the Court's involvement

189. See Lily Wakefield, *President of Ukraine Vows to Fight for LGBTQ+ Equality After Joe Biden Meeting*, PINK NEWS (Sept. 2, 2021), <https://www.pinknews.co.uk/2021/09/02/ukraine-volodymyr-zelenskyy-joe-biden-lgbt/>.

190. Prieb, *supra* note 171.

191. See Masha Gessen, *The Russians Fleeing Putin's Wartime Crackdown*, NEW YORKER (Mar. 20, 2022), <https://www.newyorker.com/magazine/2022/03/28/the-russians-fleeing-putins-wartime-crackdown>.

192. See Current Time RFE/RL's Kazakh Service, *Thousands Detained at Anti-War Protests Across Russia*, RADIO FREE EUR. (Mar. 6, 2022), <https://www.rferl.org/a/russia-1000-protesters-arrested-ukraine-invasion/31738786.html>.

193. See Anton Troianovski, *Atrocities in Ukraine War Have Deep Roots in Russian Military*, N.Y. TIMES, (Apr. 17, 2022), <https://www.nytimes.com/2022/04/17/world/europe/ukraine-war-russia-atrocities.html>.

194. See Jo & Simmons, *supra* note 173, at 7.

195. See *id.*

in the region, dubbed “unintended positive complementarity.”¹⁹⁶ As opposed to ordinary positive complementarity, which involves member state judiciaries initiating prosecutions in coordination with the OTP,¹⁹⁷ Dancy and Montal identify unintended positive complementarity as a phenomenon in which an OTP investigation of a situation incentivizes latent political struggles of local actors,¹⁹⁸ namely between the “ruling coalition” within the state who strive to demonstrate a willingness to abide by international criminal law and “reformer coalitions” who try to expose the actions of the ruling coalition as pretense.¹⁹⁹

Dubbed a “willingness game,” this interaction allows for “gap-filling litigation.”²⁰⁰ One drawback to relying on the Court to combat instances of human rights violations is the OTP’s focus on “those who bear the greatest responsibility,”²⁰¹ i.e., “major criminals responsible for large-scale atrocities.”²⁰² As most human rights violations do not rise to the level of international atrocity crimes,²⁰³ the chance of broader accountability for human rights violations committed by low-level offenders, e.g., police and soldiers, at the Court is remote.²⁰⁴ However, gap-filling litigation in the shadow of an OTP investigation’s scrutiny is a way in which reformers can pressure domestic courts to pursue these lower-level individual criminal cases without fear of reprisal,²⁰⁵ and, as

196. See Geoff Dancy & Florencia Montal, *Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions*, AM. SOC’Y INT’L L. (forthcoming Nov. 2017) (manuscript at 3-4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736519.

197. *See id.* at 4, 14.

198. *See id.* at 5 (arguing that only an OTP investigation is sufficient to trigger the “willingness game” because it is only then that the OTP can request arrest warrants from the Pre-Trial Chamber. This allows for specific potential perpetrators to be singled out, thereby increasing the fear within the “ruling coalition” of the likelihood of prosecution and punishment. Furthermore, this recognition comes with certain “social costs” because it may stigmatize individuals in the eyes of investors, diplomats, and other international actors. Therefore, Dancy and Montal argue that the “ruling coalition” waits until this moment to make concessions to the “reformer coalition” because until then they are not really playing a two-level game between international and domestic audiences. As the OTP has already announced the opening of an investigation in Ukraine, the reasoning behind this idea and argument will not be developed further in this paper. However, for further analysis please *see id.* at 42-44.

199. *See* Jo & Simmons, *supra* note 173, at 5, 14.

200. *See id.* at 27-29.

201. *Id.* at 28.

202. *Id.* at 13-14.

203. *See id.* at 29.

204. *See id.* at 28.

205. *See id.* at 29.

Dancy and Montal found, states under OTP investigation are on average four times as likely to try low-level offenders.²⁰⁶

While this “willingness game” can be particularly useful in combating persecution on sexual orientation and gender identity grounds because most identified instances of such human rights violations within Ukraine involve low-level perpetrators and elements of the current government seem open to international pressure,²⁰⁷ it can potentially have an even broader vital legislative impact. Currently, Ukrainian legislation does not recognize sexual orientation and gender-identity-based violence as a hate crime,²⁰⁸ and, historically, the Verkhovna Rada, Ukraine’s legislative body, is notoriously resistant to any efforts to promote the protection of LGBTQ+ persons absent significant pressure.²⁰⁹ This tension was on display in Ukraine’s previous Human Rights Action Plan. Although several of the components implicating LGBTQ+ Ukrainians were implemented,²¹⁰ a key component concerning the criminalization of hate crimes was not implemented due to significant opposition by the united religious body, the CCRO.²¹¹ By publicly including sexual orientation and gender identity in its gender-based persecution analysis, the Court would be providing a substantial normative counter-weight to the CCRO’s disproportionate influence, thereby allowing “reformer coalitions” greater ability to pressure the Verkhovna Rada into passing the vital legislation and significantly improving protections for and recognition of the LGBTQ+ community within Ukraine.

V. CONCLUSION

In 1944, Raphaël Lemkin coined the term genocide in part as a response to the Nazis’ systematic murder of Jews in the Holocaust.²¹² However, the Jewish people did not face annihilation alone. Deemed a “threat” to the “Aryan” race, the Nazis likewise viewed homosexuality as in need of being “stamped out.”²¹³ Around 100,000 gay men were

206. *See id.* at 4.

207. *See* NASH SVIT REPORT, *supra* note 146, at 30–45; *see also* Lavers, *supra* note 145.

208. *See* NASH SVIT REPORT, *supra* note 146, at 2–3.

209. *See id.* at 3–4.

210. *See id.* at 2.

211. *See id.* at 3–4.

212. U.N. OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, *Genocide: Background*, <https://www.un.org/en/genocideprevention/genocide.shtml> (last visited May 30, 2022).

213. Andrea Carlo, *Why It Took Decades for LGBTQ Stories to Be Included in Holocaust History*, TIME (Apr. 7, 2021, 2:48 PM), <https://time.com/5953047/lgbtq-holocaust-stories/>.

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arrested, and tens of thousands were sent to concentration camps where they were tortured, experimented upon, raped, and murdered; just under two-thirds of those men never returned.²¹⁴ Although this number pales in comparison to the overwhelming number of Jews lost in the Holocaust, these men were likewise targeted simply because they belonged to an identifiable group. Further, this number does not account for the atrocities faced by lesbian women and intersex persons.²¹⁵

However, like most wartime abuses of pre-existing marginalized groups,²¹⁶ the crimes committed against the LGBTQ+ community during World War II were almost entirely excluded from the current system's foundational human rights discourse and justice processes, including the exclusion of sexual orientation or gender identity as grounds upon which genocide could be committed. Instead, the LGBTQ+ community has only just begun to receive international legal recognition in the last thirty years.²¹⁷ Today, however, unlike the concentrated threat of Nazi Germany, the LGBTQ+ community faces existential threats worldwide.

Therefore, it is of paramount importance that every tool in the international human rights toolbox that has failed the LGBTQ+ community since its inception be utilized to combat the rising anti-LGBTQ+ sentiment and stigmatization. As one of the preeminent international norm-setting institutions whose mission is to bring an end to impunity for the most serious crimes of concern to the international community, the Court should lead the charge in this area. As demonstrated, although targeting LGBTQ+ individuals solely based on sexual orientation and gender identity is insufficient to qualify as genocide, the definition of "gender," as defined in Article 7, paragraph 3 of the Statute, is sufficiently broad to encompass persecution on that status. Moreover, not only is "gender" analysis a better category in which to house sexual orientation and gender identity, as the examples of Afghanistan and Ukraine demonstrate, it is of vital importance that it is.

For these reasons, this Note calls on the OTP and the Court itself to intentionally and publicly recognize sexual orientation and gender identity grounds within the prohibition of gender persecution. This stance should be reflected not only in a policy paper but also in the

214. *See id.*

215. *See id.*

216. IRAQUEER ET AL., *supra* note 17, ¶ 14.

217. Toonen v. Australia, Human Rights Committee, U.N. Doc. CCPR/C/50/D/488/1992, ¶ 8.7 (Apr. 4, 1994).

Court's jurisprudence in order to allow for the furthest possible social and prosecutorial deterrent effect, as well as provide opportunities for "unintended positive complementarity." Finally, as a long-term objective, this Note calls on state parties to the Statute to amend the Statute, pursuant to Article 121,²¹⁸ and broaden the enumerated grounds for genocide to more accurately account for violations of the most serious crimes of concern to the international community.

218. Rome Statute, *supra* note 14, art. 121.