

DEFINITIONAL PROBLEMS, INDEFINITE SOLUTIONS: REVISITING THE ICC’S CONCEPTION OF GENDER IN A GENDER-CRITICAL WORLD

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ABSTRACT

Article 7(3) of the International Criminal Court’s Rome Statute defines gender as “the two sexes, male and female, within the context of society.” It further notes that “‘gender’ does not indicate any meaning different from the above.” The product of heated negotiations between States, this definition reifies a binary view of gender, excluding from the court’s ambit whole swaths of people who do not conform to simply male or female. This Comment argues that revisiting the definition of gender is necessary in an increasingly transphobic world where violence against gender variant persons is reaching a fever pitch. Such violence may rise to the level of gender persecution—a crime against humanity—if not worse. This Comment traces the history of negotiations on Article 7(3) of the Rome Statute, identifies three approaches towards the “gender” question, and suggests a path forward. For the court to truly hold perpetrators of crimes accountable, it cannot hold to such a narrow, exclusionary understanding of gender.

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INTRODUCTION

The Rome Statute of the International Criminal Court (ICC) defines gender as “the two sexes, male and female, within the context of society” and provides that, “[the] term ‘gender’ does not indicate any meaning different from the above.”¹ This Comment argues that this narrow conception of gender excludes from the Rome Statute’s coverage countless people whose genders do not fit into a binary, and thus implicates the

¹ Rome Statute of the International Criminal Court art. 7(3), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

ICC's ability to hold accountable perpetrators of (minority) gender-based violence that may amount to crimes against humanity.²

Negotiating states conceived of the ICC as having jurisdiction "over persons for the most serious crimes of international concern."³ Up until the ICC's creation, the ability to try individuals, as opposed to states, for international crimes was vested in ad hoc, conflict-specific tribunals, such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.⁴ Otherwise, the onus to prosecute serious international crimes was on states that criminalized such internationally wrongful acts.⁵ The ICC was envisioned as a permanent autonomous court,⁶ untethered to any special mandate,⁷ which could try individuals alleged to have committed one of four crimes: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.⁸

The foundational instrument of the ICC is the Rome Statute, a treaty that entered into force on July 1, 2002.⁹ The Rome Statute was the product of "five weeks of difficult negotiations."¹⁰ As such, compromise and debate necessarily tempered the language of the Rome Statute.¹¹ It is within this context that the question of gender as construed by the Rome Statute becomes important.

Part I of this Comment will outline the background of the ICC through a genealogy of international criminal law, the rationale for a

² The aforementioned definition of gender is offered within the context of the enumeration of crimes against humanity. *See id.* art. 7.

³ *Id.* art. 1.

⁴ INT'L CRIM. CT., *Understanding the International Criminal Court*, 3–4 (2020). Special note here should be made of the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East, which "set in motion powerful trends for the establishment of a permanent international criminal tribunal to avoid the creation of ad hoc tribunals in the future." Shabtai Rosenne, *Antecedents of the Rome Statute of the International Criminal Court Revisited*, 75 INT'L L. STUD. 387, 394 (2000).

⁵ LORI F. DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW: CASES AND MATERIALS 1271 (6th ed. 2014); *See, e.g.*, U.S. CONST. art. I, § 8(10) (authorizing Congress to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations").

⁶ INT'L CRIM. CT., *supra* note 4, at 11.

⁷ *Id.* at 4.

⁸ Rome Statute, *supra* note 1, art. 5.

⁹ DAMROSCH & MURPHY, *supra* note 5, at 1328.

¹⁰ *Id.*

¹¹ *See generally* PROJECT ON INTERNATIONAL COURTS AND TRIBUNALS., KLEWER LAW INTERNATIONAL, THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, AND RESULTS (Roy S. Lee ed., 1999) [hereinafter MAKING OF THE ROME STATUTE].

permanent court of individual criminal responsibility, and the negotiations surrounding the Rome Statute, particularly as it pertains to Article 7(3). Part II will argue that the Rome Statute's binary definition of gender reifies biologically essentialist understandings of gender, to the exclusion of frequently legally distinct third-gender identifications in many jurisdictions around the world. This definition of gender may further decrease the legitimacy of the ICC in the eyes of vulnerable minorities, who are at particular risk of violence, potentially even widespread and systematic violence. This would then fit the definition of a crime against humanity.¹² The present gender-critical moment makes either the renegotiation of or judicial activism toward a broader definition of gender even more pressing. Part II will also identify some ways forward for the redefinition of gender, not strictly limited to the renegotiation of Article 7(3) of the Rome Statute, and will consider whether the ICC's latest policy on gender persecution goes far enough in rectifying these definitional limitations. Finally, Part III will conclude with observations on the reactive nature of law, particularly international law, and its tendency toward stagnancy and regress. Twenty years after the institution of the ICC, more serious legal analysis of Article 7(3) should be conducted that centers the lived experiences of trans, non-binary, and other gender-diverse identities. This Comment attempts to begin to fill that gap.

At this early juncture, it is important to acknowledge the rapid pace of developments around the issue of transgender rights. Throughout the writing of this Comment, much changed globally and nationally in the United States concerning transgender people—whether from a more permissive or regressive standpoint. To successfully write this Comment, it was necessary to impose some temporal limitations on what developments could be addressed. As such, at the time of publication, this Comment may reference outdated developments. Rather unfortunately, however, the core argument of this Comment remains salient.

¹² Article 7 of the Rome Statute enumerates acts which, “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack,” constitute crimes against humanity. Rome Statute, *supra* note 1, art. 7(1). Article 7(1)(h) enumerates persecution based on gender as an act that could amount to a crime against humanity if committed as part of a widespread or systematic attack—“as defined in [Article 7] paragraph 3.” *Supra*, art. 7(1)(h).

I. BACKGROUND

The last twenty years of the ICC have triggered accountability and controversy alike. As the first permanent court asserting international criminal jurisdiction over individual perpetrators of war crimes, crimes against humanity, genocide, and the crime of aggression, the ICC occupies a central role in the proliferation and progressive development of international criminal law.¹³ On the other hand, the ICC has also been criticized for its disproportionate focus on African contexts—and, therefore, Black men¹⁴—thus reifying the structural racism that many argue is a throughline in the history of international law.¹⁵ Given this, it is not unreasonable to wonder at the potential existence of bias against transgender and gender-variant individuals, one that a less-than-inclusive definition of gender might only entrench further. This section will broadly trace three genealogies to understand the past and present of international criminal law, gender diversity, and the “gender-critical” movement.

¹³ *About the Court*, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/about/the-court> [<https://perma.cc/4A4M-M726>] (last visited Oct. 5, 2023, 2:55PM).

¹⁴ All forty-two of the individuals who have been indicted before the ICC as of July 2020 are African or Arab-African. The ICC has resisted accusations of racism. Kamari Maxine Clarke, *Negotiating Racial Injustice: How International Criminal Law Helps Entrench Structural Inequality*, JUST SECURITY (last updated July 24, 2020), <https://www.justsecurity.org/71614/negotiating-racial-injustice-how-international-criminal-law-helps-entrench-structural-inequality/> [<https://perma.cc/P7VE-BT9P>]. Clarke also notes that not only does the ICC’s selection of indicted individuals reflect a worldwide bias against Black people, but it reflects a bias against Muslims as well.

¹⁵ See, e.g., Rachel Lopez, *Black Guilt, White Guilt at the International Criminal Court*, in RACE AND NATIONAL SECURITY (Matangai Sirleaf ed.) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4237581 [<https://perma.cc/D6HD-6JYF>] (arguing that given the ICC’s focus on the “worst of the worst” international criminals, its conviction of solely Black men “[expresses] the not-so-subtle suggestion that the ‘worst of the worst’ criminals on the planet are Black men”). For more on the anti-Black history of international human rights law and international humanitarian law respectively see generally Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L. L.J. 201 (2001); Frédéric Mégret, *From “Savages” to “Unlawful Combatants”: A Postcolonial Look at International Humanitarian Law’s “Other”*, in INTERNATIONAL LAW AND ITS “OTHERS” (Anne Orford ed., 2006). For more on race and racism in global governance after World War II, see Amitav Acharya, *Race and Racism in the Founding of the Modern World Order*, 98 INT’L AFFAIRS 23 (2022).

A. THE INTERNATIONAL CRIMINAL COURT: INCEPTION,
CONCEPTION, NEGOTIATION, OPERATION

1. *Incepting International Criminal Law*

International criminal law is “a body of international rules designed both to proscribe certain categories of conduct . . . and to make those persons who engage in such conduct criminally liable.”¹⁶ As with domestic criminal law, international criminal law has a substantive and procedural component.¹⁷ Also akin to domestic criminal law, international criminal law imbues states with the authority and obligation to prosecute and punish violations thereof.¹⁸ While states are primarily responsible for trying serious international crimes, whether committed domestically or internationally, the ICC operates under the principle of complementarity.¹⁹ Under this principle, the ICC prosecutes individuals where a state is genuinely unwilling or unable to prosecute.²⁰ International criminal law imposes an obligation on states to prosecute violations of international criminal law *outside* their own borders.²¹ That is, “international legal prescriptions are capable of imposing obligations directly on individuals, without the intermediary of the state wielding authority over such individuals.”²² It is also noteworthy that international criminal law shares considerable overlap with—and, in fact, derives much of its law from—international human rights law (IHRL) and international humanitarian law (IHL).²³ Indeed, ICC judges are expected to “have established competence in relevant areas of international law such as international humanitarian law and the law of human rights.”²⁴

International criminal law is a relatively modern concept. Scholars trace the birth of international criminal law back to the International

¹⁶ ANTONIO CASSESE & PAOLA GAETA, *INTERNATIONAL CRIMINAL LAW* 3 (3rd ed. 2013).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See Int’l Crim. Ct., *Understanding the International Criminal Court* 11 (2020).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 5. Cassese and Gaeta also note the importance of national criminal law to the origin and development of international criminal law. As such, international criminal law “is an essentially hybrid branch of law.”

²⁴ Rome Statute, *supra* note 1, art. 36(3)(b)(ii).

Military Tribunal at Nuremberg (Nuremberg Trials) and the International Military Tribunal for the Far East (Tokyo Tribunal), which emerged from the ashes of World War II (WWII).²⁵ Before World War II, states regulated and punished war crimes through instruments such as the Geneva Conventions (beginning in 1864) and the Hague Convention of 1907.²⁶ The International Military Tribunals established crimes against humanity and crimes against peace as “new classes of international criminality.”²⁷ With the 1948 drafting of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), the realm of individual criminal liability for internationally wrongful acts was dramatically expanded.²⁸ Concurrent with adopting the Genocide Convention, the UN General Assembly tasked the International Law Commission with studying “the desirability and possibility of establishing an international judicial organ” to try persons charged with international crimes, including genocide.²⁹ Though the International Law Commission did not recommend the creation of a court of individual criminal liability for international crimes (nor did it recommend expanding the International Court of Justice to encompass international crimes), the UN General Assembly nonetheless convened a committee of seventeen member states to draft potential conventions and proposals for a prospective international criminal court.³⁰

This was only the first effort toward an eventual international criminal court; however, each attempt was deemed deficient in some manner, and the rapidly expanding membership of the United Nations following decolonization complicated what consensus existed regarding the prioritization of such an endeavor.³¹ Though these efforts stagnated, human rights and humanitarian law continued proliferating. Notably, in 1984, the UN General Assembly adopted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which imposed an obligation on states to proscribe and prosecute attempted and actual acts of torture.³² None of this was sufficient, however, to preempt or

²⁵ Rosenne, *supra* note 4, at 394.

²⁶ See Rosenne, *supra* note 4, at 391. Per the Rome Statute, war crimes are “[g]rave breaches of the Geneva Conventions” or “serious violations of the laws and customs applicable” in international and non-international armed conflict. Rome Statute, *supra* note 1, art. 8(2)(a)-(b).

²⁷ CASSESE & GAETA, *supra* note 16, at 4.

²⁸ Rosenne, *supra* note 4, at 394.

²⁹ *Id.*

³⁰ *Id.* at 396.

³¹ *Id.* at 396–98.

³² United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 85 U.N.T.S. 1465, art. 4–7.

respond to the atrocities committed in Rwanda and in the former Yugoslavia in the early 1990s. While a discussion of the Rwandan and Bosnian genocides is outside the scope of this Comment, suffice it to say that the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) served a crucial role in further codifying the tenets of international criminal law, both procedural and substantive.³³ The establishment of these tribunals allowed for the prosecution of “core crimes”: genocide, crimes against humanity, and war crimes.³⁴ Other ad hoc tribunals such as the Special Court for Sierra Leone and the Special Tribunal for Lebanon, mandates of which were materially and temporally limited, continued to solidify international criminal law even as the ICC began its own permanent mandate.³⁵

2. *Conceiving the International Criminal Court*

The question of an international criminal court predated the establishment of the aforementioned ad hoc tribunals. In 1989, the UN General Assembly requested the International Law Commission to revisit the question of an international criminal court one more time.³⁶ This proved to be a more successful endeavor than the assembly’s previous efforts, and the relative success of the ICTR and ICTY only spurred existing momentum toward a permanent international criminal court.³⁷ In 1996, the assembly established the Preparatory Committee on the Establishment of an International Criminal Court, which eventually submitted a draft statute and draft final act to the Diplomatic Conference at Rome.³⁸ At this point, the negotiations over the statute of the eventual ICC began in earnest.

According to Antonio Cassese, former president of the Special Tribunal for Lebanon and prominent legal scholar, three distinct groups were formed surrounding the negotiations for what would eventually become the Rome Statute. The first group encouraged “a fairly strong Court with broad and ‘automatic jurisdiction,’ the establishment of an

³³ CASSESE & GAETA, *supra* note 16, at 4–5.

³⁴ *Id.* at 20.

³⁵ *Id.* at 4.

³⁶ This request was made 36 years after the General Assembly’s previous attempt to consider the establishment of an international criminal court. ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 340–41 (1st ed. 2003).

³⁷ *Id.* at 341.

³⁸ *Id.* at 342. The Draft Statute was submitted in July 1998. The name “Rome Statute” derives from this conference.

independent prosecutor empowered to initiate proceedings, and a sweeping definition of war crimes.”³⁹ The second group, which included the United States, Russia, and China, opposed automatic jurisdiction and a prosecutor empowered to initiate proceedings.⁴⁰ This group favored a greater role for the security council; unsurprising, as the United States, Russia, and China are part of the “P5,” security council states that possess the ability to veto any proposed action.⁴¹ Crucially, and particularly relevant to the ongoing Russia-Ukraine war, this group was opposed to including the crime of aggression under the court’s jurisdiction.⁴² The final group particularly favored including the crime of aggression and the death sentence as a possible penalty, and it opposed a role for the security council as well as jurisdiction over war crimes committed in noninternational armed conflicts.⁴³ Despite these seemingly insurmountable chasms, the Rome Statute was adopted by 120 votes to 7.⁴⁴ Interestingly, the Rome Conference was a rushed job and “delegations had not been given a proper opportunity to express their views on portions of the text before it was put to the final vote in the Conference.”⁴⁵ Moreover, “If the Rome Statute has defects, without doubt one explanation lies in the haste with which the conference was convened, without adequate or completed preparatory work.”⁴⁶ Given the importance of preparatory works as a supplemental means for the interpretation of international treaties, the lack thereof is disappointing for any scholar wishing to examine the negotiations underlying the Rome Statute.⁴⁷

³⁹ *Id.* at 342.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See id.*

⁴³ *Id.*

⁴⁴ *Id.* at 343.

⁴⁵ Rosenne, *supra* note 4, at 406.

⁴⁶ *Id.* at 405.

⁴⁷ *See generally* Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331 (“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation . . . (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable”).

3. Negotiating “Gender”

While preparatory works as such might not exist, an account of the negotiations leading to the Rome Statute does exist.⁴⁸ Among the most controversial issues preceding the finalization of the Rome Statute were issues surrounding gender; specifically, the extent to which gender, gender inclusivity, and acts of sexual and gender-based violence should be reflected in the text of the Rome Statute.⁴⁹ The Rome Statute was “the first international treaty to recognize a range of acts of sexual and gender violence,” and it was the first to recognize the seriousness of those crimes under international law.⁵⁰ There was a need to recognize such crimes as concerning more than just “honor and dignity,” as had been the approach of the 1977 Additional Protocols to the Geneva Conventions.⁵¹ The Rome Statute was able to build on the momentum of the ICTY and ICTR, which included rape as a crime against humanity though not as a war crime.⁵² This was in addition to broader efforts to include “a gender perspective” in global governance efforts, including the 1993 Vienna Declaration and Programme of Action, emerging out of the World Conference on Human Rights;⁵³ the Fourth World Conference on Women in 1995;⁵⁴ and resolutions of the UN Commission on Human Rights, which specifically called for “those States participating in the drafting of the statute of the International Criminal Court to give full consideration to integrating a gender perspective.”⁵⁵

Despite these movements, it took the intervention of the Women’s Caucus for Gender Justice in the ICC before states concerned themselves

⁴⁸ See generally MAKING OF THE ROME STATUTE, *supra* note 11.

⁴⁹ See *id.* at 357–90 (discussing the process of incorporating gender issues into the final version of the Rome Statute).

⁵⁰ *Id.*

⁵¹ MAKING OF THE ROME STATUTE, *supra* note 11, at 362.

⁵² *Id.*

⁵³ The Vienna Declaration and Programme of Action contained references to, in order, gender-based violence; “gender bias in the administration of justice and the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism;” the use of gender-specific data; gender-specific abuses, and the importance of training UN personnel to work without gender bias. World Conference on Human Rights, *Vienna Declaration and Programme of Action* para. 18, 38, 42, U.N. Doc.A/CONF.157/24 (June 25, 1993).

⁵⁴ The Beijing Declaration and Platform for Action encouraged governments and intergovernmental institutions to “integrate a gender perspective in the resolution of armed or other conflicts and foreign occupation.” The Fourth World Conference on Women, *Beijing Declaration and Platform of Action*, para. 142(b) U.N. Doc. A/CONF.177/20 (Sept. 15, 1995).

⁵⁵ U.N. Commission on Human Rights Res. 1997/44, para. 5 (Apr. 11, 1997).

with “the serious gaps in the [International Law Commission] Draft Statute with regard to gender issues.”⁵⁶ Even then, the issue was not *whether* to include gender at all, but “which references to include, and how they should be articulated in the text.”⁵⁷ The definition of “gender,” in particular, garnered intense disagreement. To reiterate, the Rome Statute’s definition of “gender” under Article 7(3) “refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.” The Rome Statute also includes another important provision:

The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender *as defined in article 7, paragraph 3*, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.⁵⁸

The very inclusion of gender as an enumerated ground for no-adverse-distinction was controversial. Some states fought to delete the enumerated ground, others fought to delete the no-adverse-distinction clause altogether, and others fought to retain both.⁵⁹ Concerns about the inclusion of the term “gender” turned on the fear that it “might be interpreted to imply rights wider than human rights sanctioned by many states,” namely rights that pertained to sexual orientation.⁶⁰ An attempt to construe “gender” in line with the Beijing Platform for Action was deemed insufficiently precise, and thus negotiations proceeded toward finding a narrow definition of the term.⁶¹

Further, replacing the term “gender” with “sex” was rejected precisely because the latter “referred only to the biological distinction between men and women,” whereas “gender” encompassed both biological and sociological approaches.⁶² The even-keeled approach was meant to reflect, for instance, the distinction between gender-based violence and sexual violence: “The former term includes non-sexual crimes targeted at

⁵⁶ MAKING OF THE ROME STATUTE, *supra* note 11, at 361.

⁵⁷ *Id.* While this paper will not explore in great detail negotiations surrounding sexual and gender-based violence, one controversial gender-related issue included the debate over the terms “enforced pregnancy” versus “forcible impregnation.”

⁵⁸ Rome Statute, *supra* note 1, art. 21(3) (emphasis added).

⁵⁹ MAKING OF THE ROME STATUTE, *supra* note 11, at 372.

⁶⁰ *Id.*

⁶¹ *Id.* at 372–73. The Beijing Platform for Action advocated for a description of gender “interpreted and understood as it was within ordinary, generally accepted usage.”

⁶² *Id.*

men or women because of the roles they play in society.”⁶³ Thus, while sociological considerations were reflected in the description of gender, states that were interested in a more conservative definition were satisfied with adding the phrase “within the context of society,” which could implicate rigid, stagnant understandings of gender.⁶⁴

An expansive reading of gender was altogether forestalled with the second sentence of the definition: “The term ‘gender’ does not indicate any meaning different from the above.”⁶⁵ The finalized version of Article 7(3) carried immense baggage, evidencing the fraught negotiations surrounding the concept of “gender,” but eventually served to satisfy all parties involved.⁶⁶

4. Operationalizing the ICC

Due to the ICC’s unique position as a court of individual criminal liability for a limited set of international crimes, it is useful to understand how the ICC operates. The ICC has jurisdiction over only four types of crimes:⁶⁷ genocide,⁶⁸ crimes against humanity,⁶⁹ war crimes,⁷⁰ and aggression.⁷¹ The ICC’s jurisdiction is limited by time; it can only assert

⁶³ *Id.* at 373–74.

⁶⁴ *Id.* at 374.

⁶⁵ *Id.* at 374 & n.53.

⁶⁶ See MAKING OF THE ROME STATUTE, *supra* note 11, at 374–375.

⁶⁷ Rome Statute, *supra* note 1, art. 5.

⁶⁸ The Rome Statute defines genocide as one or more of five acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group,” where the acts in question encompass “killing members of the group;” “causing serious bodily or mental harm to members of the group;” “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;” “imposing measures intended to prevent births within the group;” and, “forcibly transferring children of the group to another group.” *Id.* art. 6.

⁶⁹ A crime against humanity is committed when one of several possible acts—including murder, extermination, torture, persecution, or “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”—are “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” *Id.* art. 7(1). Persecution, here, is defined as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.” *Id.* art. 7(2)(g).

⁷⁰ War crimes encompass a variety of grave breaches to the Geneva Conventions, as well as “serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law” (as enumerated in the Rome Statute). *Id.* art. 8(2)(b). For the ICC to have jurisdiction over war crimes, war crimes must be “committed as part of a plan or policy or as part of a large-scale commission of such crimes.” *Id.* art. 8(1).

⁷¹ The crime of aggression refers to “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest

jurisdiction over crimes committed after the Rome Statute entered into force, and only over states that have ratified the Rome Statute.⁷²

Despite its universalist ambitions, the ICC's ability to assert jurisdiction is limited. The ICC's prosecutor may only investigate and prosecute acts if: "(1) the state where the alleged crime was committed is a party to the Rome Statute (including where the crime was committed on an aircraft or vessel of the state); (2) the person suspected of committing the crime is a national of a party to the Rome Statute; (3) the state where the alleged crime was committed, or the national of which suspected of committing the crime, consents *ad hoc* to the jurisdiction of the ICC; or (4) the security council refers the crime to the ICC under Chapter VII of the UN Charter."⁷³ There is another limitation: out of respect for the principle of complementarity, under which the ICC *is not* supreme over national courts when it comes to accountability for international crimes,⁷⁴ the ICC may only assert jurisdiction where a state that would otherwise have jurisdiction is unwilling and genuinely unable to investigate or prosecute the issue.⁷⁵

Once the issue of subject matter jurisdiction is resolved, there are three ways for the ICC prosecutor to initiate an investigation into a "situation."⁷⁶ A state party may refer a situation to the prosecutor, the UN Security Council can refer a situation to the prosecutor, or the prosecutor may begin an investigation on their own initiative "on the basis of information received from individuals or organizations."⁷⁷ No matter the means by which the investigation was initiated, the prosecutor has ultimate discretion to decide whether there is a "reasonable basis" for proceeding.⁷⁸

In addition to the Office of the Prosecutor (OTP), the ICC consists of three judicial chambers: the pre-trial chamber, the trial chamber, and

violation of the Charter of the United Nations." *Id.* art. 8*bis*(1). An act of aggression is "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations." *Id.* art. 8*bis*(2).

⁷² *Id.* art. 11.

⁷³ DAMROSCH & MURPHY, *supra* note 5, at 1330–31.

⁷⁴ For more, see PHILIPPA WEBB & MORTEN BERGSMO, INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS, COMPLEMENTARITY AND JURISDICTION, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2010).

⁷⁵ Rome Statute, *supra* note 1, art. 17.

⁷⁶ A situation is "... a particular crisis where crimes are thought to have occurred." DAMROSCH & MURPHY, *supra* note 5, at 1331.

⁷⁷ *Id.*

⁷⁸ Rome Statute, *supra* note 1, art. 15.

the appeals chamber.⁷⁹ When an investigation is initiated, the corresponding situation is assigned to a pre-trial chamber.⁸⁰ The pre-trial chamber is responsible for issuing warrants of arrest or summons to appear if the prosecutor so requests, and if there are reasonable grounds to believe a suspect may have committed a crime within the subject matter jurisdiction of the ICC.⁸¹ The same pre-trial chamber “holds a hearing to confirm the charges that will be the basis of the trial,” if the suspect appears before the court.⁸² After this, a trial chamber conducts the trial. Once the trial concludes, the accused, the prosecutor, or a concerned state may appeal the decision, that is then decided by an appeals chamber.⁸³ The ICC allows for victims to participate in court proceedings, at the behest of the prosecutor,⁸⁴ and may order a convicted defendant to pay reparations—including restitution, compensation, and rehabilitation, to victims.⁸⁵

The ICC prosecutor is elected by the states party to the Rome Statute for a non-renewable mandate of nine years.⁸⁶ As a result, between and within prosecutorial tenures, policies and priorities may change. The OTP routinely publishes reports detailing its policy on various matters, including on victims’ participation, case selection and prioritization, sexual and gender-based crimes, and—most pressingly for present purposes—gender persecution.⁸⁷ The ICC released its “Policy on the Crime of Gender Persecution” on December 7, 2022, which will be discussed in detail later in this work.⁸⁸

B. GENDER DIVERSITY IN THE PRE-COLONIAL WORLD TO GENDER BINARISM IN THE COLONIAL WORLD

The concepts of gender and gender identity are neither monolithic nor universal. The definition of gender identity as generally accepted in

⁷⁹ See DAMROSCH & MURPHY, *supra* note 5, at 1331–32.

⁸⁰ *Id.* at 1331.

⁸¹ DAMROSCH & MURPHY, *supra* note 5, at 1331.

⁸² *Id.*

⁸³ *Id.* at 1332.

⁸⁴ Rome Statute, *supra* note 1, art. 54(3)(b).

⁸⁵ *Id.* art. 75.

⁸⁶ *Id.* art. 42(4).

⁸⁷ *Policies and Strategies*, INT’L CRIM. CT., <https://www.icc-cpi.int/about/otp/otp-policies> [<https://perma.cc/9C32-3MXG>] (last visited Sep. 20, 2023).

⁸⁸ INT’L CRIM. CT. OFF. OF THE PROSECUTOR, POLICY ON THE CRIME OF GENDER PERSECUTION (Dec. 7, 2022), <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf> [<https://perma.cc/G6RM-QANM>].

IHRL is provided by the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles):

each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.⁸⁹

The notion of gender being limited to two sexes, male and female, is by no means universal.⁹⁰ Even aside from the existence of intersex persons,⁹¹ gender-variant and gender-diverse peoples “have existed throughout the world and across time, celebrated in some cultures, denigrated in others.”⁹² One, though by no means the only, prominent example of a historical “third” gender group is the *khwaja sira* in South Asia, which has existed on the subcontinent for thousands of years.⁹³ Many *khwaja sira* people “served as the guards of the female quarters, as well as administrators, military commanders, envoys, intelligencers, collectors of land revenue, and managers of business ventures.”⁹⁴ Others were devotees of monastic orders, or otherwise visited households to either “bless or curse fertility,” performing at births and weddings.⁹⁵ Others still occupied

⁸⁹ THE YOGYAKARTA PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY pmb1 (2007), https://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf [<https://perma.cc/UZN6-7RME>] [hereinafter Yogyakarta Principles]. The Yogyakarta Principles are non-binding in nature, but nonetheless exercise normative power as soft law.

⁹⁰ For discussion of the ICC's limited definition of gender as excluding intersex persons, see generally, María Manuela Márquez Velásquez, *Intersex: A Neglected Category in the Understanding of Gender-Based Crimes at the ICC?*, OPINIOJURIS (Mar. 9, 2022), <https://opiniojuris.org/2022/03/09/intersex-a-neglected-category-in-the-understanding-of-gender-based-crimes-at-the-icc/> [<https://perma.cc/RZV4-MLEG>].

⁹¹ Intersex persons are individuals with “natural bodily variations, sometimes visible at birth and sometimes only apparent in puberty.” Intersex persons might be “. . . individuals born with sex characteristics—genitals, gonads, chromosome patterns—that do not fit the traditional binary notions of male or female bodies.” *Id.*

⁹² Neela Ghoshal, *Transgender, Third Gender, No Gender: Part II*, OPINIOJURIS (Sept. 4, 2020), <https://opiniojuris.org/2020/09/04/transgender-third-gender-no-gender-rights-perspectives-on-laws-assigning-gender-part-ii/> [<https://perma.cc/QD3F-FJ3M>].

⁹³ Alizeh Kohari, *The Guru Who Said No*, PIPE WRENCH: THE NONBINARY ISSUE (Summer 2020), <https://pipewrenchmag.com/pakistan-khwaja-sira-fight-for-the-right-to-be/> [<https://perma.cc/569G-UH98>].

⁹⁴ JESSICA HINCHY, GOVERNING GENDER AND SEXUALITY IN COLONIAL INDIA: THE HIJRA, C. 1850–1900 23 (2019).

⁹⁵ *Id.* at 21, 23.

several mundane roles, such as agricultural laborers, shopkeepers, weavers, and other occupations.”⁹⁶ It was not until British colonialism that these “divergent” expressions of gender were quashed, forcing *khwaja sira* into the liminal spaces of society.⁹⁷ Other examples of gender variance include two-spirit persons in some Native American communities, whose roles and expressions vary across gender, but for whom fluidity has been the norm;⁹⁸ the *waria* in Southeast Asia;⁹⁹ the *Fa’afafine* in the Pacific Islands;¹⁰⁰ the *muxes* of the Zapotec people in Oaxaca;¹⁰¹ among many others.¹⁰²

With modern European colonialism, these fluid understandings of gender and gender identity were flattened. The advent of colonialism, and along with it the civilizing mission of Western Christianity, brought with it “blunt classificatory instruments” and “imposed new bureaucracies of gender assignment.”¹⁰³ This subsequently marginalized gender-variant communities and persons who existed beyond a male–female binary—and entrenched the gender roles that binary entailed.¹⁰⁴ As these identities emerge from marginalization, fighting for rights and legal recognition, some countries have been receptive—albeit haltingly, and in a limited manner—to the notion of offering a third gender identity aside from male and female, either through the marker of “X” or through an explicit “third gender” option.¹⁰⁵ This affords gender-variant persons greater civil rights

⁹⁶ *Id.* at 21.

⁹⁷ Kohari, *supra* note 93. For more on the colonial origins of transphobia in South Asia, *see generally*, HINCHY, *supra* note 94. Note that *hijra* was another word for people of a third gender in South Asia, sometimes implying a different gender role, sometimes seen as a derogatory term for third gender people. *See id.* at n.71.

⁹⁸ *Two Spirit and LGBTQ+ Identities: Today and Centuries Ago*, HUM. RTS. CAMPAIGN (Nov. 23, 2020), <https://www.hrc.org/news/two-spirit-and-lgbtq-identities-today-and-centuries-ago> [<https://perma.cc/RC53-J9WA>].

⁹⁹ Ghoshal, *supra* note 92.

¹⁰⁰ *Id.*; *Beyond Gender: Indigenous Perspectives, Fa’afafine and Fa’afatama*, NAT. HIST. MUSEUM L.A. CNTY., <https://nhm.org/stories/beyond-gender-indigenous-perspectives-faafafine-and-faafatama> [<https://perma.cc/3MUC-WNVM>] (last visited Sept. 17, 2023).

¹⁰¹ *Beyond Gender: Indigenous Perspectives, Muxe*, NAT. HIST. MUSEUM L.A. CNTY., <https://nhm.org/stories/beyond-gender-indigenous-perspectives-muxe> [<https://perma.cc/E9RT-CZL4>] (last visited Oct. 24, 2023).

¹⁰² Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 932 (2019).

¹⁰³ Ghoshal, *supra* note 92. In colonial India, for example, the British criminalized the practices of hijra (third gender) communities and removed state protection for them. Clarke, *supra* note 102. *See generally*, HINCHY, *supra* note 94.

¹⁰⁴ Ghoshal, *supra* note 92; Clarke, *supra* note 102; HINCHY, *supra* note 94.

¹⁰⁵ Ghoshal, *supra* note 92.

and access to the state's protection.¹⁰⁶ However, legal recognition is not a panacea, and this issue will be salient in our present discussion of gender in international criminal law. The recognition of some genders is at the expense of others, and can “generate backlash, reinforce stereotypes about the third category, and domesticate the radical potential of non-binary gender.”¹⁰⁷

Further, the very act of categorization dehumanizes trans and gender-variant persons, and, on an international level, the influence of European or North American discourse on gender variance in the global South may create “neo-colonial harm.”¹⁰⁸ Through this lens, then, the Yogyakarta Principles' definition of gender identity is lacking. The principles fail to consider the fluidity of gender and gender identity; rather, the text of the principles describes gender as something “deeply felt” and—by implication—fixed and unchanging.¹⁰⁹ This is to say nothing about how most human rights treaties, despite the Yogyakarta Principles, conceive of gender as a male-female binary.¹¹⁰ It is no such surprise that international criminal law has replicated this binary, particularly given that the same states who gatekeep the (il)legality of gender identity and expression are the ones negotiating definitions and conceptions in international treaties, no matter what realm of law.

Thus, any consideration of gender variance and transgender identities must strike a careful balance between under and overlegalization, as well as inclusion and exclusion. Any definition of gender, therefore, will be fraught with limitations—and yet it is precisely the task of a protective regime to ponder this question, minimizing harms while maximizing protections.

C. THE RISE AND DANGERS OF THE GENDER-CRITICAL MOVEMENT

Further complicating the discussion of the rights and recognition of gender-variant and transgender peoples is the rise, or perhaps resurgence, of the “gender-critical” movement. Put simply, the “gender-critical” movement is hostile toward the mainstreaming of transgender and non-binary gender identities, with gender-critical feminists often

¹⁰⁶ Clarke, *supra* note 102, at 937.

¹⁰⁷ *Id.*

¹⁰⁸ Sandra Duffy, *Contested Subjects of Human Rights: Trans- and Gender-variant Subjects of International Human Rights Law*, 84 MOD. L. REV. 1041, 1043 (2021).

¹⁰⁹ *Id.* at 1045.

¹¹⁰ Duffy, *supra* note 108, at 1044.

demanding the exclusion of trans women from female-only spaces. At the same time that many parts of society are becoming accepting of trans and nonbinary identities,¹¹¹ other segments—often right-wing, sometimes feminist—have made the legal recognition of nonbinary and transgender identities the “subject of intense debate” at best, if not the target of violence.¹¹² For instance, Pakistan passed a law in 2018 protecting the rights of transgender people, enshrining the Pakistani Supreme Court’s directives into “anti-discrimination legislation;”¹¹³ however, years later, the Transgender Persons Act¹¹⁴ has come under renewed and vitriolic scrutiny, organized by a right-wing, religious political party and—ironically—right-wing transgender people.¹¹⁵

This backlash is not limited to Pakistan. Hungary, the United Kingdom, Denmark, Poland, and the United States are among the countries that have pushed back against “gender ideology”—arguing that traditional mores are under attack, “that children in the classroom are being indoctrinated to become homosexuals, and that ‘gender’ is a dangerous, if not diabolical, ideology threatening to destroy families, local cultures, civilization, and even ‘man’ himself.”¹¹⁶ And yet, it is not just right-wing groups that criticize expansive conceptions of gender. “Gender-critical” feminists (also known as Trans Exclusionary Radical Feminists, or TERFs) argue that trans women represent a threat to cisgender (i.e., individuals whose gender identity matches the gender they were assigned at

¹¹¹ States that have adopted legislative models for gender recognition based on self-determined gender include, among others, Argentina, Denmark, Colombia, Ireland, Malta, Norway, Chile, and Switzerland. Victor Madrigal-Borloz (Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity), *Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, U.N. Doc. A/73/152 (July 12, 2018).

¹¹² Duffy, *supra* note 108, at 1041.

¹¹³ Kohari, *supra* note 93.

¹¹⁴ *Id.*

¹¹⁵ Mehrub Moiz Awan’s work on this matter is instructive. See, e.g., Mehrub Moiz Awan, *Performing for Our Humanity*, PIPE WRENCH: THE NONBINARY ISSUE (Summer 2022), <https://pipe-wrenchmag.com/class-capitalism-and-transgender-equality-in-pakistan/> [<https://perma.cc/WCD8-FLBB>].

¹¹⁶ Judith Butler, *Why is the idea of ‘gender’ provoking backlash the world over?*, THE GUARDIAN (Oct. 23, 2021), <https://www.theguardian.com/us-news/commentisfree/2021/oct/23/judith-butler-gender-ideology-backlash> [<https://perma.cc/AF95-WK9M>] (ironically, they describe one of the critiques of “gender ideology” leveled by the Vatican: that such ideologies are “colonizing imperialism.”).

birth) women and “women-only spaces and services.”¹¹⁷ Thus, TERFs seek to exclude trans women “on the premise of protection from ‘men.’”¹¹⁸

II. ANALYSIS

The definition of gender in the Rome Statute reflected states’ fears of a progressive, expansive definition of gender. This fear was misplaced and did not consider the question of trans and nonbinary gender identities. Moreover, even though states did not consider gender variance, the Rome Statute’s definition of gender reifies biologically essentialist understandings of gender to the exclusion of legally distinct gender identities around the world. The ICC’s binary definition of gender may risk decreasing the ICC’s legitimacy in the eyes of communities that are under particular risk of violence based on their gender identity and expression. Such instances of violence may sadly amount to crimes against humanity, thus placing them within the ambit of the Rome Statute. This would only further compound the ICC’s already fractured reputation. The ICC’s binary definition of gender may legitimize the gender-critical movement and the global, frequently violent, pushback against gender-diverse communities and gender-variant persons, such that it is imperative that the Article 7(3) definition of gender be reviewed, either literally or through interpretation. This section will end with an analysis of possible prescriptions for the future of Article 7(3), and the extent to which the ICC OTP’s new gender persecution policy adheres to these prescriptions.

A. IMPLICATIONS FLOWING FROM THE ROME STATUTE’S BINARY DEFINITION OF GENDER

1. *The ICC’s binary definition of gender reifies biologically essentialist understandings of gender to the exclusion of legally distinct gender identities around the world*

Article 21(3) of the ICC Rome Statute reflects the principle (adopted by consensus prior to the Rome Conference) that the application of law pursuant to the statute must be consistent with international human

¹¹⁷ Luke Armitage, *Explaining Backlash to Trans and Non-binary Genders in the Context of UK Gender Recognition Act Reform*, 8 J. INT’L NETWORK FOR SEXUAL ETHICS & POL. 11, 16 (2020).

¹¹⁸ *Id.*

rights.¹¹⁹ However, the internal limitation within this clause is significant: rather than deferring to the international human rights articulations of gender, which have been decidedly nonbinary,¹²⁰ the Rome Statute limits “adverse distinction founded on grounds such as gender” by explicitly adding “as defined in article 7, paragraph 3.”¹²¹ Article 21(3) strengthens the binary interpretation of gender and, seemingly, attempts to hold it in stasis, walling it off from the progressive development of international law as it pertains to gender. Even though international human rights law has come a long way since the early 2000s in its definition and conception of gender and gender identity, Article 21(3) seeks to create an island, untouched by change or progress, upon which the Article 7(3) definition of gender can remain constant. This is not only a shocking contrast to international law’s own conception of itself as a law that is—and is *encouraged* to be—progressively developed,¹²² but is actively harmful. Gender as a biological

¹¹⁹ MAKING OF THE ROME STATUTE, *supra* note 11, at 371.

¹²⁰ For some examples of international human rights articulations of gender and gender identity, see Yogyakarta Principles, *supra* note 89, at 8 (“Understanding ‘gender identity’ to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms”); Victor Madrigal-Borlitz (Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity), *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, para. 13, U.N. Doc. A/HRC/47/27 (June 3, 2021) (“[G]ender is the term used to describe the sociocultural constructs that assign roles, behaviours, forms of expression, activities and attributes according to the meaning given to biological sex characteristics. Under this definition, gender and sex do not substitute each other, and gender identity and gender expression are inextricably linked to them as practices of concern in anti-discrimination analysis”); Gender Identity, Equality, and Non-Discrimination to Same Sex Couples, Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24, para. 32(f) (Nov. 24, 2017) (as translated in Giovanna Gilleri, *Abandoning Gender “Identity”*, 116 A.J.I.L. UNBOUND 27, 28 (2022), the definition of “gender identity” draws on the Yogyakarta Principles, but crucially stipulates that “[g]ender identity is a broad concept which allows for auto-identification and refers to the individual experience of one’s own gender”).

¹²¹ Rome Statute, *supra* note 1, art. 21(3) (the full text reads: “The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.”).

¹²² The United Nations Charter mandates the General Assembly to “encourage the progressive development of international law and its codification.” U.N. Charter, art. 13, para. 1(a). “Progressive development,” in this sense, “encompasses the drafting of legal rules in fields that have not yet been regulated by international law or sufficiently addressed in State practice.” *Codification and Progressive Development of International Law*, UNITED NATIONS OFFICE OF LEGAL AFFAIRS, <https://legal.un.org/cod/> [<https://perma.cc/AC47-46AY>] (last visited Sep. 23, 2023). Progressive development is one way in which international law seeks to remain relevant, given that it responds to a dynamic, constantly evolving world. It is a means, in the author’s opinion, to remedy the

binary is held, in this inertia, as gospel—and even if in practice the ICC can deviate from the inertia, it will only take a return to gender-as-binary for all progress to be undone.

As discussed in Part I, the negotiations surrounding the definition—or even inclusion—of gender in the Rome Statute were reflections of the zeitgeist of the time. The latter third of the twentieth century saw the mainstreaming of women’s rights¹²³ and the nascence of a broader international human rights movement to include a “gender perspective.”¹²⁴ This coincided with highly televised atrocities that included mass sexual violence and the Bosnian and Rwandan genocides, which catapulted wartime rape and related issues into the public eye.¹²⁵ Thus, advocates for the inclusion of a gendered dimension to the Rome Statute sought to correct for the inadequate attention that international humanitarian law paid to sexual violence.¹²⁶ Certainly,

The Rome Statute’s gender provisions . . . encapsulate the international community’s acknowledgement of the gross injustices perpetuated by the traditional marginalization of these [gender-based] crimes under international law, and its willingness to take positive steps to build on the momentum generated principally by the work of the two ad hoc Tribunals in order to redress the situation.¹²⁷

inherent conservatism of the law; not in terms of its values, though that may also be a consequence, but conservatism in that the law is a slow-moving organism. Precisely because progressive development seeks to rectify that which has “not yet” been regulated or even addressed in state practice, it imbues international law with the means of its own proactivity. For Article 21(3) of the Rome Statute to render gender inert may, thus, run contrary to the very spirit of international law.

¹²³ This sea-change was despite the fractious consequences of the Cold War. In fact, “Second” and “Third” World States “played a significant role in shaping women’s rights at the UN during the 1970s,” culminating in the Convention on the Elimination of All Forms of Discrimination Against Women. Celia Donert, *Whose Utopia? Gender, Ideology, and Human Rights at the 1975 World Congress of Women in East Berlin*, THE BREAKTHROUGH: HUMAN RIGHTS IN THE 1970S 68, 69 (Jan Eckel & Samuel Moyn eds., 2013).

¹²⁴ Beijing Declaration and Platform of Action, *supra* note 54, para. 142(b).

¹²⁵ On the point of the televised nature of these conflicts, it is important to note that while sexual violence has been a feature of conflict since time immemorial, the genocides in Rwanda and Bosnia took place in the 1990s, when televisions were ubiquitous. Extensive coverage of these conflicts, and the atrocities therein, mobilized rage and activism. This became a valuable arrow in the quiver of advocates seeking to realize accountability for wartime rape and sexual violence. Heidi Nichols Haddad identifies “media attention and symbolic framing” as one of three “antecedent variables” that helped pressure the ICTY and ICTR into addressing the issues of sexual violence in conflict (the other conditions being “prior connections and matched interests with local women’s and human rights groups” and “geopolitical factors). Heidi Nichols Haddad, *Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals*, 12 HUM. RTS. REV. 109, 111 (2011).

¹²⁶ MAKING OF THE ROME STATUTE, *supra* note 11, at 362.

¹²⁷ *Id.* at 390.

However, it is striking that the admirable legal imagination employed in service of expanding international criminal law to encompass gender-based and sexual violence stopped short of conceiving such violence as being targeted toward individuals whose genders did not adhere to a strict binary. Perhaps such shortsightedness might be understandable given the narrow agendas of state representatives to the negotiations. But within the context of the long road to the ICC and ongoing advocacy¹²⁸ for the expansion of the Rome Statute's coverage, exclusion of gender minorities may preclude justice.

At the same time that rights for some have been progressed, there has been a pushback against what has come to be perceived as the muddying of the bounds of human rights.¹²⁹ If international law is a consent-based system, one in which “[the] rules of law binding upon States . . . emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law,” then states are only bound by international law to the extent that they agree to be bound by

¹²⁸ Revealingly, there was tension during the negotiations even between NGOs. Conservative NGOs actively lobbied against the inclusion of gender, supporting those States arguing that “the term ‘gender’ could imply rights more expansive than those currently recognized in many states, with the main concern being that the term might sanction rights based on sexual orientation.” Additionally, though not a member state of the ICC, the Holy See (i.e., the Vatican) frequently boasts a large presence in international negotiations. This was also the case at the negotiations surrounding the Rome Statute; the Holy See was vocally against the construction of gender as societal and based on “dubious interpretations based on world views which assert that *sexual* identity can be adapted indefinitely to suit new and different purposes.” 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, 65 (2005) (emphasis added by present author). Alliances between States and NGOs based on ideology are not unique to the Rome Statute; ideological divisions between NGOs have animated other treaty negotiations, such as those surrounding the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. See generally, ANNE GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* (2010); JO DOEZEMA, *SEX SLAVES AND DISCOURSE MASTERS: THE CONSTRUCTION OF TRAFFICKING* 49–73 (2010); UNITED NATIONS OFFICE ON DRUGS AND CRIME, *TRAVAUX PRÉPARATOIRES OF THE NEGOTIATIONS FOR THE ELABORATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO* at 317–447, U.N. Sales No. E.06.V.5 (2006).

¹²⁹ For an articulation, and defense, of such concerns see Hurst Hannum, *Reinvigorating Human Rights for the Twenty-First Century*, 16 HUM. RTS. L. REV. 409 (2016). Hannum argues that “the increasingly strident calls from European and other ‘Western’ human rights activists for adherence to the contemporary liberal European construct of society is likely to create a backlash in the rest of the world.” *Id.* at 413; For an argument that the “inflation objection” stymies the ability of individuals to challenged long-entrenched status quos and thus makes it difficult to undo conservative notions of the utility of law, see Jens T. Theilen, *The Inflation of Human Rights: A Deconstruction*, 34 LEIDEN J. INT’L L. 831 (2021).

international law.¹³⁰ Thus, the blurring of the edges of human rights to encompass *more* rights than those which states agreed to may seem not only contrary to international law, at least through a positivist lens, but might be seen as one more way in which powerful states may dictate the domestic and international politics of less powerful states.¹³¹ Many states that were opposed to this “inflation” in human rights¹³² would have feared their international commitments being used to broaden the scope of women’s rights, for instance, past what their religious, societal, or cultural mores permitted.¹³³ But an anti-inflation mindset does not just preserve religious, societal, or cultural mores, nor does it just stymie the progressive development of human rights and international criminal law. It actively conceives of human rights as “distinct from ‘political debate and activism’ instead of one of many tools used within, and as a field shaped by, such activism.”¹³⁴ More specifically, “the more a human rights claim is geared at far-reaching social transformation, the more threatening it seems from within the anti-inflation mindset.”¹³⁵ If the purpose of international human rights law is to “reaffirm faith . . . in the dignity and worth of the human

¹³⁰ S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. 5, 18 (Sept. 7).

¹³¹ See, e.g., B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT’L CMTY. L. REV. 3, 12 (2006) (arguing, for instance, that while human rights law certainly has a progressive dimension, it “can easily be abused to threaten third world leaders and peoples unless they are willing to accept the dictates of the first world”); Hannum, *supra* note 129, at 413 (describing human rights hawks and “activists who see an expansive concept of ‘rights’ as the primary means to effect domestic social and political change, as well as by governments that wish to burden human rights with broader geopolitical initiatives.”).

¹³² This rhetoric of the “inflation” of human rights reflects the concern that if there are too many human rights, the *value* of human rights may sink. Theilen, *supra* note 129, at 832.

¹³³ For example, many States entered reservations to the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) asserting that they would comply with certain key clauses of the treaty to the extent that those clauses were not repugnant to the State’s constitution or, in many cases, Islamic law. The States that have levied reservations noting the primacy of compliance with Islamic law are Bahrain, Bangladesh, Brunei Darussalam, Egypt, Iraq, Kuwait, Libya, Malaysia, Mauritania, Morocco, Oman, Qatar, Saudi Arabia, Syria, and the United Arab Emirates. Crucially, these are *not* the only States that have entered reservations to key provisions of the Convention. Rangita de Silva de Alwis & Melanne Vermeer, “*Time Is A-Wasting*”: Making the Case for CEDAW Ratification by the United States, 60 COLUM. J. TRANSNAT’L L. 1, 35 (2021). The extent to which Islamic law *is* in tension with women’s rights under international human rights law is debatable, though well beyond the scope of the present article. Other States have also entered reservations based on religion, practicality, or other considerations. United Nations Treaty Collection, “Convention on the Elimination of All Forms of Discrimination Against Women,” <https://treaties.un.org/doc/Publication/UNTS/Volume%201249/v1249.pdf> [<https://perma.cc/J2NT-DR5F>]. Notably, the United States has yet to ratify CEDAW at all—one of only a handful of countries to have not ratified the treaty—despite President Jimmy Carter having signed the treaty in 1980. de Silva de Alwis, *supra* note 133, at 5.

¹³⁴ Theilen, *supra* note 129, at 845.

¹³⁵ *Id.* at 849.

person” and “promote social progress and better standards of life in larger freedom,”¹³⁶ its institutions must be unafraid to push beyond the status quo. International institutions and lawyers alike need to actively lean into and champion vastly more revolutionary, and vastly more protective, visions of the law, lest complacency—or, worse, regression—crystallize.

The Rome Statute’s definition of gender, if it is meant to be analogous to sex, is itself false and not reflective of sex as a biological category. The existence of intersex persons—themselves at risk of “non-conformity with expected bodily appearances of males and females”¹³⁷—defies biologically essentialist notions of sex and gender. It reveals “gender-critical” factions’ avowed commitment to “biology” for what it truly is: a deep-seated and conservative view of acceptable gender expressions. This expanded view of gender is not simply a rhetorical stance, nor just a moral one, but a legal stance. Any definition of gender on real biological grounds must necessarily be nonbinary (or nondimorphic),¹³⁸ as biology inherently allows for variations in sex.¹³⁹

Biology aside, the Rome Statute’s conception of gender as binary is out of step with the laws of many of the ICC’s member-states. As noted previously, several countries have legalized gender markers beyond male/female or otherwise loosened restrictions on gender recognition.¹⁴⁰ For the ICC to champion accountability for gender persecution while remaining tied to such an outdated understanding of gender is nothing short of hypocritical and harmful.

¹³⁶ U.N. Charter, *supra* note 122. This is recalled in the preamble to the Universal Declaration of Human Rights: “Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom. . .” G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

¹³⁷ United Nations High Comm’r for Refugees, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, para. 10, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012).

¹³⁸ Where being dimorphic refers to a phenomenon that occurs “in two distinct forms.” *Dimorphic*, MERRIAM-WEBSTER.COM DICTIONARY, <https://www.merriam-webster.com/dictionary/dimorphic> [<https://perma.cc/Q85D-365P>] (last visited Sept. 21, 2023).

¹³⁹ For just one example of scientific research arguing that “a belief in absolute sexual dimorphism is wrong” see Melanie Blackless, Anthony Charuvastra et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 AM. J. HUM. BIOLOGY 151, 163 (2000) (noting in the introduction that “Biologists and medical scientists recognize, of course, that absolute dimorphism is a Platonic ideal not actually achieved in the natural world”).

¹⁴⁰ Susan Dicklitch-Nelson & Indira Rahman, *Transgender Rights Are Human Rights: A Cross-national Comparison of Transgender Rights in 204 Countries*, 21 J. HUM. RTS. 525, 532 (2022).

2. *The ICC's binary definition of gender may risk decreasing the ICC's legitimacy in the eyes of communities that are under particular risk of violence based on their gender identity and expression*

The promise of the International Criminal Court has been rapidly brought down to earth, frequently in painful ways. Criticisms have been levied against the ICC from all fronts, on all fronts. For example:

In the Court's first two decades, convictions have been few and controversial, key arrest warrants have gone unfulfilled and widely ignored, high-profile cases have collapsed, investigations appear to have been undermined, cooperation has been withheld, neocolonial bias has been alleged, states have withdrawn or threatened to, and the world's most powerful state [the United States] has brazenly attacked the institution (with the Court initially cowering in response).¹⁴¹

The ICC's continued effectiveness relies on its ability to rehabilitate its image. Legitimacy is a powerful phenomenon in international law; insofar as legitimacy is "central for international organizations . . . to make a difference in world politics," the "dwindling legitimacy of the [ICC] in the eyes of many African governments" has a direct impact on its relevance and effectiveness as a court of individual criminal liability for international crimes.¹⁴² Moreover, this dwindling legitimacy has a knock-on effect regarding "the capacity of [international organizations] to develop new rules and norms."¹⁴³ Given the role of judicial decisions as a subsidiary source of international law,¹⁴⁴ and the hope that international legal norms will filter down into the domestic law of individual states, if states were to simply

¹⁴¹ Tom Dannenbaum, *The ICC at 20 and the Crime of Aggression*, VÖLKERRECHTSBLOG (July 14, 2022), <https://voelkerrechtsblog.org/the-icc-at-20-and-the-crime-of-aggression/> [https://perma.cc/S4EP-ZLUL]. Other criticisms of the ICC include its characterization as "the legal arm of NATO," Reed Brody, *The ICC at 20: Elusive Success, Double Standards and the 'Ukraine Moment'*, JUSTICE INFO (June 30, 2022) <https://www.justiceinfo.net/en/102866-icc-20-elusive-success-double-standards-ukraine-moment.html> [https://perma.cc/D8ZS-CUFS]. The ICC has also been criticized for playing a role in entrenching "global structural inequality that plays out in racialized cartographies," Clarke, *supra* note 14. Additionally, the ICC's inability—or unwillingness—to hold certain States, including the United States and Israel, accountable, has also been criticized. Matt Killingsworth, *20 years on, the International Criminal Court is doing more good than its critics claim*, THE CONVERSATION (July 11, 2002, 9:24 PM), <https://theconversation.com/20-years-on-the-international-criminal-court-is-doing-more-good-than-its-critics-claim-186382> [https://perma.cc/3UWY-A6QC].

¹⁴² Jonas Tallberg & Michael Zürn, *The Legitimacy and Legitimation of International Organizations: Introduction and Framework*, 14 REV. INT'L ORGS. 581, 581–82 (2019).

¹⁴³ *Id.*

¹⁴⁴ Statute of the International Court of Justice, art. 38, para. 1.

ignore the ICC's jurisprudence based on its sour reputation, it would set the development of international law, and international criminal law, back.

In the present case, the legitimacy concern could go either way. The ICC may be more reticent to introduce an expansive understanding of gender out of concern that states antagonistic to such a turn may abandon the ICC altogether, especially if such states are already skeptical of the ICC. However, such states were likely always going to abandon the ICC. States that are skeptical of the whole enterprise of international criminal law and the ICC are likely to be on the search for reasons to withdraw from the Rome Statute. This may be particularly true of states that anticipate being investigated or prosecuted by the ICC prosecutor. It would be far more advantageous for a state's image on the international (and domestic) stage if said state left under ideological pretenses, as opposed to vocalizing its desire for self-preservation.

Furthermore, temporary hostility does not mean perpetual hostility. Policymakers are beholden, simultaneously, to the pressures of domestic international politics.¹⁴⁵ Both can change over time, and evidence suggests that domestic constituents can affect the depth of states' commitments to international agreements¹⁴⁶—that is, advocates need not be disheartened if greater protection of rights causes states to withdraw from international obligations. Concentrated lobbying, including transnational advocacy, has the potential to rejuvenate state adherence to international legal values. That may go a longer way in legitimizing the ICC than the more tempestuous allegiance of states ever could. Such transnational advocacy is precisely what spurred international tribunals to take sexual violence in conflict as a violation of international humanitarian law more seriously. It may well be what makes a difference in providing more robust international legal protections for gender-variant persons—as well as accountability for perpetrators of violence thereagainst.

¹⁴⁵ For more on the notion of a “two-level game,” see Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988).

¹⁴⁶ See Jessica Edry, *Shallow Commitments May Bite Deep: Domestic Politics and Flexibility in International Cooperation*, 46 INT'L INTERACTIONS 669 (2020).

3. *The ICC's binary definition of gender may legitimize the gender-critical movement and the global—often violent—pushback against gender-diverse persons*

Adherence to gender-as-binary causes tangible harm by signaling a tacit agreement with the harmful and violent ideology of the gender-critical movement. As more persons with prominent followings begin throwing their lots in with such ideologies, violence against trans and gender-variant persons—already disproportionately high—threatens to ramp up. All around the world, violence against transgender persons is on the rise, despite simultaneous (albeit incremental) improvements in the status of trans, nonbinary, and other gender-variant persons.¹⁴⁷ For example, in the United States such violence is becoming dangerously organized, let alone interpersonal. Increasingly, US state legislatures have been introducing and considering laws that would harm transgender and gender-variant persons. Already, they have passed laws “banning transgender children’s access to trans-affirming care or scholastic sports.”¹⁴⁸ Enacted under the guise of protecting children, such laws are more likely to cause children to harm themselves.¹⁴⁹

The spillover effect of gender-critical furor has grown to encompass those *perceived* as being gender-variant. For example, many drag artists have been threatened even in avowedly liberal cities such as Boston, Massachusetts, where masked neo-Nazis stormed a drag story hour for children.¹⁵⁰ Anti-trans legislation reporter Erin Reed identified over 270 bills targeting gender-variant people as of early February 2023 with twenty-three US states considering bills targeting trans peoples’ access to

¹⁴⁷ Dicklitch-Nelson & Rahman, *supra* note 140.

¹⁴⁸ Heron Greenesmith, *Violence Against Transgender People is on the Rise, Stopping it Requires a Holistic Solution*, JUST SECURITY (Oct. 18, 2022), <https://www.justsecurity.org/83597/violence-against-transgender-people-is-on-the-rise-stopping-it-requires-a-holistic-solution/> [<https://perma.cc/575K-WHNA>].

¹⁴⁹ Orion Rummmler, *How Utah's new ban on gender-affirming care for minors is affecting trans teens in the state*, PBS (Feb. 3, 2023, 5:25 PM), <https://www.pbs.org/newshour/nation/how-utahs-new-ban-on-gender-affirming-care-for-minors-is-affecting-trans-teens-in-the-state> [<https://perma.cc/MA2X-CHXD>].

¹⁵⁰ Greenesmith, *supra* note 148. In direct contrast to right-wing concerns that drag queens (and trans people in general) were trying to harm children, Patty Bourrée—the drag queen whose story hour was stormed—tweeted, “I can’t put myself (and the kids!) in a potentially violent situation.” PATTY (@pattybourree), X (Aug. 7, 2022, 1:36 PM), <https://twitter.com/PattyBourree/status/1556348603572133889> [<https://perma.cc/EW7X-9LB8>].

healthcare.¹⁵¹ At the time of writing this Comment, Alabama, Arkansas, and Utah have successfully passed healthcare bans. Florida, Mississippi, Missouri, Montana, Tennessee, West Virginia, and Wyoming are all considering similar bills, some of which are in advanced stages of consideration.¹⁵²

These legislations do not exist in a silo. They politicize—and render into policy—real-world violence against gender-variant people and those perceived as such. Anti-trans furor has resulted in horrific tragedies being turned into fodder for anti-trans sentiment. “Right-wing messaging boards” successfully circulated a disinformation campaign that alleged that the 2022 Robb Elementary School shooting in Uvalde, Texas was perpetrated by a transgender woman.¹⁵³ This hoax, perpetuated by Representatives Paul Gosar and Marjorie Taylor Green, likely resulted in four El Paso men attacking a young trans girl.¹⁵⁴ Anti-trans (and broadly anti-LGBTQI+) violence has encroached on safe spaces as well; in November 2022, a gunman entered and killed five people at Club Q, an LGBTQI+ nightclub south of Denver, Colorado.¹⁵⁵ Some have even drawn connections between a December 2022 attack on a power grid in Moore County, North Carolina, and protests against a local drag show.¹⁵⁶ Consequently, forty-five thousand people in the county lost power, and many “struggled to stay warm as temperatures dropped below freezing overnight.”¹⁵⁷ While it is not clear that the attack on the power plant was linked to the drag performances, the Department of Homeland Security “warned that the LGBTQ community and critical infrastructure may be targets of violence

¹⁵¹ Erin Reed, *The State of the States*, ERIN IN THE MORNING (Feb. 4, 2023), <https://www.erininthemorning.com/p/the-anti-trans-state-of-the-states> [<https://perma.cc/3USD-ZQGB>] [hereinafter *Anti-Trans State*].

¹⁵² *Id.*

¹⁵³ Greensmith, *supra* note 148.

¹⁵⁴ *Id.*

¹⁵⁵ Sam Metz et al., *Mother, Friends, Performers among Dead at Colorado Gay Club*, AP NEWS (Nov. 22, 2022, 7:57 AM), <https://apnews.com/article/crime-shootings-colorado-denver-springs-79976bed902603de59bd7b6ba2b16aff> [<https://perma.cc/ZZ5F-QBAW>].

¹⁵⁶ The protesters claimed that drag queens were trying to “groom” or “indoctrinate” children. There were also allegations that the theatre hosting drag performances received threats of violence. John Riley, *Anti-Drag Activist Claims God is Behind North Carolina Power Outage*, METROWEEKLY (Dec. 5, 2022).

¹⁵⁷ Hannah Schoenbaum, *NC Power Grid Attack Stokes Fear in Rural LGBTQ Community*, AP NEWS (Dec. 8, 2022, 7:31 PM), <https://apnews.com/article/north-carolina-durham-united-states-government-1a9e2fd69b41171a7b55a22440486912> [<https://perma.cc/25FB-8QEE>].

as domestic extremists and foreign terrorist organizations encourage online supporters to carry out attacks.”¹⁵⁸

The impact of such widespread and high-profile hostility on gender-variant youth cannot be overstated. A 2022 Trevor Project survey found that 53 percent of transgender and nonbinary youth had seriously considered suicide in the past year.¹⁵⁹ That Republican presidential hopefuls such as former US President, Donald Trump, and Florida Governor, Ron DeSantis, have expressed their support for harsh anti-trans policies shows how politically fertile such ground is.¹⁶⁰

If silence is complicity, the ICC—on paper—becomes even more complicit if it does not reckon with the implications of its definition of gender. Moreover, it is important that trans and gender-variant persons have an avenue for protection and to hold accountable potential and present perpetrators. Even though transphobic movements are presently largely domestic, coalitions across borders already exist.¹⁶¹ It is thus possible that persecution of gender-diverse communities may take on a widespread and systematic nature, amounting to the crime against humanity of persecution on the grounds of gender—if not genocide, as the Lemkin Institute, named after the man who coined the term genocide, has warned.¹⁶² This would draw such violence closer to the competence of international criminal law and the ICC. An argument could be made that such conditions are already manifest in the United States. The ICC’s own gender

¹⁵⁸ *Id.*

¹⁵⁹ 2022 *National Survey on LGBTQ Youth Mental Health*, THE TREVOR PROJECT, at 5, https://www.thetrevorproject.org/survey-2022/assets/static/trevor01_2022survey_final.pdf [<https://perma.cc/LE4S-39VZ>]. The survey notes that “LGBTQ youth are not inherently prone to suicide risk because of their sexual orientation or gender identity but rather placed at higher risk because of how they are mistreated and stigmatized in society.” Considering that in 2022 155 anti-trans bills were filed across the United States, it is no wonder that gender-variant youth felt stigmatized. See Erin Reed, *Updated Anti-trans Legislative Risk Assessment Map*, ERIN IN THE MORNING (Jan. 19, 2023), <https://www.erininthemorning.com/p/updated-anti-trans-legislative-risk> [<https://perma.cc/HF8Q-DW79>].

¹⁶⁰ Erin Reed, *National Trans Bans? Both Trump and DeSantis Advocate Anti-Trans Policies on Same Day*, ERIN IN THE MORNING (Feb. 2, 2023), <https://www.erininthemorning.com/p/national-trans-bans-both-trump-and-> [<https://perma.cc/MU6Z-QS9Y>].

¹⁶¹ Judith Butler identifies two transnational organizations that mobilize against “gender ideology:” the International Organization for the Family; Platform CitizenGo, founded in Spain but with the ability to mobilize “anti-gender” activists as far afield as Brazil; and Agenda Europe, which consists of over 100 organizations and “casts gay marriage, trans rights, reproductive freedom, and LGBTQI anti-discrimination efforts as assaults on Christianity.” Butler, *supra* note 116.

¹⁶² *Statement on the Genocidal Nature of the Gender Critical Movement’s Ideology and Practice*, LEMKIN INST. FOR GENOCIDE PREVENTION (NOV. 29, 2022), <https://www.lemkininstitute.com/statements-new-page/statement-on-the-genocidal-nature-of-the-gender-critical-movement%E2%80%99s-ideology-and-practice> [<https://perma.cc/H5SR-6NWN>].

persecution policy has nodded to this potential and has signaled an awareness—unfortunately salient—of the fact that a rise in gender persecution may rope in those individuals who are not actually part of the targeted community but are perceived to be.¹⁶³

This adds another layer of urgency to the present matter: without clarity on what constitutes gender at the international criminal level, there is little clarity on *who* may be victimized by the crime of gender persecution, and what recourse there is for such victims. Indeed, if one of the purposes of the criminal law, whether domestic or international, is deterrence, then the lack of inclusivity under Article 7(3) does little to deter the persecution of gender-variant persons and gender-diverse communities. Aside from mere deterrence, an underinclusive definition of gender precludes accountability for the victimization of trans and nonbinary persons. As violence and violent rhetoric ramps up, the answers to such questions are of great legal and actual consequence.

B. APPROACHING GENDER: SOME WAYS FORWARD

1. *Silence, Reconstruction, or Constructive Ambiguity?*

While advocates, scholars, and international organizations have attempted different ways to treat the issue of gender, this Comment focuses on three approaches: silence, reconstruction, and constructive ambiguity. Silence has been proffered as a solution to the gender definition quandary by many feminists and organizations. Not only did the Beijing Declaration and Platform of Action of 1995 argue for the nondefinition of gender, but two and a half decades on, the International Law Commission acquiesced to lobbying by “a broad campaign coalition between NGOs, states, and several UN Experts . . . to remove the re-employment of the Rome Statute gender definition from the draft convention.”¹⁶⁴ This “silence” regarding the definition of gender has been a longstanding feminist proposal,¹⁶⁵ and its acceptance by an organization no less than the International Law Commission, charged with identifying emerging norms of international law and drafting treaties, is deeply promising. Whether states will accept this noninclusion as the general assembly reviews the Draft

¹⁶³ INT’L CRIM. CT. OFF. OF THE PROSECUTOR, *supra* note 88, para. 62.

¹⁶⁴ Juliana Santos de Carvalho, *The Powers of Silence: Making Sense of the Non-Definition of Gender in International Criminal Law*, 35 LEIDEN J. INT’L L. 963, 965 (2022).

¹⁶⁵ *See id.* at 965.

Convention on Crimes Against Humanity remains to be seen. Still, this is one possible approach to the Rome Statute's definition of gender: deletion altogether. The flaw of this approach is also its strength, and the discussion of silence in international law is instructive here.¹⁶⁶ Silence occupies several roles. Silence can be passivity and subjugation (particularly when viewed through a feminist or Third World Approaches to International Law—TWAIL—lens). However, silence can also signify the nonobjection of states in international law. In this sense, nonobjection, or the “tacit acceptance or toleration, something that allows the non-objected practice,”¹⁶⁷ can constitute *opinio juris*, and therefore international custom. In other cases, silence can be “merely political,” reflecting “an inability to speak or lack of direct interest.”¹⁶⁸ As such, context—factual, sequential, relational—is crucial when interpreting silence.¹⁶⁹ If silence becomes the order of the day, it will require feminists, queer theorists, and other international lawyers in solidarity to shape the meaning of silence.

Another approach, which this article will refer to as “reconstruction,” attempts to rectify several exclusions at once. Reconstruction would, first, rely on the ICC to be an activist court and interpret “the crime of gender-based persecution as persecution on gender grounds rather than against gender groups.”¹⁷⁰ Second, reconstruction requires following one of two paths: (1) “interpret gender as incorporating ‘sex,’ ‘gender as a social construct,’ and ‘sexual orientation,’” thus creating the scope for broad protections; or (2) construe gender as a “socially constructed concept.”¹⁷¹ In the second alternative, persecution based on sex and sexual orientation would count as a crime against humanity through the residual clause in Article 7(1)(h), i.e., “or other grounds that are universally recognized as impermissible under international law.”¹⁷²

Neither solution is a complete panacea.¹⁷³ Moreover, both alternatives force the states party to the Rome Statute back to the negotiation

¹⁶⁶ See *id.* at 966–67.

¹⁶⁷ *Id.* at 966.

¹⁶⁸ *Id.*

¹⁶⁹ See *id.*

¹⁷⁰ Márquez Velásquez, *supra* note 90, at 3. This suggestion was also proffered by the author in the past. Neiha Lasharie, *We Need to Talk about the ICC's Trans-Exclusionism*, THE FLETCHER FORUM OF WORLD AFFAIRS (July 13, 2020), <http://www.fletcherforum.org/the-ros-trum/2020/7/13/we-need-to-talk-about-the-iccs-trans-exclusionism> [<https://perma.cc/G6N4-3TBX>].

¹⁷¹ Márquez Velásquez, *supra* note 90, at 3.

¹⁷² Rome Statute, *supra* note 1, art. 7(1)(h).

¹⁷³ Márquez Velásquez, *supra* note 90, at 3.

table, and while it would be hopeful to assume that concerns regarding human rights “expansion” have abated, it is less likely that concerns regarding the inclusion of sexual orientation—even the suggestion of which engendered fierce opposition and debate during the negotiations over the Rome Statute and the ambit of gender—have lessened.

The final approach, constructive ambiguity, is also the current status quo. International lawyer and professor of international law, Valerie Oosterveld,¹⁷⁴ argues that the definition of gender reflects “constructive ambiguity,” thus leaving “open opportunities for a positive and precedent-setting approach—an opportunity that should be seized upon by lawyers and the ICC itself.”¹⁷⁵ In 2005, still around the infancy of the ICC, this defense of “gender” as defined in the Rome Statute might well seem justified. Unfortunately, it is also reflective of perhaps a misplaced faith in the progressive capacity of *any* judicial body, let alone an international judicial body. A long-term approach to international law would imbue anyone with hope, and such an approach should not be abandoned in favor of the pessimistic tethers of the present. But the long-term progressive turn of international law cannot be presumed to be linear, nor presumed at all, just as the long-term progressive turn of any society cannot be presumed. The pendulous nature of societal views on gender and gender-variance is a testament to this. International law as an instrument of states will only serve progressive ends if sufficient pressure is placed on states *toward* progressive ends. And international law will only serve as a protective, progressive instrument if it is wielded as such. At present, there is little in the ICC’s construction of gender, or its jurisprudence so far, to indicate that “constructive ambiguity” has worked.

This is not to exclude the possibility that an ICC judge, prosecutor, researcher, or even legal counsel might exhibit the kind of legal imagination required to move the needle on mindfully including gender-diverse communities in international criminal law. After all, “judicial decisions and the teachings of the most highly qualified publicists of the various nations” are subsidiary sources of international law.¹⁷⁶ But the literal language of the law is not sufficient to save vulnerable communities; if anything, it can be the source of immense harm if its limitations are not reckoned with from a perspective that centers the vulnerable.

¹⁷⁴ Oosterveld, *supra* note 128, at 55.

¹⁷⁵ *Id.* at 58.

¹⁷⁶ Statute of the International Court of Justice, *supra* note 144, at art. 38, para. 1(d).

2. *The ICC Office of the Prosecutor's Policy on Gender Persecution (2022)*

Given the above discussion, how does the ICC Office of the Prosecutor's new policy on gender persecution measure up? It is certainly a positive step that the "Special Adviser on Gender Persecution" drafted the policy after an "extensive, year-long consultative process" with other special advisers and "external actors" spanning civil society, the UN system, "affected communities," and others.¹⁷⁷ While the OTP's efforts are cause for greater optimism, there are some shortcomings to the OTP's gender persecution policy. Moreover, the OTP's gender persecution policy constitutes only one aspect of the ICC's overall approach to gender issues. It remains to be seen whether the judges of the court will follow suit.

The policy begins with a list of definitions of terms used throughout the report. Interestingly, the glossary includes a definition for the term "intersex" but not transgender.¹⁷⁸ At the same time, the glossary includes the term "LGBTQI+"¹⁷⁹—making the specific extrication of "intersex" out of the LGBTQI+ umbrella noteworthy.¹⁸⁰ By itself, this may not necessarily be a bad thing and could even be cause for hope. If the OTP is so conscious of the existence of intersex people, who by virtue of existing falsify the very definition of gender in the Rome Statute, this may herald greater consideration for transgender and nonbinary gender identities. It is also possible that the lack of definition for other terms in the LGBTQI+ umbrella was purposeful, signaling a desire to take the "silence" approach to gender issues out of consideration for the vastly different experiences

¹⁷⁷ The full list of those consulted is as follows: "... representatives of States, UN experts, UN Women, international institutions, civil society organisations, affected communities, activists, academics, scholars and victims/survivors through workshops, panels, briefings and meetings before and during the drafting of this Policy. Over 500 organisations, institutions, States, UN experts, independent experts, activists, scholars and academics, representing over 100 countries and territories made submissions for consideration, signaling the importance of developing this Policy." INT'L CRIM. CT. OFF. OF THE PROSECUTOR, *supra* note 88, at 10.

¹⁷⁸ The OTP defines intersex as "an umbrella term used to describe a wide range of natural bodily variations in sex characteristics." *Id.* at 3.

¹⁷⁹ The definition provided for LGBTQI+ is as follows: "Lesbian, gay, bisexual, transgender, queer and intersex identified persons. The plus sign represents people who identify with the broader LGBTQI community, but use other terms for self-identification." The definition includes a footnote, which reads, "While the acronym LGBTQI+ is inclusive of a broad range of persons, it is not exhaustive, nor is it the universally standard acronym." This lends more credence to the assertion that the OTP *chose* not to define the specific terms constituting the acronym—but why it chose to define *intersex* but not *transgender* is worthy of consideration. The OTP defines intersex as "an umbrella term used to describe a wide range of natural bodily variations in sex characteristics." *Id.*

¹⁸⁰ *Id.*

of gender-variant persons and gender-diverse communities around the world. But this is an interpretation read into the policy, as opposed to one that is self-evident; such silence may, ultimately, not be useful as far as strategy goes.

The policy recognizes that gender-based crimes are not just limited to women and girls. Importantly, it notes that gender-based crimes may “target groups such as women, men, children, and LGBTQI+ persons, on the basis of gender.”¹⁸¹ While this is an important acknowledgment, it creates an artificial distinction between LGBTQI+ persons and “women, men, children,” while also artificially conflating gender and sexuality.¹⁸² This muddying of concepts is repeated in the statement, “LGBTQI+ persons can belong to women, girls, men and boys groups, and can also be targeted for belonging to LGBTQI+ groups.”¹⁸³ A more accurate description would have been along the lines of “target groups on the basis of gender and gender roles, whether cisgender, transgender, or outside the gender binary.” This would be best with an explicit understanding that, frequently, sexual identity is perceived through the lens of gender and gender roles, and thus people of nonheterosexual sexualities may be at risk of gender persecution as well.

This level of critique is not just a quibble. Understanding and extricating gender and sexuality at, arguably, the highest echelon of international criminal law and individual criminal liability signals to others that such differences are worth noticing and acknowledging. It signals that gender-variant persons should not be cobbled together into an umbrella “other” category, when the struggles of transgender, nonbinary, and other gender-nonconforming persons are not the same as the struggles of gay, lesbian, bisexual, and other sexual minorities.¹⁸⁴ The confusing language notwithstanding, the OTP’s acknowledgment that “gender-based crimes

¹⁸¹ *Id.* at 4.

¹⁸² In fact, such conflation tends to ignore the fact that transgender, intersex, non-binary, and other gender-variant persons may, themselves, belong to lesbian, gay, bisexual, and other sexual minority communities. See Dicklitch-Nelson & Rahman, *supra* note 140, at 527.

¹⁸³ Such conflation is again repeated in the phrase, “. . . vulnerable gender groups such as women, girls and LGBTQI+ persons,” failing to acknowledge, once again, that women and girls may themselves be part of LGBTQI+ groups and vice versa. INT’L CRIM. CT. OFF. OF THE PROSECUTOR, *supra* note 88, at 5.

¹⁸⁴ Even though countries that persecute sexual minorities frequently (though not always) persecute transgender and other gender-diverse minorities, and vice versa, it is important that the experiences of these different groups not get conflated as, in doing so, trans experiences and oppression thereof tend to disappear. Moreover, the very “notion of LGBT rights and transgender rights is not without controversy,” tending toward “a Western bias,” that homogenizes Global Southern experiences of gender diversity. Dicklitch-Nelson & Rahman, *supra* note 140, at 526–527.

are used by perpetrators to regulate or punish those who are perceived to transgress gender criteria that define ‘accepted’ forms of gender expression manifest in, for example, roles, behaviors, activities, or attributes”¹⁸⁵ is crucial to the push for protecting gender-diverse communities, and should be lauded. Equally crucial is the understanding that “intersex, non-binary or transgender persons may be targeted for not belonging to ‘male/men’ or ‘female/women’ groups, as defined by the perpetrator”—making the previous conflation even more striking in its incongruity.¹⁸⁶

Another confusing element of the OTP’s policy is its assertion that “international criminal law recognises that people of all genders and sexual orientations can be targeted with sexual and gender-based violence.”¹⁸⁷ There is no citation offered for this assertion which, if true, would constitute a basis for greater protection of gender-diverse communities at an international criminal legal level—a huge coup, as it provides an even more compelling basis for a rereading of the Rome Statute’s definition of gender.¹⁸⁸ That is, by the OTP’s admission that international criminal law recognizes that all people can be victimized by sexual and gender-based violence, Article 7(3) is rendered contrary to international criminal law. This necessitates rewriting, or at least reconstructing, the definition of gender under the Rome Statute so that future OTPs are bound by the same understanding.

The OTP’s policy also notes that among the means of rights deprivation based on gender is “the imposition of regulations that can impact persons in every aspect of life.”¹⁸⁹ This signals an understanding that gender-diverse communities are not only harmed by “violence or destruction,” but are also harmed because of the decisions of policymakers—a very important, and very meaningful, acknowledgment that widens the scope of what acts constitute gender persecution.¹⁹⁰

The OTP identifies several international human rights instruments that it uses as reference points “when assessing fundamental rights deprivations.”¹⁹¹ Despite being a policy on gender persecution, the OTP omits

¹⁸⁵ INT’L CRIM. CT. OFF. OF THE PROSECUTOR, *supra* note 88, at 4.

¹⁸⁶ *Id.* at 16.

¹⁸⁷ *Id.* at 6.

¹⁸⁸ *Id.*

¹⁸⁹ INT’L CRIM. CT. OFF. OF THE PROSECUTOR, *supra* note 88, para. 24.

¹⁹⁰ *Id.* The OTP notes that such regulations may include policies governing “[a person’s] reproductive and family options, who they can marry, whether they can attend school, where they can work, how they can dress and whether they are simply allowed to exist.”

¹⁹¹ *Id.* para. 37.

the Yogyakarta Principles from its list of considerations. This is unfortunate, as none of the other referenced instruments touch on the issue of gender identity and expression. Granted, this list was not meant to be exhaustive,¹⁹² but reference to the Yogyakarta Principles would have explicitly signaled the OTP's awareness and consideration of gender-diverse communities. It is also possible that the OTP only wanted to reference binding, universal instruments; however, it also mentions the Universal Declaration of Human Rights (which, being a declaration, is non-binding, though much of it is considered customary international law), and regional human rights instruments such as the African Charter on Human and Peoples' Rights, the American Convention on Human Rights, and the European Convention on Human Rights—which are necessarily limited to states in those respective regions. The OTP would not have been remiss in mentioning the Yogyakarta Principles among these other treaties, not least because it would contribute to the legitimacy of the principles.

Importantly, at a practical level—and particularly relevant given the surge of violence toward gender-variant persons—the OTP commits itself to “[reacting] promptly to upsurges of violence, which may include or give rise to gender persecution” and “[engaging] with States, UN experts and bodies and civil society organisations at an early stage in order to verify information on alleged gender persecution.”¹⁹³ At the time of writing this Comment, the OTP has not specifically referenced any instances of violence toward gender-variant persons or gender-diverse communities, despite many high-profile examples in the United States alone.¹⁹⁴ It remains to be seen the extent to which such language is applied to less traditional instances of gender persecution.

The OTP signals its awareness of the nuances of gender throughout the world. It acknowledges the importance of briefing its staff on and familiarizing them with “local traditions, religious practices, customs, and cultural issues, including the status of women, girls, men, boys, and LGBTQI+ persons within this context.”¹⁹⁵ On the same theme, the OTP commits it's atself to “[strengthening] its in-house expertise on gender

¹⁹² *Id.* at 14, n.47.

¹⁹³ *Id.* para. 71.

¹⁹⁴ While the United States is not a party to the ICC, that has not stopped the ICC from considering international criminal issues that have a nexus with the United States. For more on the United States' fraught relationship with the ICC, see Caleb Wheeler, *Should the ICC Allow the United States to Become a State Party?*, OPINIOJURIS (Aug. 12, 2022), <http://opiniojuris.org/2022/08/12/should-the-icc-allow-the-united-states-to-become-a-state-party/> [<https://perma.cc/UMV7-N9VA>].

¹⁹⁵ INT'L CRIM. CT. OFF. OF THE PROSECUTOR, *supra* note 88, para. 74.

persecution, both in conflict and non-conflict situations.”¹⁹⁶ The OTP also nods to the importance of external expertise, which could be construed as local expertise.¹⁹⁷ If that construction is correct, it signals that the OTP acknowledges that gender identity—as well as sexual identity—varies throughout the world. The LGBTQI+ umbrella is not universally applicable. Thus, appealing to local expertise allows the OTP to tailor its understanding of gender persecution to specific socio-cultural contexts. This means that widespread and systematic instances of gender persecution will be less likely to fall through the cracks simply because the OTP lacks the requisite understanding. This—and the policy in general—indicates a broadened conception of gender persecution, both in terms of its subjects and contexts. The OTP’s policy has some contradictions, as previously noted, and some major areas of opportunity; future work on gender persecution policy could benefit from more explicit commentary on gender-diverse communities, as opposed to the more tangential references peppered throughout the policy. Still, the policy is novel in that it steps away from the “women-and-girls” approach to gender, widening the scope to include men and boys, and, if imperfectly, other gender and sexual identities.

Yet, nowhere in the policy does the OTP refer to the Rome Statute’s definition of gender. This could be a conscious decision; the OTP appears to distance itself from a binary definition of gender with its silence. But this silence does not meaningfully reckon with the implications of the definition. It does not overturn the binary definition or actively condemn Article 7(3). In doing so, it allows for future prosecutors to return to a narrow perspective on gender—and, because this policy is limited to the OTP, the rest of the ICC infrastructure remains wedded to Article 7(3). Given that it is the ICC’s judicial branch, ultimately, that doles out justice, the OTP’s efforts are important but necessarily limited, and flawed at that.

3. *Threading the Needle: A Multi-Pronged Approach to Article 7(3)*

The OTP’s approach most carefully resembles a combination of decontextualized silence, and Márquez Vásquez’s suggestion of construing “the crime of gender-based persecution as persecution on gender grounds rather than against gender groups.”¹⁹⁸ However, Márquez Velásquez’s suggestion was geared toward the ICC as a whole acting as an

¹⁹⁶ *Id.* para. 109.

¹⁹⁷ *Id.*

¹⁹⁸ Márquez Velásquez, *supra* note 90, at 3.

activist court; limited as this reconception of gender persecution is to the OTP, it can only go so far. And decontextualized silence can only do so much without meaningful engagement with the purpose of silence.¹⁹⁹ The ICC, then, remains untested in its approach to gender; and, by virtue of this fact, the ICC's binary definition of gender also remains untested.

Transnational advocates should learn from the successes of the past and persistently lobby states party to the ICC (even those not party to the ICC, but with significant international influence, such as the United States) and the court alike to address the glaring deficiencies of Article 7(3). It is not enough that the OTP takes an open-minded approach to gender persecution policy; as is, said policy has several issues that need ironing out. Instead, a multipronged approach is necessary. First, states must be called upon to rewrite Article 7(3), even if such rewriting results in the removal of the article altogether as a conscious and contextual silence. After, advocates must continue to be vigilant in ensuring that if and when such cases arrive at the court, the court is prepared to expand its construction of gender, and thus, gender persecution. Only with this sustained, transborder advocacy will gender-variant persons and gender-diverse communities be truly represented at the international criminal level.

In a world where the so-called gender-critical movement seems to be spreading, bringing with it patterns of hostility and violence that may manifest as a crime against humanity, it is crucial that international lawyers and advocates lobby states and the ICC alike to rewrite, or at least reconstruct via policies and jurisprudence, Article 7(3). Even if getting all the parties to the negotiation table makes this task difficult, the endeavor itself is worthy as a symbol of progress and representation. Even if many countries levy reservations against the definition, there's still a possibility of withdrawing reservations in the future as domestic pressures mount. Advocates, international lawyers, and institutions cannot and should not despair, for to despair is to acquiesce. Emancipation is a long-term project that requires commitment and strategy. Precisely because domestic politics are tempestuous, and administrations come and go, today's state policies do not accurately reflect future state policies. Where states are malleable, advocates must remain stalwart. Faith, tethered to law, becomes a liberatory tactic.

¹⁹⁹ See Santos de Carvalho, *supra* note 164.

III. CONCLUSION

Article 7(3) of the Rome Statute posits a harmful definition of gender. Article 7(3) excludes whole swaths of people with gender-variant identities. As a result, individuals who are victims of gender-based violence and persecution on account of their gender variance may not benefit from the ICC's protection from a deterrence standpoint, nor are perpetrators of such violence likely to be held accountable for targeting gender-variant people. Though this article has identified patterns of violence against gender-variant people as having the potential to rise to crimes against humanity, this is a conservative prediction. While even this conservative prediction has devastating stakes, rhetoric in the United States calling for the eradication of "transgenderism" could give rise to—or, grimly, validate and exacerbate—genocidal fervor.²⁰⁰ Moreover, the eradication of "transgenderism" necessitates the eradication of trans and gender-variant people. This only underscores the massive urgency underlying this Comment's argument.

This Comment identified three approaches to Article 7(3). The first approach, "silence," would see Article 7(3) and references to gender deleted altogether. By not defining gender, gender as a concept maintains its fluidity, and state nonobjection over time can crystalize a definition of gender that has blurry edges built in. However, this depends on states acquiescing to a nondefinition. Moreover, silence without context may be counterproductive and render gender-variant people invisible. The second approach, "reconstruction," could take many different forms and requires states party to the Rome Statute to contend directly with Article 7(3), while also depending on the ICC to be an activist court. Thus, while it has great potential, it relies on the good faith of several different parties and requires consistent and sustained messaging to states parties and the court. The third approach, "constructive ambiguity," would maintain the status quo, and assume that international lawyers and the ICC will eventually work within the constraints of Article 7(3) to expand Article 7(3).

²⁰⁰ At the Conservative Political Action Conference, Michael Knowles said in a speech that, "For the good of society . . . transgenderism must be eradicated from public life entirely—the whole preposterous ideology, at every level." While other conservative politicians have argued Knowles did not mean the eradication of transgender *people*, it is not preposterous to assume that this is how Knowles' words might be understood by many. Pablo Manriquez, *Republicans Hate "Transgenderism"—but Is That All They Hate?*, THE SOAPBOX (THE NEW REPUBLIC) (Mar. 8, 2023), <https://newrepublic.com/article/171035/republicans-hate-transgenderism> [<https://perma.cc/65XQ-K43P>].

Each approach has pros and cons; but the common thread across all these approaches is advocacy and pressure. Successful silences require self-evident contexts; for reconstruction to succeed, advocates must be thoughtful and united in what (broadly, at least) they want reconstruction to achieve, and how. Constructive ambiguity may be the least successful approach, as courts cannot be seen as presumptively progressive. The ICC OTP's most recent gender persecution policy is some cause for optimism, but concerned individuals should not be complacent. There is much that needs to be reconsidered, expanded upon, and included in the gender persecution policy. Most importantly, of course, just because the OTP is considering these issues does not mean that the entire ICC edifice will follow. A multi-pronged approach that is cognizant of various approaches but remains stalwart in advocating for better inclusion of gender-diverse communities will be necessary to realize better protections against and accountability for gender persecution.

Law tends to be reactive rather than proactive. International law is especially prone to this, given that states are still the primary actors in international law and thus the progressive development of international law becomes necessarily sluggish. Particularly if the gender-critical trend continues, it will be crucial to ensure some recourse to accountability for atrocities against gender minorities, and the ICC can, in this sense, set an example for other jurisdictions in the world to follow. Ultimately, law is just one tool for emancipation and justice. Law can only successfully become such a tool if it is utilized by people, acting in solidarity, toward emancipatory ends. We have seen far too often how the law, even international law, becomes a vehicle for regress or stagnancy rather than progress. The European Court of Human Rights's recent decision to weigh the margin of appreciation more heavily than gender identity is a testament to this.²⁰¹ Only through sustained advocacy, strategic lawyering, and solidarity can courts be nudged to protect the marginalized.

In other words: the law will not save people. People will save people.

²⁰¹ *Judgment Y v. France*, App. No. 7688/17, 1-2 (Jan. 31, 2023) (finding that “France had not failed in its positive obligation to secure effective respect for the applicant’s private life” when France refused to grant complainant’s request to change the sex on their birth certificate from “male” to “neutral” or “intersex”) <https://hudoc.echr.coe.int/eng-press?i=003-7555188-10380613> [<https://perma.cc/8UWY-5HZM>].