Is Criminalization Criminal?: Antisodomy Laws and the Crime Against Humanity of Persecution

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This Article argues that the enforcement of antigay laws, which most often criminalize consensual sex between men, can constitute the crime against humanity of persecution. By analyzing the instances of enforcement of antigay laws around the world and the jurisprudence on the crime against humanity of persecution, this Article demonstrates that under certain conditions, enforcement of antigay laws satisfies the material elements of the crime as defined in the ICC's Rome Statute.

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I. INTRODUCTION

In August 2013, Judge Michael Ponsor of the United States District Court for the District of Massachusetts held that antigay advocacy can constitute a crime against humanity.[1] The case, *Sexual Minorities Uganda (SMUG) v. Lively*,[2] brought under the Alien Tort Statute,[3] asserts that Scott Lively, through his antigay activism in Uganda, has committed the crime against humanity of persecution against Uganda's lesbian, gay, bisexual, transgender, and intersex (LGBTI) communities.[4] Judge Ponsor found that "[m]any authorities implicitly support the principle that widespread, systematic persecution of individuals based on their sexual orientation and gender identity constitutes a crime against humanity that violates international norms."[5] In dismissing Lively's motion to dismiss the case, Ponsor declared: "The answer to the first question is straightforward and clear. Widespread, systematic persecution of LGBTI people constitutes a crime against humanity that unquestionably violates international norms."[6]

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1. Sexual Minorities Uganda (SMUG) v. Lively, 960 F. Supp. 2d 304, 316 (D. Mass. 2013).
2. *Id.*
3. 28 U.S.C. § 1350 (2012).
4. First Amended Complaint Pursuant to Federal Rules of Civil Procedure 15(a)(1)(B) for Crime Against Humanity of Persecution at 1-2, *SMUG*, 960 F. Supp. 2d 304 (No. 3:12-CV-30051 (MAP)).
5. *SMUG*, 960 F. Supp. 2d at 310.
6. *Id.* at 316.

There was only a very cursory analysis of the crime against humanity of persecution and its application to the facts alleged in the decision. However, the implications of the claim are significant and, therefore, deserve to be explored in greater depth—pervasive and institutionalized societal discrimination against gays is not limited to Uganda. Seventy-six states around the world have laws that criminalize acts associated with homosexuality.[7] Crimes against humanity may be ongoing against LGBTI populations in numerous jurisdictions.

Since 2010, individuals have been arrested under antigay laws[8] in many countries, including Cameroon,[9] Malawi,[10] Tunisia,[11] Bahrain,[12] Zambia,[13] Egypt,[14] Malaysia,[15] and Nigeria.[16] In 2006, Nigeria's ambassador to the United Nations stated: "The notion that executions for offences such as homosexuality and lesbianism is excessive is judgmental rather than objective. What may be seen by some as disproportional penalty in such serious offences and odious conduct may be seen by others as appropriate and just punishment."[17]

Of the seventy-six states with antigay laws, seven provide for capital punishment for the conviction of certain offences.[18] Of those seven, it is difficult to tell if and when execution has been employed. There were

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7. Lucas Paoli Itaborahy & Jingshu Zhu, *State-Sponsored Homophobia*, ILGA 5, http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2013.pdf.

8. The laws under examination in this Article have been labeled many things. For ease of reading, they will be referred to as antigay laws. This term is broad enough to cover the range of legislation and targeted enough to denote the purpose behind the legislation in question. And while some might charge that laws criminalizing sodomy can be general in application, they are rarely, if ever, used against heterosexuals engaging in sexual activities.

9. *Cameroon Man Sentenced to Prison Under Anti-Gay Laws*, ASSOCIATED PRESS (June 23, 2013), http://www.huffingtonpost.com/2013/07/23/cameroon-gay-arrest_n_3641344.html/.

10. *Malawi Gay Couple Get Maximum Sentence of 14 Years*, BBC (May 20, 2010), http://www.bbc.co.uk/news/10130240.

11. Tristian Dreisbach, *Politician Arrested for Sodomy Subjected to Invasive Examination*, TUNISIA LIVE (Apr. 19, 2013), http://www.tunisia-live.net/2013/04/19/politician-arrested-on-sodomy-charges-remains-in-jail/.

12. *Bahrain Arrests 200 Men at Gay Party—Newspapers*, REUTERS (Feb. 9, 2011), http://in.reuters.com/article/2011/02/09/idINIndia-54770520110209.

13. *Kapiri Same Sex Suspects Trial Continues*, ZAMBIA DAILY MAIL (June 12, 2013), http://www.daily-mail.co.zm/breaking-news/11139.

14. *Egypt: 7 Men Remain Detained over Anti-Gay Charges*, PINK NEWS (Nov. 6, 2012), http://www.pinknews.co.uk/2012/11/06/egypt-7-men-remain-detained-over-anti-gay-charges/.

15. *Malaysia: Drop Persecution of Anwar*, HUM. RTS. WATCH (Sept. 16, 2003), http://www.hrw.org/news/2013/09/16/malaysia-end-political-persecution-anwar.

16. *Nigerian Homosexuals Protest over Arrest of Two Members in Anambra State*, NIGERIA DAILY NEWS (June 13, 2013), http://www.nigeriadailynews.com/news/74720-nigerian-homosexuals-protest-over-arrest-of-two-members-in-anambra-state.html.

17. *Love, Hate and the Law: Decriminalizing Homosexuality*, AMNESTY INT'L 23 (July 4, 2008), https://www.amnesty.org/en/library/info/POL30/003/2008/en.

18. *Id.* at 24.

reports that two men were executed in Iran in 2005 after being convicted under Iranian antigay laws.[19] Overall, enforcement of antigay laws varies. Some states, like Cameroon and Nigeria, are more active in enforcing their antigay laws. Other states, like Uganda, are currently debating ways to increase enforcement and strengthen their antigay laws.[20] Many states with antigay laws do not appear to enforce them at all.[21] Then there are states, like Senegal, that do not enforce the laws as actively as others but still defend them as legitimate. In June 2013, Senegalese President Macky Sall told U.S. President Barack Obama, "We are still not ready to decriminalize homosexuality."[22] As recently as 2009, Senegal sentenced nine men to eight years in prison for violating the country's antigay laws contained in article 319.3 of the Penal Code of Senegal.[23]

To properly analyze the existence of persecution as an international crime, one must turn to its roots in the aftermath of the Second World War. On October 1, 1946, the International Military Tribunal at Nuremberg (Nuremberg Tribunal) handed down its judgment in the Trial of German Major War Criminals, the first instance of individuals being convicted for the international crime of persecution.[24] The Tribunal was authorized by article 6(c) of the Charter of the International Military Tribunal for the Trial of the Major War Criminals (Nuremberg Charter) to try individuals for "persecutions on political, racial or religious grounds" under the heading "Crimes Against Humanity."[25] While the

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19. *We Are a Buried Generation: Discrimination and Violence Against Sexual Minorities in Iran*, HUM. RTS. WATCH 29 (Sept. 2010), http://www.hrw.org/reports/2010/12/15/we-are-buried-generation.

20. *Uganda: Violation of the Human Rights of Lesbian, Bisexual, Transgender (LBT), and Kuchu People in Uganda*, INT'L GAY & LESBIAN HUM. RTS. COMM'N (Sept. 2010), http://www.iglhrc.org/content/uganda-violation-human-rights-lesbian-bisexual-transgender-lbt-and-kuchu-people-uganda.

21. For a full list of countries with antigay laws, see ITABORAHY & ZHU, *supra* note 7.

22. Julie Pace, *Obama and President of Senegal Offer Very Different Visions of Gay Rights in African Meeting*, NAT'L POST (June 27, 2013), http://news.nationalpost.com/2013/06/27/obama-and-president-of-senegal-offer-very-different-visions-of-gay-rights-in-african-meeting/.

23. *Fear for Life*, HUM. RTS. WATCH 33 (Nov. 30, 2010), http://www.hrw.org/reports/2010/11/30/fear-life-0. The convictions and sentences were later overturned on appeal for lack of evidence and procedural flaws.

24. 22 Trials War Crim. Before the Nuremberg Mil. Tribunal Under Control Council L. No. 10, at 1 (Nuremberg Mil. Tribunals 1946-49).

25. Charter of the International Military Tribunal, art. 6(c), Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 279. The full text of the article reads:

> Article 6. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
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> (c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds

situations examined in this study, as well as in *SMUG*, are not of the same gravity as the Nazi persecutions and the Holocaust in terms of scope and suffering, there is a similarity between the conduct that led to the convictions at Nuremberg and the conduct that is currently taking place under the guise of antigay laws. In both situations, states and their organs, protected by the veil of legislation, take it upon themselves to target, exclude, degrade, arrest, and imprison segments of their population based on their self-identification. If this formed the basis of the convictions for crimes against humanity at Nuremberg, one wonders if the same can hold true today.

When one thinks of crimes against humanity today, one is drawn to the more vivid examples of the recent jurisprudence. For acts committed in Cambodia, the former Yugoslavia, or Rwanda, international tribunals have created an inadvertent nexus between crimes against humanity and armed conflict. International tribunals, however, have established that a crime against humanity may be committed where no armed conflict exists.[26] The crime against humanity of persecution aims to maximize the protection given to international human rights, and one of its founding principles was the international prosecution of persecution. It is necessary, therefore, to assess whether present forms of persecution that result in a violation of human rights currently exist and if they have escaped the scrutiny of international law.

This Article will demonstrate, after examining the jurisprudence to date and the realities in certain states, that at times, enforcement of antigay laws does satisfy the material elements of a crime against humanity of persecution under article 7(1)(h) of the Rome Statute of the International Criminal Court (Rome Statute).[27]

This Article will proceed in five sections. Part II will give a brief overview of the existence and enforcement of antigay laws. Part III will use various Nuremberg trials to explore the genesis of persecution as an international crime. Part III highlights the Nuremberg trials' findings of

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> in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

26. Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 141 (Int'l Crim. Tribunal for the Former Yugoslavia Oct. 2, 1995), *available at* http://www.icty.org/x/cases/tadic/acdec/en/51002.htm.

27. Rome Statute, July 17, 1998, International Criminal Court, U.N. Doc. A/CONF.183/9 [hereinafter Rome Statute], *available at* http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf.

instances of legal persecution[28] to be crimes against humanity in order to demonstrate that the conduct under examination in this Article conceptually comports with a crime against humanity. Parts IV and V will explore the jurisprudence of the crime against humanity of persecution and its application to the enforcement of antigay laws. The final section, Part VI, will respond to a counterargument to the conclusion, namely that the enforcement of antigay laws, while perhaps violating human rights, does not rise to the level of gravity necessary to bring it within the purview of international criminal law.

As international criminal law evolves, standards are coalescing around the definitions of crimes prescribed in the Rome Statute. Therefore, in assessing whether a country's enforcement of its antigay laws constitutes a crime against humanity of persecution, this Article will use the definitions in the Rome Statute as its standard. The clarification is necessary due to the fact that the term "persecution" has been legally defined differently in other instruments.[29]

A subject of this breadth raises issues that are well beyond the scope of this Article. *SMUG* focuses on the antigay advocacy positions taken by Scott Lively and his Ugandan counterparts and how that leads to widespread persecution of Ugandan gays. This Article, while cognizant of the broader implications of nonstatutory forms of persecution, opts for a narrower approach. In an attempt to be more securely in line with the elements and jurisprudence of persecution, as well as the type of conduct targeted by crimes against humanity in general, this Article shall focus solely on the existence of antigay laws that criminalize the most intimate forms of same-sex relations.

II. ANTIGAY LAWS, THEIR ENFORCEMENT, AND EFFECTS OF ENFORCEMENT

When South Africa's Constitutional Court overturned the country's antisodomy laws in *National Commission for Gay & Lesbian Equality v. Minister of Justice*, Justice Albie Sachs wrote, "[I]t is not the act of sodomy that is denounced by the law, but the so-called sodomite who performs it; not any proven social damage, but the threat that same-sex passion in itself is seen as representing to heterosexual hegemony."[30] He

28. Legal persecution is the term this Article uses to denote instances where a state's laws are the means of persecution.

29. *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*, ICTY (Sept. 2009), http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

30. Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice, 1998(1) SA6 (CC), ¶ 108 (S. Afr.).

continued, "Thus the violation of equality by the anti-sodomy laws is all the more egregious because it touches the deep, invisible and intimate side of people's lives."[31]

At the time of writing, seventy-six states—representing every continent except North America and Europe—had antigay laws.[32] While the language between the provisions varies, the common factor between them is the criminalization of sodomy between consenting adults of the same sex. In Ethiopia, article 629 of the Criminal Code makes the commission of a "homosexual act, or any other indecent act" when committed with a person of the same sex, illegal and subject to a minimum one-year prison sentence.[33] Another common provision, whose wording does not explicitly target homosexuality, can be seen in section 162(a) of Kenya's Penal Code, which provides for up to a maximum of fourteen years' imprisonment for "any person who has carnal knowledge of any person against the order of nature."[34] In Sierra Leone, the offence is one of "buggery," according to the Offences Against the Person Act.[35]

In Bhutan, section 213 of the Penal Code is more explicit. "A defendant shall be guilty of the offence of unnatural sex, if the defendant engages in sodomy or any other sexual conduct that is against the order of nature."[36] The Islamic Penal Code of Iran provides, among other antigay laws, in article 123 under "Part 2: Punishment for Sodomy, Chapter 2: Ways of Proving Sodomy in Court," "If two men not related by blood stand naked under one cover without any necessity, both of them will be subject to Ta'azir of up to 99 lashes."[37] In Kuwait, the Penal Code applies to "consensual intercourse between men."[38]

Moving to South America, section 352 of the Guyana Criminal Law (Offences) Act goes beyond the mere commission of sodomy and widens the definition in a manner that could conceivably apply to individuals not directly engaged in an act.

> Any male person, who in public or private, commits, or is a party to the commission, or procures or attempts to procure the commission, by any male person, of an act of gross indecency with any other male person shall be guilty of misdemeanour and liable to imprisonment for two years.[39]

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31. *Id.* ¶ 114.
32. AMNESTY INT'L, *supra* note 17, at 23.
33. ITABORAHY & ZHU, *supra* note 7, at 48.
34. *Id.* at 50.
35. *Id.* at 57.
36. *Id.* at 68.
37. *Id.* at 70.
38. *Id.* at 72.
39. *Id.* at 91.

Antigay laws are enforced frequently in the African nation of Cameroon. On July 25, 2013, two men in Cameroon, Joseph Omgbwa and Nicolas Ntamack, were respectively sentenced to two years and one year in prison after they were found guilty under article 347*bis* of Cameroon's Penal Code, which prohibits "sexual relations with a person of the same sex."[40] Records in Cameroon's Ministry of Justice show twenty-two convictions for homosexuality between 2010 and 2011, and twenty-eight charges under the law between 2010 and 2013.[41] In 2011, two men were arrested when police, searching for a stolen laptop, found condoms and lubricant in their house.[42] Some of those arrested have been subjected to rectal examinations.[43] On April 28, 2011, a man named Roger M. was sentenced to three years in prison for sending another man text messages where he confessed, "I've fallen in love with you."[44] His conviction and sentence were upheld on appeal.[45]

It is difficult to track each instance in which antigay laws have been enforced. Limited media coverage and hostile environments for LGBT organizations make publicizing incidents challenging. John Mbuzi and James Mwape were arrested in the Zambian town of Kapiri Mposhi in May 2013 and put on trial for violating § 155 of the Penal Code, entitled "Unnatural Offences," which makes it a crime for "any person who permits a male person to have carnal knowledge of him or her against the order of nature."[46] In 2008, nine men were arrested in Senegal and charged under antigay laws.[47] At trial, the prosecution requested sentences of five years; instead, the trial judge convicted them for eight.[48]

Between 2001 and 2004, 179 men were arrested under Egypt's antigay law, many of whom were required to undergo anal examinations

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40. *Cameroon Man Sentenced to Prison Under Anti-Gay Laws*, *supra* note 9; ITABORAHY & ZHU, supra note 7, at 45.

41. *Criminalizing Identities*, HUM. RTS. WATCH (2010), http://www.hrw.org/reports/2010/11/04/criminalizing-identities-0. Human Rights Watch claims that only eight have been convicted.

42. *Id.* at 2.

43. *Id.* at 26. It is worth pointing out that the practice of subjecting men to rectal examinations for this purpose has been described as "medically worthless" by United Nations experts and has been declared to be in contravention on the prohibition against torture and ill-treatment by the U.N. Committee Against Torture, the U.N. Special Rapporteur on Torture, and the U.N. Working Group on Arbitrary Detention. *See* Rep. of the U.N. High Commissioner for Hum. Rts., 17th Sess., Nov. 17, 2011, U.N. Doc. A/HRC/19/41, *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/170/75/PDF/G1117075.pdf?OpenElement.

44. *Criminalizing Identities*, *supra* note 41, at 26-27.

45. *Id.* at 28.

46. *Kapiri Same Sex Suspects Trial Continues*, *supra* note 13.

47. *Fear for Life*, *supra* note 23, at 5.

48. *Id.* at 33.

by the "Forensic Medical Authority," an arm of the Egyptian Ministry of Justice.[49] In 2000, a "high official in the police" told Human Rights Watch that "'two or three' arrests for consensual sodomy happen every year in [Harare, Zimbabwe]."[50] By October 2013, approximately twelve men were in prison or awaiting trial in Nigeria under its antigay laws.[51] It is believed that an additional thirty-eight men were arrested following the passage of even tougher antigay laws in December 2013.[52]

It is also important to appreciate that even if the laws are not enforced as forcefully as possible, their mere existence, and the knowledge of the potential for abusive treatment, is enough to instill feelings of fear and isolation, thus preventing individuals from living their lives freely. Addressing the situation in Iran, Human Rights Watch reported, "The fact remains that Iranian law provides the death penalty for consensual same-sex acts, the threat of execution hangs above all Iranians who engage in such acts."[53] On October 8, 2013, seventeen Iranian men were arrested by the Revolutionary Guard as part of an assault on "homosexuals and satanists."[54]

Enforcement of antisodomy laws, however, does more than arrest individuals known to have violated the law. The difficulty associated with catching someone in the act of sodomy creates a reality where enforcement of the law is directed against those who are believed to have a propensity to violate it. Individuals are targeted not necessarily because it is known they have violated an antigay law, but instead because, in the eyes of enforcers, and most likely for stereotypical reasons, it is believed that they could. Human Rights Watch states:

> The peculiar dynamic of so-called "sodomy laws" and their assault on privacy is that the difficulty of proof tends to dissolve the specificity of

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49. *In a Time of Torture*, HUM. RTS. WATCH 1-2 (2004), http://www.hrw.org/reports/2004/egypt0304/egypt0304.pdf.

50. *More Than a Name*, HUM. RTS. WATCH 86 (2003), http://www.hrw.org/sites/default/files/reports/safriglhrc0303.pdf.

51. Colin Stewart, *Nigerian LGBT Case Brings Total to 12 in Prison or Awaiting Trial*, ERASING 76 CRIMES (Oct. 9, 2013), http://76crimes.com/2013/10/09/nigerian-lgbt-case-brings-total-to-12-in-prison-or-awaiting-trial/.

52. Michelle Faul, *Why It's a Crime To Be Gay in Nigeria*, ASSOCIATED PRESS (Jan. 14, 2014), http://www.usatoday.com/story/news/world/2014/01/14/dozens-arrested-for-being-gay-in-north-nigeria/4471391/. It is important to note that the new law in Nigeria does not target individuals on account of sexual behavior; instead, it criminalizes same-sex marriage and the existence of and support for LGBT organizations.

53. *We Are a Buried Generation: Discrimination and Violence Against Sexual Minorities in Iran*, *supra* note 19, at 27.

54. Saeed Kemall Dehghan, *Iran Arrests 'Network of Homosexuals and Satanists' at Birthday Party*, GUARDIAN (Oct. 10 2013), http://www.theguardian.com/world/2013/oct/10/iran-arrests-network-homosexual-satanists.

> their provisions. Instead of searching out the crime itself, police look for the exterior traces of an interior tendency. In the end, officers treat not deeds but demeanors as culpable, working—as Human Rights Watch has elsewhere written—based on an "atmosphere of stigma, in which certain outward marks signal the presence of a certain kind of person, and certain identities and groups become automatic targets of the law."[55]

The result is that, in line with Justice Sachs's pronouncement on targeting the "sodomite" as opposed to sodomy itself, antigay laws are a means to divide societies between morally sanctioned and unsanctioned groups of individuals: heterosexuals and homosexuals. Numerous consequences flow from these laws that open the door to tolerating abuse and mistreatment by state agents that would not otherwise be accepted. Amnesty International reports:

> Such laws, even when not implemented, construct societal attitudes, sending a clear message of, at best, second-class citizenship . . . .
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> Laws criminalizing homosexuality encourage the dehumanization of lesbians and gay men by effectively making that aspect of their identity illegal.
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> They can result in impunity for arbitrary arrests on the basis of allegations about sexual orientation, rumours of sexual behaviour or objection to gender presentation, with few, if any consequences for torture of other ill-treatment.[56]

Upon arrest, the nine men detained in Senegal reported widespread abuse at the hands of the police:

> We were all bleeding. They beat us for an hour and a half. All this time they were abusing us, calling us names—"dirty fag." "You are not good for the country." "You are damned." "You are a shame for the people." They kept calling us goorjigeen [a derogatory term for homosexual], thousands of times.[57]

In August 2013, a Jamaican man named Adrian told a Canadian newspaper that while under arrest for "buggery [anal intercourse]" and "gross indecency with another male" under articles 76 and 79 of the Offences Against the Person Act, "he was beaten with a broom and a shovel, urinated and spat upon."[58] He claimed, "That's because I'm a gay man, and because I'm charged with buggery and gross indecency."[59] In

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55. *In a Time of Torture*, *supra* note 49, at 345.
56. INT'L SECRETARIAT, *supra* note 17, at 7-8.
57. *Fear for Life*, *supra* note 23, at 26.
58. ITABORAHY & ZHU, *supra* note 7, at 92; Jennifer Quinn, *Homophobia a Way of Life in Jamaica*, TORONTO STAR (Aug. 11, 2013), http://www.thestar.com/news/world/2013/08/11/homophobia_a_way_of_life_in_jamaica.html.
59. Quinn, *supra* note 58.

Egypt, once in prison, "guards encourage other prisoners to rape suspected homosexuals."[60] Those in Cameroon who are imprisoned for homosexuality or "attempted homosexuality" have reported being beaten in prison, having their heads shaved, and being forced to sing songs announcing, "We have sex through the anus."[61]

III. THE ORIGIN OF PERSECUTION AS A CRIME AGAINST HUMANITY AT NUREMBERG

The trials at Nuremberg were the first instance where charges of crimes against humanity were heard by a court or tribunal. Though the definition of a crime against humanity has been refined since then, critical to the present examination is that at Nuremberg, persecution committed through a state's legal system was found to constitute a crime against humanity.

Article 6(c) of the Nuremberg Charter gave the Tribunal jurisdiction over "Crimes Against Humanity," defined as:

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[62]

According to the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v. Duško Tadić*, the decision to place crimes against humanity within the Nuremberg Tribunal's jurisdiction resulted "from the Allies' decision not to limit their retributive powers to those who committed war crimes in the traditional sense but to include those who committed other serious crimes that fall outside the ambit of traditional war crimes."[63] Thus Nuremberg stands for the contention that crimes against humanity originated in order to punish new concepts of criminality that did not fit within traditional models of international crimes, but whose acts still reached a certain threshold of gravity making them deserving of international retribution.

Many Nazis convicted by the Nuremberg Tribunal for the crime against humanity of persecution were convicted in part for their role in either formulating or implementing Nazism as an ideology and

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60. *In a Time of Torture*, *supra* note 49, at 2.

61. *Criminalizing Identities*, *supra* note 41, at 43.

62. Charter of the International Military Tribunal, *supra* note 25.

63. Prosecutor v. Tadić, Case No. IT-94-1-T, ¶ 619 (Int'l Crim. Tribunal for the Former Yugoslavia 1995), http://www.icty.org/x/cases/tadic/acdec/en/51002.htm.

employing laws as their means to do so during the war. This can be distinguished from crimes associated with the conduct of the war itself or the actual extermination of the Jews. "Legal crimes" that targeted classes of individuals based on their identity and membership in that class included the 1935 Nuremberg Race Laws and their implementation throughout the war, as well as the legal system put in place that governed European Jewry leading up to their extermination and all those who were occupied by the Nazis during the war.

The Nuremberg Tribunal's judgment spent considerable time looking at the persecution of Jews and other victims of Nazism, though it omitted any mention of persecution of homosexuals as a class. The Tribunal noted: "With the seizure of power, the persecution of the Jews was intensified. A series of discriminatory laws was passed, which limited the offices and professions permitted to Jews; and restrictions were placed on their family life and their rights of citizenship."[64] When it turned to judgments against specific individuals, the Tribunal did not undertake a detailed application of facts to law. Instead, it was able to rely on its earlier general finding established by the facts that the commission of the war and treatment of Jews and other occupied persons constituted crimes against humanity.[65] The Tribunal did accept that its jurisdictional limitations precluded a finding that acts before the war were considered crimes against humanity, but that a policy of persecution existed before 1939 and that the persecution of Jews before 1939 was "established beyond all doubt."[66]

In its specific judgment against Hermann Göring, whose conviction included crimes against humanity, the Nuremberg Tribunal found, "As these countries fell before the German Army he extended the Reich's anti-Jewish laws to them."[67] Alfred Rosenberg was similarly convicted and sentenced by the Nuremberg Tribunal, in part for the "policies of Germanization" he helped formulate and see implemented.[68]

Hans Frank was convicted and sentenced to death for the crime against humanity of persecution for his role ruling occupied Poland, where Jews in ghettos were "subjected to discriminatory laws."[69] The Nuremberg Tribunal convicted Wilhelm Frick and sentenced him to death partially because

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64. 12 Trials War Crim. Before the Nuremberg Mil. Tribunal Under Control Council L. No. 10, at 1, 464 (Nuremberg Mil. Tribunals 1946-49).

65. *Id.* at 468.

66. *Id.* at 493.

67. *Id.* at 527.

68. *Id.* at 540.

69. *Id.* at 543.

> Frick drafted, signed, and administered many laws designed to eliminate Jews from German life and economy. His work formed the basis of the Nuremberg Decrees, and he was active in enforcing them. Responsible for prohibiting Jews from following various professions and for confiscating their property, he signed a final decree in 1943, after the mass destruction of Jews in the East, which placed them "outside the law" and handed them over to the Gestapo.[70]

Other leading Nazis sentenced to death for crimes against humanity partially rooted in the legal persecution of Jews included Julius Streicher, who, it was found, "advocated the Nuremberg Decrees of 1935," and Arthur Seyss-Inquart, who "put into effect a series of laws imposing economic discrimination against the Jews."[71]

Recognition that legal persecution can constitute a valid basis for the crime against humanity of persecution was further developed by subsequent trials at Nuremberg. *United States v. Altstötter*, commonly known as the *Justice Case*, put sixteen German judges and lawyers on trial for their role in the war, ten of whom were convicted.[72] Setting out the framework for its judgment, the Tribunal noted how laws became persecutory:

> The German criminal laws, through a series of additions, expansions, and perversions by the defendants became a powerful weapon for the subjugation of the German people and for the extermination of certain nationals of the occupied countries. This Program resulted in the murder, torture, illegal imprisonment, and ill-treatment of thousands of Germans and nationals of occupied countries.[73]

It would go on to state that enforcement of laws constituted a crime against humanity:

> The very essence of the prosecution case is that the laws, the Hitlerian decrees and the Draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against

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70. *Id.* at 546.

71. *Id.* at 576.

72. 3 Trials War Crim. Before the Nuremberg Mil. Tribunal Under Control Council L. No. 10, at 23, 23-24 (Nuremberg Mil. Tribunals 1946-49). Convictions for crimes against humanity were pursuant to article 2(c) of Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, which defined crimes against humanity as: Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated. *Id.*

73. *Id.* ¶ 23.

> humanity and that participation in the enactment and enforcement of them amounts to complicity in crime.[74]

The Tribunal went on to find that any connection to the persecutory system of laws was enough to find someone responsible for committing crimes against humanity:

> Some of the defendants took part in the enactment of laws and decrees. . . . Others, in executive positions, actively participated in the enforcement of those laws. . . . Others, as judges, distorted and then applied the laws and decrees against Poles and Jews as such in disregard of every principle of judicial behavior.[75]

Of importance for the present inquiry is that the Tribunal held that notwithstanding that the overall aim of the persecutory system "was one for the actual extermination of Jews and Poles," extermination was only one means of persecution. "[L]esser forms of racial persecution were universally practiced by governmental authority and constituted an integral part in the general policy of the Reich."[76] It then went on to mention prohibitions against Jews holding certain professions and sexual relations between Jews and non-Jews.[77]

This statement, and emphasis placed on acts of persecution as stand-alone offences, nullifies any concern that systems of legal persecution cannot on their own rise to the level of a crime against humanity in the absence of an overarching goal of extermination.

In *United States v. Weizsäcker*, commonly known as the *Ministries Case* because it tried twenty-one individuals from different German ministries, crimes against humanity were again found to apply to situations where persecution stemmed from the imposition of a certain legal regime.[78] The Tribunal found:

> Beginning 7 April 1933, legislative, administrative, and police measures were enacted depriving Germans of Jewish extraction of every conceivable right and economic position that they might have had as German citizens or even as human beings; Germans of Jewish extraction were barred from the professions, including law, medicine, teaching, writing, and the arts and sciences; from all public service, national, state, and local; and from the universities and other educational institutions.[79]

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74. *Id.* at 984.
75. *Id.* at 1063.
76. *Id.*
77. *Id.* at 984.
78. 12 Trials War Crim. Before the Nuremberg Mil. Tribunal Under Control Council L. No. 10, at 38-43 (Nuremberg Mil. Tribunals 1946-49).
79. *Id.* at 40.

In the *Ministries Case*, the Tribunal also acknowledged that the crimes the accused were convicted of were not, "when committed, crimes against international law."[80] However, given the gravity of what had been done, it felt that convictions of crimes against humanity for new forms of human cruelty and denials of fundamental rights and dignity were warranted. It suggested that the international community needed the ability to deal with the advent and onset of such persecution, then and in the future.

> Such arguments [that the crimes committed were not crimes against international law at the time of commission] and observations rather serve to emphasize the urgent need of comprehensive legislation by the family of nations, with respect to individual human rights. Such steps as have been taken in this direction since the late war may need to be further advanced and implemented.[81]

There is a direct causal link running from the Nuremberg trials to the expansion of international criminal law today. The growth of jurisprudence, particularly with respect to crimes against humanity, permits one to test the extent to which international criminal law has kept up with the challenge set by the tribunal in the *Ministries Case* to ensure that the conduct it addressed would be covered by a facet of international law.

IV. CRIMES AGAINST HUMANITY TODAY

In order to test the extent to which international criminal law may have changed or evolved since Nuremberg, this Article considers crimes against humanity as defined by the Rome Statute in article 7, even though some of the more comprehensive analysis of the crime comes from the ad hoc tribunals. Article 7 of the Rome Statute states:

> 7(1): For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act

80. 13 Trials War Crim. Before the Nuremberg Mil. Tribunal Under Control Council L. No. 10, at 116 (Nuremberg Mil. Tribunals 1946-49).

81. *Id.* at 117.

> referred to in this paragraph or any crime within the jurisdiction of the Court;[82]

Therefore, in order to show that the existence and enforcement of antigay laws constitutes a crime against humanity today, one must show the act of persecution meets the following four criteria:

1. it must be widespread or systematic;
2. it must constitute an attack;
3. it must be directed against any civilian population; and
4. it must be carried out with knowledge of the broader attack.

The Rome Statute further clarifies certain terms in the *chapeau*:

> 7(2)(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. . . .
>
> (g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.[83]

The fourth element of the *chapeau*, "with knowledge of the attack," is an element of intent that must be proven specifically in the context of crimes against humanity's *chapeau*. It does not replace the overall mens rea requirements laid out in article 30 of the Rome Statute that must be met for the crime as a whole. Article 30 states:

> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
> 2. For the purposes of this article, a person has intent where:
>   (a) In relation to conduct, that person means to engage in the conduct;
>   (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
> 3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.[84]

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82. *Rome Statute*, *supra* note 27, at 3-4.
83. *Id.* at 4.
84. *Id.* at 20.

The ICC Pre-Trial Chamber, in *Situation in the Republic of Kenya* (*Kenya Decision on Authorization*), summarized the requirements associated with the *chapeau* in a manner that combines the *chapeau* with the explanatory additions in article 7(2):

> The Chamber observes that the following requirements can be distinguished: (i) an attack directed against any civilian population, (ii) a State or organizational policy, (iii) the widespread or systematic nature of the attack, (iv) a nexus between the individual act and the attack, and (v) knowledge of the attack.[85]

Due to the existence of numerous articles that survey and provide commentary on the elements of crimes against humanity, this investigation will only examine and explain those necessary for its specific purposes.

A. Widespread or Systematic

The simplest way to define widespread or systematic is that the former refers to the act's quantitative qualities and the latter to its qualitative qualities. In its confirmation of charges in *Prosecutor v. Katanga*, the ICC Pre-Trial Chamber explained that the purpose of this requirement is that it "excludes random or isolated acts of violence," which was earlier declared by the *Tadić* Trial Chamber.[86] It continues to define *widespread* as "the large-scale nature of the attack and the number of targeted persons" and *systematic* as "the organised nature of the acts of violence and the improbability of their random occurrence."[87]

Reliance is placed on the ad hoc tribunals, and the Pre-Trial Chamber continues to note that *systematic* "has been understood as either an organised plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts or as 'patterns of crimes' such that the crimes constitute a 'non-accidental repetition of similar criminal conduct on a regular basis.'"[88]

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85. Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 79 (Int'l Crim. Ct. Mar. 31, 2010), http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf.

86. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Judgment, ¶ 394 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 30, 2008), http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf; Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, ¶ 648 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), http://www.icty.org/x/cases/tadic/acdec/en/51002.htm.

87. *Katanga*, Case No. ICC-01/04-01/07, ¶ 394.

88. *Id.* ¶ 397.

B. Attack

An attack is defined in the Rome Statute as a course of conduct; it need not be violent. This interpretation is confirmed by the Pre-Trial Chamber in the Confirmation of Charges in *Prosecutor v. Gombo* when it said that the term *attack* "refers to a campaign or operation carried out against the civilian population."[89] The ICTY indictment of Dragan Nikolic found that discriminatory measures can constitute an attack.[90] Of importance for situations whereby the alleged crime against humanity is through separate acts of multiple actors, each contributing in part to the crime's commission, the Extraordinary Chambers in the Courts of Cambodia (ECCC) Trial Chamber in *Co-Prosecutors v. Kaing* (*Duch*) stated, "The accused does not have to commit all of the acts of violence that make up the attack—the accused's acts need only be part of the broader attack."[91]

C. Directed Against Any Civilian Population "Pursuant to or in Furtherance of a State or Organizational Policy"

This aspect of the *chapeau* ensures that the act in question is carried out against a definable element of the civilian population. The *Gombo* Pre-Trial Chamber held:

> The Prosecutor must demonstrate that the attack was such that it cannot be characterised as having been directed against only a limited and randomly selected group of individuals. However, the Prosecutor need not prove that the entire population of the geographical area, when the attack was taking place, was being targeted.[92]

The *Duch* Trial Chamber stated, "The 'population' element is intended to imply crimes of a collective nature."[93]

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89. Prosecutor v. Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 75 (Int'l Crim. Trib. for the Former Yugoslavia June 15, 2009), http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf.

90. Prosecutor v. Nikolic, Case No. IT-94-2-R61, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 27 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 20, 1995), http://www.icty.org/x/cases/dragan_nikolic/tord/en/951020.pdf.

91. Co-Prosecutors v. Duch, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶ 298 (Int'l Crim. Trib. for the Former Yugoslavia July 26, 2010), *available at* http://haguejusticeportal.net/Docs/Court%20Documents/ECCC/Kaing%20Guek%20Eav%20(Duch)%20case_summary%20of%20judgement.pdf.

92. *Gombo*, Case No. IC-01/05-01/08, ¶ 77.

93. *Duch*, Case No. 001/18-07-2007/ECCC/TC, ¶ 302.

In the confirmation of charges in *Prosecutor v. Gbagbo*, the Pre-Trial Chamber summarized the court's approach to the policy requirement:

> This policy needs to have been implemented by either State or organisational action. The Statute does not provide definitions for the terms "policy" or "State or organizational". As previously held by this Chamber, the following elements had been identified: a) it must be thoroughly organised and follow a regular pattern; b) it must be conducted in furtherance of a common policy involving public or private resources; c) it can be implemented either by groups who govern a specific territory or by an organisation that has the capability to commit a widespread or systematic attack against a civilian population; and d) it need not be explicitly defined or formalised.[94]

As to the term "multiple commission of acts," the *Gombo* Pre-Trial Chamber held this to mean "more than a few isolated incidents or acts as referred to in article 7(1) of the Statute."[95]

D. With Knowledge of the Attack

The final *chapeau* requirement ensures, according to the Trial Chamber in *Duch*, that an accused "understand[s] the overall context in which the acts took place."[96] It eliminates the possibility for convicting those who had no appreciation that they were in any way contributing to the commission of a crime against humanity, or those who should have known. The application for an arrest warrant against Sudanese President Omar al-Bashir stated that the prosecution must show that "(i) the perpetrator intended to further the attack and (ii) the perpetrator knew that his conduct constituted, and took place as part of a widespread or systematic attack against a civilian population."[97] The Canadian Supreme Court looked at this issue in *R. v. Finta* (*Finta*), which the *Tadić* Trial Chamber and others endorsed, and found that this requirement could be met by a standard of willful blindness.[98] "The mental element required to

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94. Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11, Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo, ¶ 37 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1276751.pdf.

95. *Gombo*, Case No. IC-01/05-01/08, ¶ 81.

96. *Duch*, Case No. 001/18-07-2007/ECCC/TC, ¶ 319.

97. *Situation in Darfur, The Sudan*, Case No. ICC-02/05, Public Redacted Version of the Prosecutor's Application under Article 58, ¶ 401 (July 14, 2008), http://www.icc-cpi.int/iccdocs/doc/doc559999.pdf.

98. *R. v. Finta*, (1994) 1 S.C.R. 701, ¶ 820 (India); Prosecutor v. Tadić, Case No. IT-94-1-T, ¶ 657 (Int'l Crim. Tribunal for the Former Yugoslavia 1995), http://www.icty.org/x/cases/tadic/acdec/en/51002.htm.

be proven to constitute a crime against humanity is that the accused was aware of or willfully blind to facts or circumstances which would bring his or her acts within the definition of a crime against humanity."[99]

E. Persecution

The crime against humanity of persecution is unique in international criminal law because it is one of the clearest instances of criminalizing conduct that is protected by international human rights law. However, unlike other crimes against humanity, persecution requires a special intent, not entirely unlike genocide, in that the perpetrator must target a group as a collective based on specific enumerated grounds. The Rome Statute states that persecution constitutes a crime against humanity under article 7(1)(h) only when it is committed

> against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.[100]

Persecution is defined in the Rome Statute as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."[101]

The *Tadić* Trial Chamber described persecution as the "violation of the right to equality in some serious fashion that infringes on the enjoyment of a basic or fundamental right."[102] It highlighted examples of persecution listed in the 1991 and 1996 International Law Commission Draft Codes as including "a prohibition on practising certain kinds of religious worship . . . a prohibition on the use of a national language, even in private."[103] It noted the "common characteristic being the denial of the human rights and fundamental freedoms to which every individual is entitled without distinction."[104]

It was in *Prosecutor v. Kupreškić* at the ICTY where persecution received its most thorough analysis. Critical to this analysis is the finding that persecution "does not necessarily require a physical

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99. R. v. Finta (1994) I.S.C.R. 701 ¶ 820.
100. Rome Statute, *supra* note 27, at 304.
101. *Id.* at 4.
102. *Tadić*, Case No. IT-94-1-T, ¶ 697.
103. *Id.* ¶ 703.
104. *Id.*

element."[105] The Trial Chamber continued and found that "persecutory acts are often committed pursuant to a discriminatory policy or a widespread discriminatory practise."[106]

Given the fact that discrimination can occur in numerous ways, a challenge with persecution is how to ascertain what acts rise to the necessary threshold of gravity associated with crimes against humanity. Accordingly, *Kupreškić* proclaimed, "Only gross or blatant denials of fundamental human rights can constitute crimes against humanity."[107] It went on to try and define how to recognize said denials:

> The Trial Chamber, drawing upon its earlier discussion of "other inhumane acts", holds that in order to identify those rights whose infringement may constitute persecution, more defined parameters for the definition of human dignity can be found in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948, the two United Nations Covenants on Human Rights of 1966 and other international instruments on human rights or on humanitarian law. Drawing upon the various provisions of these texts it proves possible to *identify a set of fundamental rights appertaining to any human being, the gross infringement of which may amount, depending on the surrounding circumstances, to a crime against humanity*. Persecution consists of a severe attack on those rights, and aims to exclude a person from society on discriminatory grounds. The Trial Chamber therefore defines persecution as the *gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5*.
>
> In determining whether particular acts constitute persecution, the Trial Chamber wishes to reiterate that acts of persecution must be evaluated not in isolation but in context, by looking at their cumulative effect. Although individual acts may not be inhumane, their overall consequences must offend humanity in such a way that they may be termed "inhumane". This delimitation also suffices to satisfy the principle of legality, as inhumane acts are clearly proscribed by the Statute.[108]

Importantly, the Trial Chamber then pointed out that it would not be helpful to try and define individual acts that might constitute persecution for fear of being overly restrictive, saying:

> The interests of justice would not be served by so doing, as the explicit inclusion of particular fundamental rights could be interpreted as the

105. Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 568 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf.

106. *Id.* ¶ 615.

107. *Id.* ¶ 620.

108. *Id.* ¶¶ 621-622.

> implicit exclusion of other rights (expressio unius est exclusio alterius). This is not the approach taken to crimes against humanity in customary international law, where the category of "other inhumane acts" also allows courts flexibility to determine the cases before them, depending on the forms which attacks on humanity may take, forms which are ever-changing and carried out with particular ingenuity. Each case must therefore be examined on its merits.[109]

In *Prosecutor v. Blaškić*, the ICTY Trial Chamber held that "serious bodily and mental harm and infringements upon individual freedom" might constitute persecution if they target the requisite groups.[110] The *Blaškić* Trial Chamber confirmed the finding in *Kupreškić* that persecution need not result in physical injury or harm. "Persecution may take forms other than injury to the human person, in particular those acts rendered serious not by their apparent cruelty but by the discrimination they seek to instil [sic] within humankind."[111]

The Appeals Chamber in *Prosecutor v. Kvočka* looked to Common Article 3 of the Geneva Conventions and its prohibition on "outrages upon personal dignity, in particular humiliating and degrading treatment" to try and ascertain what type of conduct rises to the level of persecution.[112] It relied on this to find that "acts of harassment, humiliation and psychological abuse . . . are acts which by their gravity constitute material elements of the crime of persecution."[113] The Trial Chamber in *Prosecutor v. Nahimana* at the International Criminal Tribunal for Rwanda (ICTR) looked to the "denigration of persons" as evidence that could constitute persecution before it proclaimed: "The crime of persecution is defined also in terms of impact. It is not a provocation to cause harm. It is itself the harm."[114]

Once one has ascertained whether persecutory acts have been committed, the next step is to ensure that such acts were carried out against an identifiable group per article 7(1)(h).

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109. *Id.* ¶ 623.

110. Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeal Chamber Decision, ¶ 220 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004), http://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf.

111. *Id.* ¶ 227.

112. Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Appeal Chamber [AC] Decision, ¶ 325 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005), http://www.icty.org/x/cases/kvocka/acjug/en/kvo-aj050228e.pdf.

113. *Id.* ¶ 325.

114. Prosecutor v. Nahimana, Case No. ICTR-99-5Z-T, Trial Chamber Decision, ¶¶ 1072-1073 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 3, 2003), *available at* http://www.unictr.org/en/cases/ictr-52.

Thus, as defined by the Trial Chamber in *Prosecutor v. Krnojelac* and upheld by the Appeals Chamber:

> The crime of persecution consists of an act or omission which:
> 1. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the actus reus); and
> 2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the mens rea).[115]

A step unique to the Rome Statute is to ensure that the persecution was carried out with the final requirement of article 7(1)(h), "in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court." This requires one to look to the other acts that comprise crimes against humanity under article 7(1) and show a nexus between the persecutory conduct and that other act.

F. Mens Rea

In addition to the mental element associated with the *chapeau* of crimes against humanity, an accused must be found to possess the requisite mens rea for all offenses in article 30 of the Rome Statute.

The ICC Pre-Trial Chamber in *Prosecutor v. Lubanga* set out three different levels of mental awareness that could satisfy a crime having been committed with the proscribed intent and knowledge. The first is if an accused

> (i) knows that his or her actions or omissions will bring about the objective elements of the crime, and (ii) undertakes such actions or omissions with the concrete intent to bring about the objective elements of the crime (also known as *dolus directus* of the first degree).[116]

The second situation addressed is termed *dolus directus* of the second degree, when an accused lacks the "concrete intent to bring about the objective elements" of the crime but is aware that they "will be the necessary outcome" of the act or omission.[117] Last, it held the mens rea

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115. Prosecutor v. Krnojelac, Case No. IT-97-25-T, Trial Chamber Decision, ¶ 431 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002), http://www.icty.org/x/cases/krnojelac/tjug/en/krn-tj020315e.pdf.

116. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment, ¶ 351 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 29, 2007), http://www.icc-cpi.int/iccdocs/doc/doc243701.pdf.

117. *Id.* ¶ 352 (relying on Prosecutor v. Tadić, Case No. IT-94-1-A, ¶¶ 219-210 (Int'l Crim. Tribunal for the Former Yugoslavia 1995), http://www.icty.org/x/cases/tadic/acdec/en/51002.htm; Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 587 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003), http://www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf.

requirements could also be satisfied by *dolus eventualis*.[118] *Dolus eventualis* is when an accused "is aware of the risk that the objective elements of the crime may result from his actions or omissions" and by reconciling or consenting to such an outcome "accepts such an outcome."[119]

V. ANTISODOMY LAWS AND CRIMES AGAINST HUMANITY

The ICC's *Elements of Crimes* (*Elements*) sets out six elements, incorporating the four criteria of crimes against humanity's *chapeau* addressed in the previous section, which all must be satisfied in order to find an individual guilty for the crime against humanity of persecution. They are:

1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.
5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.[120]

A. "The Perpetrator Severely Deprived, Contrary to International Law, One or More Persons of Fundamental Rights"

Rulings of numerous international, regional, and national courts confirm that the mere existence of antigay laws constitutes severe deprivation, contrary to international law, of fundamental rights. While not all rights treaties and constitutions afford the same protections, or word respective rights in the same manner, antigay laws violate rights

118. *Id.* ¶ 352 (relying on *Tadić*, Case No. IT-94-1-A, ¶¶ 219-220; *Stakić*, Case No. IT-97-24-T, ¶ 587).

119. *Id.*

120. INT'L CRIM. CT. (ICC), ELEMENTS OF CRIMES art. 7(1)(h) (2011) (footnotes omitted).

that protect privacy and family life. It follows that instances where individuals are arrested and detained in accordance with such laws are also unlawful infringements on their right to liberty. These rights exist in numerous international, regional, and national rights instruments.

In *Toonen v. Australia*, the Human Rights Committee (HRC) of the International Covenant of Civil and Political Rights (ICCPR) considered sections 122(a), 122(c), and 123 of the Tasmanian Criminal Code that criminalized "various forms of sexual contacts between men, including all forms of sexual contacts between consenting adult homosexual men in private" and whether this amounted to a violation of article 17 of the ICCPR protecting the right to privacy and the right to protection by the law from interference into one's private life.[121] The HRC examined these laws in 1994, notwithstanding the fact that the closest Tasmania came to enforcing them was a 1988 pronouncement by the Director of Public Prosecutions that if there was "sufficient evidence of commission of a crime," his office would initiate proceedings.[122] No arrests had been made in the preceding decade.[123]

The deficient use of the laws was not enough to deter the HRC from finding them in violation of the ICCPR, saying that a record of nonenforcement "does not amount to a guarantee that no actions will be brought against homosexuals in the future."[124] A violation of article 17 of the ICCPR was made out on the basis that the "continued existence of the challenged provisions therefore continuously and directly 'interferes' with the author's privacy."[125]

An opinion by the United Nations Working Group on Arbitrary Detention looking at the situation in Cameroon also held that the existence of antigay laws "and the application of criminal penalties"

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121. Toonen v. Australia, Commc'n No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992, U.N. Human Rights Committee, Apr. 4, 1994, ¶ 2.1. Article 17 of the *International Covenant on Civil and Political Rights (ICCPR)*, Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) reads:

> 17. 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
> 2. Everyone has the right to the protection of the law against such interference or attacks.

122. *Toonen*, Commc'n No. 488/1992, § 2.2.
123. *Id.* ¶ 8.2.
124. *Id.* ¶ 8.2.
125. *Id.* ¶ 8.2.

constituted an arbitrary deprivation of liberty in violation of articles 17 and 26 of the ICCPR.[126]

Antigay laws have appeared before the European Court of Human Rights (ECtHR) on four separate occasions. On each one, the state in question was found to be in violation of rights protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

In the first case, *Dudgeon v. United Kingdom*, Dudgeon's home was searched per a warrant related to a drug suspicion. During the search, a number of personal papers were seized, including correspondence and diaries "in which were described homosexual activities"; however, after consultations between the Director of Prosecutions and the Attorney General, it was decided not to charge Dudgeon with "gross indecency with another male," under Northern Ireland's criminal law.[127]

Noting that "[t]he present case concerns a most intimate aspect of private life," the ECtHR could not find "a pressing social need" that could justify the provisions in question. Much like the HRC in *Toonen*, it was not persuaded that the nonenforcement of the provisions undermined the argument that they violated Dudgeon's rights. The Court highlighted "the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation."[128] It held, "Dudgeon has suffered and continues to suffer an unjustified interference with his right to respect for his private life."[129]

Antigay laws were also the subject of *Norris v. Ireland*, where Norris feared he could face prosecution even though Ireland had not been enforcing its antigay laws.[130] The ECtHR found Norris "legally at

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126. Ayissi v. Cameroon, Working Group on Arbitrary Detention, Opinion No. 22/2006, U.N. Doc. A/HRC/4/40/Add.1 at 91 (2006). It is important to point out that the Working Group found that criminalization alone was sufficient to violate the ICCPR. Article 26 of the ICCPR, *supra* note 121, states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

127. Dudgeon v. United Kingdom, 7525/76 Eur. Ct. H.R., HUDOC ¶ 33 (1981), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57473. At the time, the offence of gross indecency carried a maximum sentence of two years imprisonment.

128. *Id.* ¶ 60.

129. *Id.*

130. Norris v. Ireland, 10581/83, Eur. Ct. H.R., HUDOC ¶¶ 10-11 (1988), http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-57547.

risk" and found an interference with his right to privacy.[131] Similarly, in *Modinos v. Cyprus*, the ECtHR found, "This policy [of not enforcing antigay laws in Cyprus] provides no guarantee that action will not be taken by a future Attorney-General" and, "the applicant's private behaviour may be the subject of investigation by the police."[132]

In *ADT v. United Kingdom*, the ECtHR considered a case where an individual was arrested under antigay laws, charged, and sentenced with a conditional discharge for two years.[133] In addition to finding a violation of the right to privacy, protected by article 8 in the ECHR, the Court declared that in such cases national authorities have a "narrow margin of appreciation" to justify the provisions given the importance of the rights affected.

The cases under the ICCPR and ECHR signify that states will have a difficult time justifying the mere existence of their antigay laws. Pronouncements like those from Senegalese President Sall that his country is not ready to decriminalize homosexuality will fail to stand up to judicial scrutiny in the absence of a very pressing need to keep in force a law that is continuously violating the human rights of gay Senegalese.

A primary reason why antigay laws severely deprive individuals of fundamental rights is that they go to the core of human dignity, identity, and expression. When the United States Supreme Court overturned antigay laws in Texas, it held that denying adults the ability to freely enter into private relationships would offend "their dignity as free persons."[134] The full effect of Texas's antigay laws was attacked in the judgment's penultimate finding that highlights the severity of the deprivation:

> The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. *The State cannot demean their existence or control their destiny by making their private sexual conduct a crime*. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.[135]

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131. *Id.* ¶¶ 11, 38.

132. Modinos v. Cyprus, 15070/89 Eur. Ct. H.R., HUDOC ¶ 23 (1993), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57834.

133. A.D.T. v. United Kingdom, 35765/97 Eur. Ct. H.R., HUDOC ¶ 10 (2000), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58922.

134. Lawrence v. Texas, 539 U.S. 558, 567 (2003) (citations omitted).

135. *Id.* at 578 (emphasis added).

South Africa's Constitutional Court also stressed the severity of the deprivation of rights protected by the constitution through antigay laws in *National Commission*:

> But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution.[136]

The Court continued to find, "The harm caused by the provisions can, and often does, affect his ability to achieve self-identification and self-fulfilment."[137] In his concurring opinion Justice Sachs added, "The violation of equality by the antisodomy laws is all the more egregious because it touches the deep, invisible and intimate side of people's lives."[138]

In India, the High Court of Delhi overturned India's antigay laws in *Naz Foundation v. NCT of Delhi* (*Naz*)[139]. It, too, noted the consequences of the existence of antigay laws and the extent to which they violate basic

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136. Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice, 1998(1) SA6 (CC), ¶ 28 (S. Afr.).

137. *Id.* ¶ 36.

138. *Id.* ¶ 114.

139. Naz Found. v. Gov't of NCT of Delhi, 160 Delhi Law Times 277 (2009). The High Court decision was overturned by the Supreme Court on appeal in *Suresh Kumar Kaushal v. Naz Foundation*, Civ. App. No. 10972 (India Sup. Ct. Dec. 11, 2013), http://dspace.judis.nic.in/bitstream/123456789/68336/1/41070.pdf#search=nazfoundation. However, the Supreme Court decision does not directly address the High Court's reasoning for finding the law violated the Indian constitution. Working with a "presumption of constitutionality" (¶ 32), it fails to state why the law does not violate rights protected in the constitution and seems to suggest that if rights are being violated, they are being done so in a manner consistent with the requirements of legitimate state interest and proportionality (see ¶¶ 45-51). While the decision of the Supreme Court still stands, the Indian government requested the Court reexamine its decision, calling it "unsustainable," and saying it "suffers from errors." *See Gay Sex Verdict: Government Moves Supreme Court for Review*, TIMES INDIA (Dec. 20, 2013), http://articles.timesofindia.indiatimes.com/2013-12-20/india/45416820_1_review-petition-delhi-high-court-verdict-delhi-hc. Legal proceedings are continuing at the time of writing, and the review petition was rejected in January 2014. *See* Naz Found. v. Suresh Kumar Kaushal, Civil Appeal 41-55 of 2014, *available at* http://supremecourtofindia.nic.in/outtoday/rc4114.pdf. However, the claimants may still file, and are expected to file, a curative petition before the Supreme Court. *See* Utkarsh Anand, *Gay Sex Ban Stays, SC Rejects Plea To Review*, INDIAN EXPRESS (Jan. 29, 2014), http://indianexpress.com/article/india/india-others/supreme-court-refuses-to-review-verdict-on-gay-sex/.

human dignity. The decision reinforced the view that these laws severely deprive individuals of their fundamental rights:

> [I]t is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. It recognises a person as a free being who develops his or her body and mind as he or she sees fit. At the root of the dignity is the autonomy of the private will and a person's freedom of choice and of action. Human dignity rests on recognition of the physical and spiritual integrity of the human being, his or her humanity, and his value as a person, irrespective of the utility he can provide to others. . . .
>
> The studies conducted in different parts of the world, including India, show that the criminalisation of same-sex conduct has a negative impact on the lives of these people. Even when the penal provisions are not enforced, they reduce gay men or women to, what one author has referred to as, "*unapprehended felons*", thus entrenching stigma and encouraging discrimination in different spheres of life. . . .
>
> The criminalisation of homosexuality condemns in perpetuity a sizable section of society and forces them to live their lives in the shadow of harassment, exploitation, humiliation, cruel and degrading treatment at the hands of the law enforcement machinery. The Government of India estimates the MSM number at around 25 lacs [2.5 million people]. The number of lesbians and transgenders is said to be several lacs as well. This vast majority (borrowing the language of the South African Constitutional Court) is *denied "moral full citizenship*."[140]

The Court concluded the law "severely affects the rights and interests of homosexuals and deeply impairs their dignity."[141]

Another crucial pronouncement made by the High Court of Delhi, which builds on the ECtHR's refusal to grant states a wide margin of appreciation in *ADT*, is that the potential popularity of the laws cannot excuse their existence and preclude gays from receiving the same constitutional protections as everyone else: "Indian Constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the LGBTs are."[142] Societal bias, therefore, cannot be used as a justification for maintaining such laws in force.

While not every jurisdiction has considered whether or not antigay laws severely deprive individuals of fundamental rights, other international rights instruments, besides those already surveyed, protect

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140. Naz Found. v. Gov't of NCT of Delhi, 160 Deh/Delhi Law Times 277 (2009), ¶¶ 26, 50, 52 (emphasis added).

141. *Id.* ¶ 92.

142. *Id.* ¶ 131.

the same rights that the cases above have found were violated by the existence of antigay laws. The Universal Declaration of Human Rights proclaims that individuals are "born free and equal in dignity and in rights."[143] The African Charter on Human and People's Rights protects "the right to the respect of the dignity inherent in a human being."[144] The American Declaration on the Rights and Duties of Man guarantees the rights to liberty and privacy, as does the American Convention on Human Rights.[145] There is no doubt then, as per the Appeals Chamber in *Prosecutor v. Kordic* and in the *Elements*, that the mere existence of antigay laws "constitute[s] a denial of or infringement upon a fundamental right laid down in international customary or treaty law."[146] Enforcement of antigay laws makes the violation of those rights all the more egregious and violates additional rights.

B. "The Perpetrator Targeted Such Person or Persons by Reason of the Identity of a Group or Targeted the Group or Collectivity as Such"

Efforts at enforcing antigay laws, by their very nature, target men because they are gay or perceived to be gay.[147] Given the difficulty of catching two men in the act of sodomy, police are often left to focus their attention on gatherings or meetings of gay men, or those suspected to be gay, as was the case recently in Iran and Bahrain in 2011.[148] As noted earlier, it is about seeking "exterior traces of an interior tendency."[149]

There have not been any instances of two men arrested and charged under antigay laws for actually being caught engaging in sodomy that were uncovered while writing this Article. It is for this reason that

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143. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), UN GAOR, 3d Sess., Supp. No. 13, U.N. Doc. A/810, at 71 (Dec. 12, 1948). While the UDHR is not a treaty, it is mentioned in *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgment, ¶ 621 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf, as the first example of an "international standard."

144. African Charter on Human and Peoples' Rights art. 5, O.A.U. Doc. CAB/LEG/67/3 rev. 5 (June 27, 1981) (entered into force Oct. 21, 1986).

145. American Declaration on the Rights and Duties of Man arts. 1, 5, May 2, 1948, *reprinted in* OEA/ser. L./V/II.71 doc. 6 rev. 1 (1987) (entered into force July 18, 1978) [hereinafter American Declaration]; Org. of Am. States (OAS), Am. Convention on Human Rights, "Pact of San Jose," Costa Rica, arts. 7, 11 (Nov. 22, 1969).

146. Prosecutor v. Kordić & Cerkez, Case No. IT-95-14/2-A, Appeals Judgment, ¶ 103 (Int'l Crim. Trib. for the Former Yugoslavia, Dec. 17, 2004), http://www.icty.org/x/cases/kordic_cerkez/acjug/en/cer-aj041217e.pdf.

147. While some states, like Cameroon, have laws that are gender neutral and ostensibly target women as well, the vast majority of statutes in question target men.

148. Dehghan, *supra* note 54; *Bahrain Arrests 200 Men at Gay Party—Newspapers*, *supra* note 12.

149. *In a Time of Torture*, *supra* note 49, at 345.

evidence used in sentencing men under Cameroon's antigay laws has included police finding condoms and lubricant in a house shared by two men and the existence of a text message from one man to another saying "I've fallen in love with you."[150] When two men were arrested in 2010 in Malawi and charged and convicted under Malawi's antigay laws, the evidence used to demonstrate "gross indecency and unnatural acts" was that they had held an "engagement ceremony."[151] In Zambia, two men were arrested only after a neighbor reported them on suspicion of homosexual behavior, and in order to verify whether or not they had violated Zambia's antigay laws, it is alleged that they were subjected to rectal examinations.[152] These examples illustrate that perceptions of sexuality are deemed sufficient to assume that the individuals in question engage in the type of behavior that actually offends the legislation. If suspicions of sexuality were not real and credible, the individuals would not be targeted.

C. "Such Targeting Was Based on Political, Racial, National, Ethnic, Cultural, Religious, Gender as Defined in Article 7, Paragraph 3, of the Statute, or Other Grounds That Are Universally Recognized as Impermissible Under International Law"

Sexual orientation is not explicitly enumerated as a protected ground in the Rome Statute, leaving one with two plausible options for the grounds of persecution. The first is that persecution is targeted based on one's gender; the other is to show that it falls within "other grounds that are universally recognized as impermissible under international law."

Gender is defined in article 7(3) of the Rome Statute as "the two sexes, male and female, within the context of society."[153] Even though this definition has been criticized on various grounds,[154] including its refusal to accept that gender identity may be malleable, it is open enough such that the arrest of two men, or two women, under antigay laws constitutes targeting them based on their gender. The fact that there is another aspect of their identity, their sexuality, whether known or perceived, that also causes them to be targeted, does not detract from the

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150. *Criminalizing Identities*, *supra* note 41, at 2.

151. *Malawi Gay Couple Get Maximum Sentence of 14 Years*, *supra* note 10.

152. *Release the Two Kapiri "Gay Men," Amnesty International Tells Zambian Government*, LUSAKA TIMES (Sept. 12, 2013), http://www.lusakatimes.com/2013/09/12/release-the-two-kapiri-gay-men-amnesty-international-tells-zambian-government/.

153. Rome Statute, *supra* note 27, art. 7(3).

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

fact that gender plays a key role in targeting them. When the Trial Chamber addressed the persecution that took place in *Nahimana*, they acknowledged that not only were certain women targeted because they were Tutsi but also because they were women.[155] In fact, in instances where one's sexuality is unconfirmed, enforcement of antigay laws targets individuals solely based on their gender; their sexual orientation is merely speculated—suspicions are raised when it is two men or two women behaving in a certain way and not one man and one woman. Where one's sexuality is confirmed, it is still one's underlying identity, or gender, that provides sanction for arrest. Rarely do provisions provide that it is illegal for any homosexual to engage in certain sexual activities; instead, provisions prohibit two persons, or two persons of the same sex, from engaging in those sexual activities. Gender, therefore, figures very prominently in the targeting.

An understanding of gender within the context of persecution as protecting rights based on sexual orientation is consistent with the understanding at the time the Rome Statute was drafted. Persecution on the grounds of gender was one of the more contentious additions into the Rome Statute, and those who supported it did so despite the fact that those who expressed concern did so in part because they did not want to provide an avenue through which rights based on sexual orientation could find protection in the court.[156] The circular and restrictive definition of gender in article 7(3) is the result of disagreement and compromise of the drafters but does not rule out persecution based on two individuals being targeted because they are of the same gender.

Moving to the second option, the legality of arresting individuals under antigay laws in seventy-six states suggests that one would have a difficult time arguing that this constitutes persecution on grounds universally recognized as impermissible. However, the jurisprudence suggests that this is not the case, and an argument for permissibility under international law to arrest individuals under domestic antigay laws because a number of states do precisely that sets a precedent that would lead to an absurd reality. In the face of overwhelming international consensus on the existence and basis for a right—as evidenced by decisions and declarations of courts, tribunals, and international organizations—giving domestic violators of that right the shield of domestic legality provides them with, in effect, a veto over international

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155. Prosecutor v. Nahimana, Case No. ICTR-99-5Z-T, Trial Chamber Decision, ¶ 1079 (Int'l Crim. Trib. for the Former Yugoslavia, Dec. 3, 2003), *available at* http://www.icty.org/sid/135.

156. Oosterveld, *supra* note 154, at 63.

human rights. The convictions at Nuremberg dispensed early on with the argument that legality in an offending state may serve as a defense to the commission of persecution.

Jurisprudence on the crime of persecution indicates that it is the offender that chooses the mode of persecution against the targeted group. The fact that certain states use their criminal justice systems as the means of persecution does not detract from the persecutory impact and reality the laws generate, which *Nahimana* stated must be the inquiry's focus.[157] If domestic legality could serve as a shield to prosecution, it could open the door to instances of persecution that would undermine the protections international criminal law is seeking to instill. In *SMUG*, the Court dismissed the argument that domestic legality should preclude a finding of persecution and stated, "The fact that a group continues to be vulnerable to widespread, systematic persecution in some parts of the world simply cannot shield one who commits a crime against humanity from liability."[158]

The decisions of the human rights courts above reinforce the notion that under international human rights instruments such as the ECHR and ICCPR, sexual orientation is a prohibited ground for discrimination. While regional differences might lend to different approaches to interpreting rights, when taken together, the growth of international and national decisions from a varied geographical context affirming that sexual orientation is a prohibited grounds for denial of basic human rights suggests that it would be exceedingly difficult for other international rights bodies to interpret those same rights as not applying to individuals on the basis of their sexual orientation.

Confirming that international human rights law affords protection based on sexual orientation, on June 17, 2011, the United Nations Human Rights Council passed Resolution 17/19 on "Human Rights, Sexual Orientation and Gender Identity."[159] To address the issue of discrimination against LGBT populations, the Resolution required a follow-up report from the High Commissioner for Human Rights

> to document discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, in all regions of the world, and how international human rights law can be used

157. *Nahimana*, Case No. ICTR-9-5Z-T, ¶ 1073.

158. Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 318 (D. Mass. 2013).

159. UNHRC Res. 17/19, U.N. HRC 17th Sess., L.9/Rev.1 (June 17, 2011), U.N. Doc. A/HRC/17/L.9/Rev.1 (2011), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/170/75/PDF/G1117075.pdf?OpenElement.

> to end violence and related human rights violations based on sexual orientation and gender identity.[160]

When it was delivered in November 2011, it proclaimed:

> All people, including lesbian, gay, bisexual and transgender (LGBT) persons, are entitled to enjoy the protections provided for by international human rights law, including in respect of rights to life, security of person and privacy, the right to be free from torture, arbitrary arrest and detention, the right to be free from discrimination and the right to freedom of expression, association and peaceful assembly.[161]

The Report confirmed the practice under the ICCPR to include sexual orientation as a protected ground against discrimination and that the Human Rights Committee has rejected the argument that "criminalization may be justified as 'reasonable' on grounds of protection of public health or morals, noting that the use of criminal law in such circumstances is neither necessary nor proportionate."[162]

Domestic courts have also confirmed sexual orientation as a protected ground against discrimination. When the Supreme Court of Canada was called to consider whether sexual orientation was analogous to the prohibited grounds of discrimination contained in the equality provisions of the Canadian Charter of Rights and Freedoms, it held, referring to an earlier decision, "On the basis of 'historical social, political and economic disadvantage suffered by homosexuals' and the emerging consensus among legislatures (at para 176), as well as previous judicial decisions (at para 177), that sexual orientation is a ground analogous to those listed in s. 15(1)."[163] Consistent with this approach, in *Naz*, the High Court of Delhi declared, "We hold that sexual orientation is a ground analogous to sex."[164]

Scholars have also accepted that sexual orientation can be an analogous ground under the Rome Statute that would permit the application of the crime against humanity of persecution to instances targeting homosexuals.[165]

The Yogyakarata Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles) also aim to establish the applicability of

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160. *Id.* ¶ 1.

161. Report of the United Nations High Commissioner for Human Rights, UNHRC, 17th Sess., ¶ 1, A/HRC/19/41 (Nov. 17, 2011).

162. *Id.* ¶¶ 7, 14.

163. Vriend v. Alberta, [1998] 1 S.C.R. 493, ¶ 90 (referring to Egan v. Canada, [1995] 2 S.C.R. 513).

164. Naz Found. v. Gov't of NCT of Delhi, 160 Delhi Law Times 277 (2009).

165. Oosterveld, *supra* note 154, at 79.

international human rights protections on grounds of sexual orientation. The Yogyakarta Principles declare that "[i]nternational human rights law affirms that all persons, regardless of sexual orientation or gender identity, are entitled to the full enjoyment of all human rights" and that

> [i]nternational human rights law imposes an absolute prohibition of discrimination in regard to the full enjoyment of all human rights, civil, cultural, economic, political and social, that respect for sexual rights, sexual orientation and gender identity is integral to the realisation of equality between men and women.[166]

Cultural arguments, should they be raised, suggesting that homosexuality is not culturally accepted within certain states or regions must also fail. Criminalization of sodomy is not "African." Eighteen African states do not maintain antigay laws; neither do twenty-one Asian, or twenty-eight Latin American and Caribbean states, or six Pacific Oceanian states.[167]

A final argument for why targeting someone based on their sexual orientation is universally recognized as impermissible under international law is evidenced by the small number of states that actually choose to enforce their antigay laws. When one searches for examples of enforcement of antigay laws, it becomes clear that the vast majority of the seventy-six states choose not to do so. It is for this reason that a great deal of the human rights literature surrounding the criminalization of aspects of sexuality focuses on the stigma surrounding the existence of the laws, even when unenforced.[168]

Thus, while antigay laws may exist in seventy-six states, they are only enforced in a minority of those states, and as will be discussed, only within a minority of those states are they enforced with any regularity or predictability. For cultural or political reasons, many states may be unwilling to undo legislation, often inherited from colonial eras, that criminalizes same-sex activities. However, those same states are equally unwilling to act and enforce those laws; they exist in name only, and one must be cautious about reading into their existence a conclusion that all seventy-six states believe they may begin a policy of arresting and prosecuting their LGBT populations in order to uphold antigay laws. One is brought back to Macky Sal's words about the situation in Senegal:

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166. *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, YOGYAKARTA PRINCIPLES 9 (Mar. 2007), http://www.yogyakartaprinciples.org/principles_en.htm.

167. ITABORAHY & ZHU, *supra* note 7, at 41-42, 65-66, 87-88, 104.

168. INT'L SECRETARIAT, *supra* note 17, at 7.

many states might not be ready to enforce their antigay laws, but nor are they ready—for any number of reasons—to remove them.

D. "The Conduct Was Committed in Connection with Any Act Referred To in Article 7, Paragraph 1, of the Statute or Any Crime Within the Jurisdiction of the Court"

The Rome Statute departs from other statutes when it requires that persecutory acts must be committed in connection with another enumerated act in article 7(1). The scenarios surveyed here indicate that two different acts in article 7(1) can meet that requirement.

Article 7(1)(e) is the crime against humanity of "[i]mprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law."[169] There is no further definition in article 7(2) as to what constitutes imprisonment, and the *Elements* merely emphasize that what is required is imprisonment or a severe deprivation of liberty that is in violation of fundamental rules of international law.[170]

In *Ayissi v. Cameroon*, the United Nations Working Group on Arbitrary Detention held that the arrest and imprisonment of men under Cameroon's antigay laws is a "deprivation of liberty," that is, "arbitrary, as contravening the provisions of article 17 and 26 of the International Covenant on Civil and Political Rights."[171] Therefore, instances where men are arrested, held on charges under antigay laws, or eventually convicted and sentenced to prison will meet the requirement creating a nexus between persecution and another form of conduct that may constitute a crime against humanity. This brings the examples discussed above in, at minimum, Cameroon, Iran, Bahrain, Zambia, Egypt, Senegal, and Nigeria all within the potential reach of the Rome Statute.

However, as has been illustrated, not all states are actively enforcing their antigay laws, requiring a different nexus between them and article 7(1). This is satisfied by article 7(1)(k), the crime against humanity of "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."[172] In *Prosecutor v. Muthaura, Kenyatta & Hussein*, the Pre-Trial Chamber referred to other inhumane acts as a "residual category" while also cautioning that article 7(1)(k) should be "interpreted conservatively and

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169. Rome Statute, *supra* note 27, art. 7(1)(e).

170. ICC, *supra* note 120, art. 7(1)(e).

171. Ayissi v. Cameroon, Working Group on Arbitrary Detention, Opinion No. 22/2006, U.N. Doc. A/HRC/4/40/Add.1 at 91 (2006), ¶ 22.

172. Rome Statute, *supra* note 27, art. 7(1)(k).

must not be used to expand uncritically the scope of crimes against humanity."[173]

Even with this caveat, applying other inhumane acts to the situations being examined here is not "uncritical." Other inhumane acts have been interpreted in a strikingly similar manner to persecution, with the emphasis on finding acts that violate international human rights. The *Elements* stipulate that such acts must be of a similar gravity to other acts in article 7(1).[174]

The ICC has not had an opportunity to pronounce definitively on other inhumane acts. However, the Trial Chamber in *Kupreškić*, as with persecution, undertook an extensive analysis of the crime. It concluded that one must keep an open mind for acts that might fit within other inhumane acts and that a proclivity for enumerating specific acts would be self-defeating in terms of the crime's objective. It stated: "An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition. . . . The more specific and complete a list tries to be, the more restrictive it becomes. The form of wording adopted is flexible and, at the same time, precise."[175] Using the same principles as with persecution, the Trial Chamber relied on international human rights instruments "to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity."[176]

In terms of discerning what is needed to make out a case under article 7(1)(k), it appears that the greatest difference between persecution and other inhumane acts is the lack of a requirement under the latter to demonstrate the persecutory intent based on the victims' identity. Therefore, given their similar reliance on using grave violations of international human rights as a guide, reliance on the crime against humanity of other inhumane acts also permits the required nexus to be drawn between the conduct associated with persecution and another act within article 7(1) of the Rome Statute, regardless of whether antigay laws are enforced or not, satisfying this unique requirement.

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173. Prosecutor v. Muthaura, Case No. ICC-01/09-02/11, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ¶ 269 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 8, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1037052.pdf.

174. ICC, *supra* note 120, art. 7(1)(k), incl. note 30.

175. Prosecutor v. Kupreškić, Case No. IT-95-16-T, Trial Chamber Decision, ¶ 563 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf.

176. *Id.* ¶ 566.

E. "The Conduct Was Committed as Part of a Widespread or Systematic Attack Directed Against a Civilian Population"

Examining whether the conduct in question satisfies the requirement of widespread or systematic is where one must draw a distinction between states that enforce their antigay laws and those that have merely kept them in the criminal laws. The distinction reinforces that only the gravest violations of human rights fall under the ambit of international criminal law. Going even further, not each instance of antigay laws being enforced passes the test.

As a law of general application to an entire segment of the population, there is no denying that antigay laws target a widespread segment of that state's population. The earlier discussion from *Dyilo* on mens rea, with its reference to commission of acts also by omission, highlights that crimes under the Rome Statute may be committed by commission or omission—in other words, by enforcing antigay laws or not enforcing them.[177] The *Krnojelac* Appeals Chamber confirmed that this applies specifically to the instance of persecution.[178]

However, charging that the existence of an unenforced law—often leftover from colonial governments, which, as demonstrated by the cases before the ECtHR, still have residual effects and cause mental suffering and anguish on a class of individuals, constitutes a widespread course of conduct that does not seem to meet the gravity threshold that is required by crimes against humanity.[179] In *Kordic*, the Appeals Chamber noted, "[N]ot every act, if committed with the requisite discriminatory intent, amounts to persecution as a crime against humanity."[180] Examples of unenforced antigay laws seem to highlight the difference in the type of acts or omissions that fall within international human rights law but not international criminal law.

Quantitative interpretations of the widespread requirement also preclude its application to situations addressing the enforcement of antigay laws, because the vast majority of instances are often directed at smaller groups of men.

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177. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment, ¶ 351 (Jan. 29, 2007) (Int'l Crim. Trib. for the Former Yugoslavia), http://www.icc-cpi.int/iccdocs/doc/doc243701.pdf.

178. Prosecutor v. Krnojelac, Case No. IT-97-25-T, Trial Chamber Decision, ¶ 185 (Mar. 15, 2002) (Int'l Crim. Trib. for the Former Yugoslavia), http://www.icty.org/x/cases/krnojelac/tjug/en/krn-tj020315e.pdf.

179. Report of the United Nations High Commissioner for Human Rights, UNHRC, 17th Sess., ¶ 40, A/HRC/19/41 (Nov. 17, 2011).

180. Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-A, Judgment, ¶ 103 (Int'l Crim. Trib. for the Former Yugoslavia, Dec. 17, 2004), http://www.icty.org/x/cases/kordic_cerkez/acjug/en/cer-aj041217e.pdf.

Therefore, in order to prove the existence of a crime against humanity through the enforcement of antigay laws, one must do so under the argument that the conduct is systematic. As stated, in *Katanga* the Pre-Trial Chamber held that for conduct to be systematic it must fit one of two possible definitions. It must be either "an organised plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts or as 'patterns of crimes' such that the crimes constitute a 'non-accidental repetition of similar criminal conduct on a regular basis.'"[181]

Between 2010 and 2012, Human Rights Watch was able to identify eight individuals convicted under Cameroon's antigay laws and twenty-eight between 2010 and March 2013 who had been charged.[182] In Iran and Egypt, researchers have documented repeated instances of police arresting individuals in small groups and, at times, in larger gatherings. Human Rights Watch spoke of "a growing number of men" targeted in Egypt and was able to identify 179 who by 2004 had charges brought against them.[183] Also in Iran, Human Rights Watch found evidence of entrapment and raids of private gatherings of men by Iranian authorities.[184] As extensions of state policy, these activities by law enforcement indicate that, as per *Gombo*, attacks or courses of conduct are not being carried against limited and random groups of men. Iran's Revolutionary Guard admitted to targeting a "network of homo-sexuals."[185]

All of the instances highlighted in this Article involve state actors playing official and deliberate roles in the enforcement of antigay laws such that there can be no denying that state entities are making calculated and deliberate decisions. Per *Katanga*, they are organized acts in furtherance of state policy against homosexuals. In line with *Katanga* and *Tadić*, the acts are not random—they are calculated decisions that involve the appropriation of state resources. Such acts involve state action in (1) the decision to enforce the provisions of the criminal law, (2) the utilization of law enforcement to investigate and arrest individuals, and finally (3) the use of the criminal justice system to try and imprison individuals. Throughout the process everything is calculated; nothing is random.

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181. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶ 397 (Sept. 30, 2008), http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf.

182. *Criminalizing Identities*, *supra* note 41, at 1.

183. *In a Time of Torture*, *supra* note 49, at 1.

184. *We Are a Buried Generation: Discrimination and Violence Against Sexual Minorities in Iran*, *supra* note 19, at 48.

185. Dehghan, *supra* note 54.

The second qualification in *Katanga* relates to frequency, using the terms "continuous commission" or "a regular basis." While at first the apparent infrequency of arrests and convictions might lead one to conclude that this should end the inquiry and preclude one from classifying these acts as systematic, that employs too narrow, and too immediate, a lens through which one views this conduct. Choosing a larger window of time to gauge whether or not acts are occurring continuously or regularly permits one to appreciate the fact that one must not restrict the inquiry to instances where conduct can be classified as constant; that is not the requirement. The gravity threshold of crimes against humanity can be met when conduct is continuous over time and not just constant in shorter windows.

At least since 2010, Cameroon has been continuously enforcing its antigay laws. Enforcement has been ongoing and the continuous commission reaches beyond those targeted and arrested, but also serves as reminders to Cameroon's entire LGBT population that the state's resources have been apportioned to target them based on their sexual orientation. Returning to *Katanga* and *Tadić*, there is nothing isolated about what is transpiring: Cameroon's government is targeting homosexuals and sending a message to the wider community that it is at risk. The certainty that the state is enforcing the law and the uncertainty as to when and whom it will specifically target, create a reality whereby every Cameroonian who could be arrested under antigay laws may be arrested under antigay laws. Borrowing a term from the High Court of Delhi in *Naz*, gay Cameroonians are all living as unapprehended felons.

The same arguments can be made for the documented periods in Egypt and Iran and in any other state where the continuous arresting of homosexuals over a period of time leaves little doubt that the state is employing a regular pattern that results in the ongoing commission of acts of targeting and arresting homosexuals under antigay laws. Deliberately apportioning state resources to this task, with the full knowledge and at least tacit support of the government, also fulfills the latter requirement of this element that as per article 7(2)(a) of the Rome Statute, the course of conduct involves "the multiple commission of acts . . . pursuant to or in furtherance of a State or organizational policy to commit such attack."[186]

States, like Bahrain, Zambia, or Tunisia, where one is not able to discern a pattern over time will not meet the Rome Statute's requirement that conduct be systematic. While one can make the argument that it is

186. Rome Statute, *supra* note 27, art. 7(2)(a).

state policy to enforce antigay laws, their extremely selective and rare usage places them within the *Katanga* and *Tadić* category of random or isolated.

Last, instances where individuals are found not guilty or have their convictions overturned on appeal will still fit within the requirements set down by the *Elements*. One cannot make the argument that because in certain instances the conduct is temporary, it falls outside the crime. As has been stated, *Nahimana* affirms the fact that persecution is about impact. Judicial outcomes, or decisions by police not to press charges, do not detract from the fact that one was persecuted in the first place, nor is the message to other homosexuals any less dire. The impact of persecution and the suffering that flows from it is just as real. This comports with the pronouncement of the Trial Chamber in *Krnojelac* that what matters is the existence of suffering by the victim, and not its longevity. "The suffering inflicted by the act upon the victim does not need to be lasting so long as it is real and serious."[187]

F. "The Perpetrator Knew That the Conduct Was Part of or Intended the Conduct To Be Part of a Widespread or Systematic Attack Directed Against a Civilian Population"

Decisions to send out law enforcement agents to target a very specific group of individuals and launch prosecutions against those charged are not made in a vacuum. The hierarchal decisions that must be made in order to operationalize the full extent of a criminal justice system indicates that those individuals—whether a director of law enforcement, a director of public prosecutions, or even an attorney general or minister of the interior—would have to know that antigay laws were being enforced. The context in which the enforcement of antigay law is taking place is too deliberative for anyone to attempt to plead ignorance, satisfying the requirement set out in *Duch* that the accused understood the context in which the act took place. This was also the standard agreed upon by the ICTR Trial Chamber in *Prosecutor v. Kayishema & Ruzindana*.[188]

Those planning and approving these arrests are doing so because they intend to further the state's enforcement of antigay laws. In the

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187. Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgment, ¶ 131 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002) (footnotes omitted), http://www.icty.org/x/cases/krnojelac/tjug/en/krn-tj020315e.pdf.

188. Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, ¶ 143 (Int'l Crim. Trib. for Rwanda, May 21, 1999), http://www.unictr.org/sites/unictr.org/files/case-documents/ictr-95-1/trial-judgements/en/990521.pdf.

words of the Appeals Chamber in *Blaškić*, an individual planning or authorizing those attacks "knows that there is an attack on the civilian population and also knows that his acts comprise part of that attack."[189] The degree to which this aspect of persecution is committed by conscientious commission as opposed to by omission suggests that one does not even need to rely on the proposition in *Finta* that willful blindness can be used to satisfy this element; the conduct is too deliberative.

At this stage, it is important to recall the findings in the *Justice Case* and *Duch* that stated an accused need only to have participated in the attack and not to have carried it out in full.[190] Therefore, it is about one's participation in the commission of the crime, and not committing each step fully on one's own.

G. Mens Rea Under Article 30

The final element that must be satisfied is the general mens rea requirement of the Rome Statute that all "material elements are committed with intent and knowledge."[191]

It is contended that this element is best explored in detail against the backdrop of a specific instance of a crime against humanity of persecution where the facts of enforcing antigay laws are well known—beyond the knowledge that individuals have been arrested and imprisoned. Absent those facts, one is not able to properly situate decisions to enforce antigay laws within one of the three categories of volition explored in *Dyilo*: *dolus directus* of the first degree, *dolus directus* of the second degree, or *dolus eventualis*.

However, in the absence of detailed facts, one can surmise that those decisions at least fall into the category of *dolus eventualis*, meeting the final substantive requirement of the Rome Statute. *Dolus eventualis* is when an accused "is aware of the risk that the objective elements of the crime may result from his actions or omissions" and, by reconciling or consenting to such an outcome, "accepts such an outcome."[192] In the

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189. Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeal Chamber Decision, ¶ 214 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004), http://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf.

190. Co-Prosecutors v. Duch, Case No. 001/18-07-2007/ECCC/TC, Trial Chamber Judgment, ¶ 298 (July 26, 2010), *available at* http://haguejusticeportal.net/Docs/Court%20Documents/ECCC/Kaing%20Guek%20Eav%20(Duch)%20case_summary%20of%20judgement.pdf.

191. Rome Statute, *supra* note 27, art. 30(1).

192. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment, ¶ 352 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 29, 2007), http://www.icc-cpi.int/iccdocs/doc/doc243701.pdf.

context of persecution through the enforcement of antigay laws, this would require an accused to be aware of the risk that the enforcement of those laws may result in the intentional and severe deprivation of an individual's fundamental human rights contrary to international law because of that individual's sexual orientation, real or perceived, and that by consenting to that outcome, the individual has accepted it.

Those who oversee the enforcement of antigay laws cannot be oblivious to the course of action their decision sets in motion. They could not seriously contend that they never meant for what happened to have actually happened. Furthermore, the consequences of enforcement are appreciated and not unknown, such that it would be too great a stretch for an accused to suggest he did not realize an individual targeted under antigay laws would have his human rights targeted or that this was not what the accused intended.

The only objection an accused might attempt to raise is that he does not believe homosexuals are a protected group when it comes to human rights and therefore could not have known that his actions would lead to the severe deprivation of international human rights. However, the growth of gay rights advocacy worldwide, including local groups like SMUG in developing countries, viewed against the backdrop of a growth of international, national, and regional decisions affirming sexual orientation as an accepted ground upon which to assert protection by international human rights, means that an accused would have to be willfully blind to the fact that sexual orientation, in the eyes of international law, has become a protected ground. When Macky Sall told President Obama that Senegal was "still not ready to decriminalize homosexuality," he implied that he knew that there was something unusual, or particular to Senegal, and that in order for a legal system to be consistent with international norms in its protections and guaranteeing of rights, it cannot have antigay laws.

Therefore, notwithstanding the existence of other barriers to prosecution dealing with jurisdiction and admissibility, which were not the subject of this Article, the enforcement of antigay laws in states like Cameroon, Egypt, and Iran, satisfies the *Elements* and meets the actus reus requirements of the crime against humanity of persecution as defined in article 7(1)(h) of the Rome Statute, as well as the general mens rea requirements under article 30.

There is one other necessary aspect to obtain a conviction for the crime against humanity of persecution that this Article has deliberately overlooked: against whom to bring the charges. The pronouncement in *Duch* that convicting a single actor for a crime that requires the

participation of multiple actors indicates that given a specific factual matrix one may choose who it has felt is most responsible for the persecution brought about by enforcing antigay laws. Much like with the discussion over *mens rea*, a discussion on this in the abstract is too speculative. Yet, suggesting that Cameroon's director of public prosecutions or its justice minister is responsible for setting down policy that operationalizes the various state organs needed to enforce antigay laws demonstrates that one may also meet the Rome Statute's requirements of individual criminal responsibility.

VI. CONCLUSION

In its examination of persecution as a crime against humanity, the *Tadić* Trial Chamber looked at the World War II jurisprudence, in particular the French court in the *Barbie* case, where it stated:

> Above all these crimes offend the fundamental rights of mankind; the right to equality, without distinctions of race, colour or nationality, and the right to hold one's own political and religious opinions. Such crimes not only inflict wounds or death, but are aggravated by the voluntary, deliberate and gratuitous violation of the dignity of all men and women: these are victimised only because they belong to a group other than that of their persecutors, or do not accept their dominion.[193]

Through suggesting a new application for the crime against humanity of persecution, it has not been the objective of this Article to expand uncritically the scope of international criminal law. Its conclusion is made knowing that some critics might posit that in its novel suggestion for the scope of the crime, it goes beyond the principle of legality enshrined in article 22 of the Rome Statute.[194] The examination was also mindful of the fact that as disturbing and offensive as certain violations of human rights may be, it is not the intention of international criminal law to capture each violation, but only the most severe, and that

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193. Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 228 (Int'l Crim. Tribunal for the Former Yugoslavia Oct. 2, 1995), http://www.icty.org/x/cases/tadic/acdec/en/51002.htm.

194. Article 22 of the Rome Statute, *supra* note 27, titled "Nullem crimen sine lege," reads:

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

it must be especially cautious as it seeks to expand definitions of existing crimes.

However, caution cannot lead to inaction in the face of facts that, when objectively analyzed against the elements and existing jurisprudence, correspond to the type of behavior international crimes seek to cover. When the *Kupreškić* Trial Chamber refused to delineate a more specific definition of persecution, with concrete examples, it knew that leaving the definition open meant it could be expanded and refined. Closing doors with overly finite definitions only safeguards potential perpetrators. By relying on a litmus test of "inhumane" for ascertaining future acts of persecution, it concluded that the principle of legality was satisfied "as inhumane acts are clearly proscribed by the Statute."[195]

This Article has strived to demonstrate that there can exist instances whereby the enforcement of antigay laws leads to an inhumane violation of human rights such that it rises to the level of a crime covered by international criminal law, notwithstanding the fact that the means through which the crime is committed might not comport with how one traditionally envisions the commission of international crimes. Yet, restricting oneself to fact patterns that replicate what one thinks is caught by international criminal law would have the precise, limiting effect that the various trial chambers wanted to avoid by refusing to enumerate specific acts that could meet the definitions of persecution and other inhumane acts. *Nahimana* proclaimed that persecution concerns itself with the "denigration of persons."[196] The facts surveyed here—arrest and imprisonment of individuals for personal and private expressions of who they are as individuals—are in every way an example of the denigration of persons.

What further confirms that the enforcement of antigay laws rises to the gravity associated with international criminal law is that the enforcement—the persecution—is at the hands of state agents. Instances examined in this Article are not about the existence of societal prejudice and harassment of homosexuals and how that affects their human rights; they are about something more grave. In the *Justice Case*, the Tribunal

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195. Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 622 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf.

196. Prosecutor v. Nahimana, Case No. ICTR-99-5Z-T, Trial Chamber Decision, ¶¶ 1072-1073 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 3, 2003), *available at* http://www.icty.org/sid/135.

stated that this is a crucial factor in distinguishing national and international crimes.[197]

That this Article seeks to place protection of, or prosecution for, violations of international human rights within the rubric of international criminal law is also not an uncritical extension of the law, as persecution explicitly provides international human rights with the protections set by international criminal law. Although this Article examines different facts, Judge Ponsor in *SMUG* was not incorrect when he held that persecution of gays constitutes a crime against humanity.

One's sexual orientation, and how one expresses that, goes to the core of human identity; it is the essence of being oneself. The judges at Nuremberg saw fit to deem that restrictions on one's professional life, and who one could marry, constituted persecution because these were considered to be basic and essential expressions of one's identity. What would be an uncritical approach to international criminal law, and the crime against humanity of persecution, would be if one dismissed instances where states continued to persecute individuals on the same or equivalent grounds, in a manner with an equal level of gravity, and did so such that the conduct was committed in a manner that corresponded to the *chapeau* of crimes against humanity and the mens rea requirements of today's international criminal law.

197. 3 Trials War Crim. Before the Nuremberg Mil. Tribunal Under Control Council L. No. 10, at 984 (Nuremberg Mil. Tribunals 1946-49).