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The Global Transgender Population and the International Criminal Court

Brian Kritz¹

I. INTRODUCTION

Recognition of the rights of lesbian, gay, and bisexual (LGB) persons has received considerable global attention in recent years. A landmark United Nations Resolution on human rights, sexual orientation and gender identity in June 2011,² a major policy address in December 2011 by then-Secretary of State Hillary Clinton,³ the 2013 Inaugural Address of President Barack Obama,⁴ a progressive court ruling in Colombia,⁵ and a reversal of discriminatory national legislation in Malawi⁶ all bode well for the contin-

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2. Human Rights Council Res. 17/19, Human Rights, Sexual Orientation and Gender Identity, 17th Sess. (July 14, 2011), *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/148/76/PDF/G1114876.pdf?OpenElement>.

3. Hillary Rodham Clinton, Sec'y of State, Remarks in Recognition of International Human Rights Day (Dec. 6, 2011), *available at* <http://www.state.gov/secretary/rm/2011/12/178368.htm>.

4. President Barack Obama, Second Inaugural Address (Jan. 21, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama> ("Our journey is not complete until our gay brothers and sisters are treated like anyone else under the law . . .").

5. See CNN Wire Staff, *Colombian Court Says Congress Must Decide on Gay Marriage*, CNN WORLD, July 27, 2011, <http://www.cnn.com/2011/WORLD/americas/07/27/colombia.gay.marriage/index.html>. The Constitutional Court of Colombia ruled that "gay couples in de facto unions constitute a family" and gave the Congress two years to create legislation addressing same-sex marriages. Colombian Constitutional Court Decision C-029 of 2009 (Jan. 28, 2009), *available at* <http://english.corteconstitucional.gov.co/sentences/C-029-2009.pdf>.

6. See Godfrey Mpondera & David Smith, *Malawi Suspends Anti-Gay Laws as MPs Debate Repeal*, GUARDIAN, Nov. 5, 2012, *available at* <http://www.guardian.co.uk/world/2012/nov/05/malawi-gay-laws-debate-repeal>. In November of 2012, President Joyce Banda of Malawi announced a moratorium on sections 153 and 156 of the national penal code, which criminalizes sexual conduct between men and sec-

ued expansion of the protection and promotion of the global LGB community.

While the global transgender community receives frequent mention as the “T” under the umbrella of so-called LGBT rights, the international call for increased prevention of rights abuses against transgender persons, promotion of transgender rights, and protection of transgender communities pales in comparison to the similar call for the global LGB population.

A conspicuous example of this divergence between LGB rights and transgender rights is Secretary of State Clinton’s December 2011 address on human rights. While Secretary Clinton mentioned the rights of LGBT persons at many points in her speech commemorating International Human Rights Day, she never spoke of the rights of transgender persons as a stand-alone, always linking transgender persons to a discussion of one or more of the LGB group.⁷ In comparison, she mentioned gay persons and issues alone on over fifteen occasions.⁸ In the arguably seminal moment in her speech, she stated that “gay rights are human rights, and human rights are gay rights,” leaving transgender persons conspicuously absent.⁹ While working for the United States Agency for International Development as a Democracy Fellow and Senior Rule of Law and Human Rights Advisor in December 2011, I heard from colleagues that an initial draft of this sentence included “transgender,” but “transgender” was stricken from the final draft of the speech, leaving transgender rights outside of the “most tweetable” moment of her speech. As illustrated by this example, the sheer volume of publically available discourse on sexual identity rights lags well behind the dialogue on LGB rights.

Yet transgender persons are, like LGB persons, the victims of considerable violence, discrimination, and persecution in many countries across the globe. As just one example of crimes against transgender persons, in March 2012, up to seventy young Iraqi males who identified as “emo” were murdered in and around Baghdad, due to their decision to wear tight-fitting, androgynous, and effete clothing, nose rings, studded leather belts and bracelets, and dyed hair, and due to their presumed links to effeminacy and homosexuality. Ali Hili, a gay Iraqi activist based in London, called the killings “a clear war on sexual minorities on Iraq.”¹⁰ Similarly, transgender

tion 137A, which criminalizes “indecent practices between females,” until Parliament decides the issue. *Id.*

7. Clinton Remarks, *supra* note 3. An example of the linking of transgender persons with lesbian, gay and bisexual individuals is Secretary Clinton’s statement that “I am talking about gay, lesbian, bisexual, and transgender people, human beings born free and given bestowed equality and dignity, who have a right to claim that, which is now one of the remaining human rights challenges of our time.” Another such example is “Many LGBT Americans have endured violence and harassment in their own lives, and for some, including many young people, bullying and exclusion are daily experiences. So we, like all nations, have more work to do to protect human rights at home.”

8. *Id.*

9. *Id.*

10. Jack Healy, *Threats and Killings Striking Fear Among Young Iraqis, Including Gays*, N.Y. TIMES, Mar. 11, 2012, available at <http://www.nytimes.com/2012/03/12/world/middleeast/killings-strike-fear-in-iraqi-gay-and-emo-youth.html>.

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persons in Latin America, Russia, and dozens of other countries suffer from endemic hostility, persecution, and mass violence.¹¹ A macro look at the numbers of transgender persons murdered in recent years is even more sobering. The March 2013 update of the Trans Murder Monitoring Project finds 1,123 reported killings of trans people in fifty-seven countries worldwide from January 1, 2008 to December 31, 2012.¹² The update also shows a significant rise in reported killings of trans people over the last five years.¹³ “In 2008, 148 cases were reported, in 2009, 217 cases, in 2010, 229 cases, in 2011, 262 cases, and in 2012, 267 cases.”¹⁴

Throughout the latter half of the 20th century and the first decade and a half of the 21st century, commonly dubbed “the age of human rights” by legal scholars, international criminal law has been at the vanguard in expanding legal protections for vulnerable populations, both attempting to protect those in need of protection and punishing those malefactors who have violated the basic rights of others.¹⁵ Whether it be the Nuremberg and Tokyo Trials after World War II, the Eichmann Trial in Israel in 1961, the cases arising in the International Criminal Tribunal for the Former Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR) in the 1990s, law has provided a so-called “engine for justice” for those previously victimized, each successive case reaching farther than its predecessors to protect more persons and more groups from international mass atrocity crimes.

With the force of almost seventy years of “the age of human rights” as an accelerant, one would hope that international criminal law would provide the global transgender and intersex communities with the type of basic protection needed by such vulnerable populations. However, international criminal law fails mightily to provide such relief. While international criminal law, as represented by protective aegis of the permanent International Criminal Court (ICC), declares its intention to “guarantee lasting re-

11. For an excellent discussion of violence against Pakistan’s transgender community, see Mashal Shah, *The Kwaja Seras: Pakistan’s Endangered Minority*, HUFFINGTON POST, Aug. 13, 2013, http://www.huffingtonpost.com/mashal-shah/pakistans-endangered-spec_b_3732591.html.

For a comprehensive report on violence against transgender women in Latin America, see INTERNATIONAL HIV/AIDS ALLIANCE, *THE NIGHT IS ANOTHER COUNTRY: IMPUNITY AND VIOLENCE AGAINST TRANSGENDER WOMEN HUMAN RIGHTS DEFENDERS IN LATIN AMERICA* (2012), available at http://issuu.com/aids_alliance/docs/thenightisanothercountry.

12. *Constant Rise in Murder Rates: Transgender Europe’s Trans Murder Monitoring Project Reveals More Than 1,100 Reported Murders of Trans People in the Last Five Years*, TRANSRESPECT VERSUS TRANSPHOBIA WORLDWIDE (Mar. 12, 2013), <http://www.transrespect-transphobia.org/en/tvt-project/tmm-results/march-2013.htm>.

13. *Id.*

14. *Id.*

15. An accessible yet broad definition of what constitutes a vulnerable population is captured in Chapter 5 of *Understanding Human Rights: An Exercise Book*, by Elisabeth Reichert. Professor Reichert writes that “[i]n a human rights sense, certain population groups often encounter discriminatory treatment or need special attention to avoid potential exploitation. These populations make up what can be referred to as vulnerable groups.” ELISABETH REICHERT, *UNDERSTANDING HUMAN RIGHTS: AN EXERCISE BOOK* (2006), at 78, available at http://www.sagepub.com/upm-data/11973_Chapter_5.pdf. Other often-cited examples of vulnerable groups include women, children, ethnic, racial, and religious minorities, among others.

spect for and the enforcement of international justice,” and to protect men, women, and children from mass atrocity, it fails to live up to its declared ideals.¹⁶ The ICC cannot pursue a case of genocide in the event of a *targeted*¹⁷ mass atrocity against transgender and intersex persons and may not even be able to protect transgender and intersex persons from crimes against humanity in the case of such a *targeted*¹⁸ attack, based on a confluence of the prevalence of transgenderism and intersexuality and the vagaries of “crimes against humanity law.” This article concludes that the State Parties to the Rome Statute of the ICC have effectively left transgender and intersex persons unprotected in the case of a targeted attack against their numbers, effectively giving perpetrators of targeted violence against such groups a sense of impunity that their actions cannot be addressed by international criminal law.

This article proceeds in eight Parts. Part II begins with a discussion of what is meant by the term “transgender,” both within and outside the discipline of law. This section includes the ongoing definitional debate over the term “transgender” and the scope of those considered to be transgender, establishing a working definition for purposes of the legal analysis set forth in Parts IV-VII of this article. Similarly, Part II will define and discuss the term “intersex.”

Part III addresses the available demographics of the global transgender and intersex communities, while also discussing the challenges of identifying the scope of the communities, writ large, both in the developed and developing world. Examining the demographics of the transgender and intersex communities is necessary to understand exactly how many transgender persons are in danger of suffering violence worldwide, and to address a number of questions as to whether these global communities can be properly protected from crimes against humanity.

Part IV introduces the issue of the scope of jurisdiction of the Rome Statute, and its potential application to address violence against transgender and intersex populations.

Part V discusses whether transgender and/or intersex persons can benefit from the protections of the genocide provisions of Article 6 of the Rome Statute. Through an examination of the Rome Statute and its legal forefather, the 1948 Convention for the Prevention of the Crime of Genocide, the *travaux préparatoires* of both instruments, and the rulings of the In-

16. The Rome Statute of the International Criminal Court (“Rome Statute”) preamble, *opened for signature* July 17, 1998, available at http://legal.un.org/icc/statute/99_corr/cstatute.htm.

17. I place a hearty emphasis that I am writing about a targeted mass atrocity against a transgender population, not a more widespread societal or national conflagration in which violence against transgender persons are a mere part. If violence against a transgender population were merely one portion or piece of another Rwanda or former Yugoslavia, my legal analysis would be entirely different (such violence very might well qualify as a crime against humanity or war crime). What I am writing about is targeted violence against transgender communities because they are transgender.

18. Again, my legal analysis is based on the assumption of a targeted attack on a transgender community or communities, not an attack of wider scope that happens to include transgender persons. In the case of a wider attack, in which attacks against transgender persons are a mere part, my legal analysis might look significantly different.

ternational Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the ICC in the case of *Prosecutor v. Bashir*, it will be concluded that transgender and intersex persons are not among the groups protected from genocide under Article 6.

Part VI describes the unique predicament of the global transgender community with regard to protection from crimes against humanity under Article 7 of the Rome Statute. Due to the unique and expansive definition of “transgender,” and the limited numbers of transgender persons, this article concludes that it would be difficult to satisfy the requirement for prosecution under Article 7—in other words, it is unlikely that there could be a widespread or systematic enough attack against a transgender civilian population to demonstrate the commission of crimes against humanity in the case of a targeted attack against their limited numbers. Similarly, the even fewer numbers of intersex persons present quite a challenge for a prosecution under Article 7.

Part VII highlights that Article 7 also may not protect transgender or intersex populations from the crime of persecution. For while it is a crime against humanity to persecute a group based on gender, “gender” is then defined as “the two sexes, male and female,” and the definition specifically excludes any other meaning. Therefore, as many transgender persons identify neither as male or female—instead describing themselves as “agender,” “androgynous,” “polygender,” or “genderqueer”—they are arguably excluded from protection under Article 7.¹⁹ Similarly, intersex persons, who are born with chromosomes, hormones, genitalia, and/or other sex characteristics that are not exclusively male or female, as defined by the medical establishment in society, are considered to be outside the binary male/female dyad seemingly required by Article 7, and are therefore potentially left unprotected by its auspices.

Part VIII is a discussion of the real-world implications of the global transgender and intersex communities having been left out of the protective and preventative sphere of the ICC, and a caution that international criminal law cannot live up to the principles set forth in the Preamble to the Rome Statute unless this vulnerable population can be protected under its auspices.

19. See SILVAN AGIUS & CHRISTA TOBLER, TRANS & INTERSEX PEOPLE: DISCRIMINATION ON THE GROUNDS OF SEX, GENDER IDENTITY AND GENDER EXPRESSION, EUROPEAN COMMISSION REPORT 12-13 (2011), available at

http://ec.europa.eu/justice/discrimination/files/trans_and_intersex_people_web3_en.pdf (“The terms *androgynous*, *polygender* and *genderqueer* are very similar in their definition and refer to those people who, having a combination of masculine and feminine characteristics, are ‘gender fluid’ and move between genders, and have blurred lines between their gender identity, gender expression and sexual orientation. *Agender* people do not have a gender identity and refuse to be classified as male or female or in any other way.”).

II(A). THE MEANING OF TRANSGENDER

The meaning of the term “transgender” has been addressed by multiple disciplines and entities on both the international and national level, but no authoritative definition exists. Therefore, this section discusses the term transgender as defined by various sources in the legal, psychological, health, advocacy, and international organizations fields. Part II concludes by establishing a working definition of the term transgender for purposes of the rest of this article.

Primary Legal Sources and the Meaning of “Transgender”

The primary sources of international law—treaties and customary law enjoying consistent state practice and *opinio juris*—do not define the term “transgender.” In the absence of a comprehensive international legal definition, it seems prudent to explore available national court rulings and their attempts to define transgender to guide our understanding of the term.

In the United States, law provides no uniform definition of “transgender.”²⁰ In fact, there are only two American cases that discuss the definition of the term with any degree of specificity and detail. In *Oiler v. Winn-Dixie Louisiana, Inc.*, Dr. Walter Bockting, Ph.D., an expert in the field of transgender issues, defined transgender as an umbrella term to describe those who cross or do not adhere to culturally defined gender categories.²¹ Under the aforementioned umbrella, Dr. Bockting included male-to-female and female-to-male transsexuals, transgenderists, bigender persons, drag queens and drag kings, and female and male impersonators.²² Dr. Bockting defined cross-dressers or transvestites as those “who desire to wear clothing associated with another sex,” male-to-female and female-to-male transsexuals as those “who pursue or have undergone hormone therapy or sex reassignment surgery,” transgenderists as those “who live in the gender role associated with another sex without desiring sex reassignment surgery,” bigender persons as those “who identify as both man and woman,” drag queens and kings as “usually gay men and lesbian women who do ‘drag’ and dress up in, respectively, women’s and men’s clothes,” and female and male impersonators as “males who impersonate women and females who impersonate men, usually for entertainment.”²³

Similarly, in *Schroer v. Billington*, Dr. Bockting testified as an expert witness on behalf of plaintiff Diane Schroer, a male to female transsexual who was offered a job at the Library of Congress, and after self-disclosure that she was a transgender person, found the offer of employment re-

20. See Judy Bennett Garner & Sandy James eds., *Employment Discrimination Against LGBTQ Persons*, 14 GEO. J. GENDER & L. 363, 365 (2013).

21. *Oiler v. Winn-Dixie Louisiana, Inc.*, No. Civ. A. 00-3114, 2002 WL 31098541, at *1 n.9 (E.D. La. Sept. 16, 2002).

22. *Id.*

23. *Id.*

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voked.²⁴ Dr. Bockting's definition of transgender in this case was quite similar to his definition given in *Oiler*. The definition in *Schroer*, as summarized by District Judge James Robertson, was "that a person's sex is a multifaceted concept that incorporates a number of factors, including sex assigned at birth, hormonal sex, internal and external morphological sex, hypothalamic sex, and gender identity."²⁵

Similarly, there exists a paucity of case law regarding the definition of transgender in European law. In a discussion of the interrelation of European Community law and the European Convention on Human Rights, the seminal case of *P. v. S.*, while discussing "transsexualism" in particular, provided an incredibly broad and inclusive definition that also may be useful in our discussion of transgender: "that biological sex and sexual identity fail to coincide."²⁶

African, Asian, Middle Eastern and South American courts have not provided any definitions of "transgender." With the lack of more than a small handful of court cases, worldwide, that discuss the term "transgender," it seems wise to examine secondary legal sources and disciplines outside of law that have had the opportunity to explore the term in greater detail.

Secondary Legal Sources on the Meaning of Transgender

Perhaps in an effort to fill the gap created by the dearth of court rulings on the issue, there have been a number of law journal articles on the definition and scope of the term transgender, which echo the definitions set forth in *Oiler v. Winn-Dixie Louisiana, Inc* and *P. v. S.*. Ilona M. Turner used transgender to describe an inclusive group composed of "transsexuals, cross-dressers and anyone else whose gender identity or expression is significantly non-traditional."²⁷ Navah C. Spero included within the term anyone who does not conform to gender norms set forth by society, including transsexuals, transvestites, and people who identify as genderqueer, while also stating that the "term has expanded to include anyone who does not identify as either male or female in our society's binary view of gender, including those that identify as part of a gender continuum."²⁸

In a lengthy European Commission Report on transgender persons in Europe, authors Silvan Agius and Christa Tobler provided a decidedly comprehensive definition.²⁹ Agius and Tobler defined transgender as in-

24. *Schroer v. Billington*, 525 F. Supp. 2d 58 (D.D.C. 2007).

25. *Id.* at 61.

26. Case C-13/94, *P. v. S.* and Cornwall Cnty. Council, Op. of Advocate Gen. Tesauro, 1995 E.C.R., I-2148, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61994CC0013:EN:PDF>.

27. Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561, 561 n.2 (2007).

28. Navah C. Spero, *Transgendered Plaintiffs in Title VII Suits: Why the Schroer v. Billington Approach Makes Sense*, 9 CONN. PUB. INT. L.J. 387, 392-93 (2010).

29. Agius and Tobler, *supra* note 19.

cluding those who identify as transsexual,³⁰ transgender,³¹ transvestite/cross-dressing,³² androgyne, polygender, genderqueer,³³ agender,³⁴ gender variant³⁵ or persons with “any other gender identity and expression which is not standard male or female, and who express their gender through their choice of clothes, presentation or body modifications, including the undergoing of multiple surgical procedures.”³⁶

The Meaning of Transgender in Health and Psychology

Transgenderism as an intertwined issue of health and psychology has a long history. Thus, it seems beneficial to explore in tandem the fields of health and psychology as potential sources of a comprehensive definition of the term “transgender.” Reviewing the disciplines of health and psychology provides definitions of transgender that are similar to that of the above legal sources. The American Psychological Association (APA) uses transgender as an “umbrella term for persons whose *gender identity, gender expression, or behavior* does not conform to that typically associated with the sex to which they were assigned at birth.”³⁷ Health-based scholarship provides a similar definition, using transgender as an adjective describing “a diverse group of individuals who cross or transcend culturally defined categories of gender.”³⁸

30. “*Transsexual people* identify with the gender role opposite to the sex assigned to them at birth and seek to live permanently in the preferred gender role. This is often accompanied by strong rejection of their physical primary and secondary sex characteristics and a wish to align their body with their preferred gender. Transsexual people might intend to undergo, be undergoing or have undergone gender reassignment treatment (which may or may not involve hormone therapy or surgery).” *Id.* at 12.

31. “*Transgender people* live permanently in their preferred gender. Unlike transsexuals, however, they may not necessarily wish to or need to undergo any medical interventions.” *Id.*

32. “*Transvestite/Cross dressing people* enjoy wearing the clothing of another gender for certain periods of time. Their sense of identification with another gender can range from being very strong and indeed it being their primary gender, to being a less critical part of their identity. Some transvestite or cross-dressing people may seek medical assistance to transition and live permanently in their preferred gender at some point in their lives. Others are happy to continue cross dressing part-time for the rest of their lives.” *Id.*

33. “The terms *androgyne, polygender* and *genderqueer* are very similar in their definition and refer to those people who, having a combination of masculine and feminine characteristics, are ‘gender fluid’ and move between genders, and have blurred lines between their gender identity, gender expression and sexual orientation.” *Id.*

34. “*Agender people* do not have a gender identity and refuse to be classified as male or female or in any other way.” *Id.*

35. “*Gender variant* refers to anyone whose gender varies from normative gender identity and the roles of the gender assigned at birth.” *Id.*

36. *Id.*

37. AM. PSYCHOL. ASS’N, ANSWERS TO YOUR QUESTIONS ABOUT TRANSGENDER PEOPLE, GENDER IDENTITY, AND GENDER EXPRESSION 1 (2011), available at <http://www.apa.org/topics/sexuality/transgender.pdf>. According to the APA, “[g]ender identity refers to a person’s internal sense of being male, female, or something else; *gender expression* refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice, or body characteristics.” *Id.*

38. E. Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, and Gender-*

The Advocacy Community and the Meaning of Transgender

It seems incomplete to only discuss how different professional groups, groups decidedly not transgender in nature, define the term “transgender.” The powerful concept of self-identity demonstrated in the transgender community’s effort to define *itself* seems vital to a full exploration of the meaning of “being transgender.” This perspective of self-identity is also relevant for Part V, because self-identification as a group is an important issue for purposes of international criminal legal protection regarding the crime of genocide.

Worldwide, there many advocacy and support groups for transgender persons, their families and loved ones. Selecting a pair of advocacy organizations to represent the self-definition of transgender was an exercise in caution. After the advice and counsel of numerous transgender advocates, I selected Global Action for Trans* Equality (GATE) and the National Center for Transgender Equality (NCTE) as the two examples of how the transgender community defines itself, because both organizations enjoy wide acceptance and respect within the transgender community and also represented a considerable level of inclusivity in their definitions of who is deemed to be represented under the “transgender” umbrella term.

Global Action for Trans* Equality uses the term “trans” to describe those who transgress binary western gender norms, and includes those who identify with a gender different from the one assigned to them at birth and those who present themselves differently to the expectations of the gender role assigned to them at birth, by means of clothing, accessories, cosmetics, or body modification.³⁹ In their open-ended definition of those fitting into the “trans” term, GATE includes transsexual and transgender people, transvestites, travesti, cross-dressers, no gender and genderqueer people.⁴⁰

The National Center for Transgender Equality provides a similar description,⁴¹ using transgender as an “umbrella term for those whose gender identity, expression, or behavior is different from those typically associated with their assigned sex at birth, including, but not limited to, transsexuals,⁴²

Nonconforming People, Version 7, 13 INT’L J. OF TRANSGENDERISM 165, 222 (2011).

39. GATE-GLOBAL ACTION FOR TRANS* EQUALITY, <http://transactivists.org/trans/> (last visited June 8, 2013).

40. *Id.* Travesti are persons who were assigned as male at birth but have a feminine gender identity. See Jessamy Calkin, *The Silicone Sisterhood*, INDEPENDENT, June 5, 1994, available at <http://www.independent.co.uk/arts-entertainment/the-silicone-sisterhood-among-brazils-poor-there-are-three-sexes-men-women-and-travestis-biological-males-who-have-changed-themselves-by-art-and-science-into-something-very-close-to-females-many-use-liquid-silicone-injections-in-order-to-enhance-the-transformation-but-the-cost-for-some-can-be-terrible-1420493.html>.

41. *Transgender Terminology*, NATIONAL CENTER FOR TRANSGENDER EQUALITY, http://transequality.org/Resources/NCTE_TransTerminology.pdf (last visited Mar. 5, 2014).

42. A term for people whose gender identity is different from their assigned sex at birth. Often transsexual people alter or wish to alter their bodies through hormones or surgery in order to

cross-dressers,⁴³ androgynous people, genderqueers,⁴⁴ and gender non-conforming people.”⁴⁵

II(B). THE MEANING OF INTERSEX

Many consider intersex persons as fitting under the transgender umbrella term, as a group of persons who identify with a gender different from the one assigned to them at birth.⁴⁶ Others opine, however, that intersex persons should be considered a distinct category from transgender persons, in that their status is not gender-related, but instead relates to their biological makeup, which is neither entirely male nor female.⁴⁷ Due to the lack of consensus, it seems prudent to dedicate a separate section for a discussion of the global intersex community, before melding together the legal discussion of international criminal protections for transgender and intersex persons for the balance of this article.

Once described as “hermaphrodites,” intersex people are born with visible sexual anatomy that combines both male and female physical characteristics,⁴⁸ and/or possess chromosomes and manifest hormonal changes (often at puberty) or other sex characteristics usually associated with the opposite sex than the one assigned to them at birth.⁴⁹

Accordingly, the biological makeup of intersex people “is neither exclusively male nor exclusively female, but is typical of both at once or not clearly defined as either. These features can manifest themselves in secondary sexual characteristics such as muscle mass, hair distribution, breasts and stature; in primary sexual characteristics such as reproductive organs

make it match their gender identity. *Id.*

43. “A term for people who dress in clothing traditionally or stereotypically worn by the other sex, but who generally have no intent to live full-time as the other gender.” *Id.*

44. Genderqueer, as used by the NCTE, is “[a] term used by some individuals who identify as neither entirely male nor entirely female.” *Id.*

45. *Id.* (“a term for individuals whose gender expression is different from societal expectations related to gender”)

46. Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 393 n.5 (2001) (citing JAMISON GREEN, *introduction to PAISLEY CURRAH & SHANNON MINTER, TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS & POLICYMAKERS* 1, 3-4 (2000), available at <http://www.thetaskforce.org/downloads/reports/reports/TransgenderEquality.pdf>).

47. See AGIUS & TOBLER, *supra* note 19, at 12.

48. See *A Word About Words...*, GENDER SPECTRUM,

https://www.genderspectrum.org/images/stories/Resources/Family/A_Word_About_Words.pdf (last visited Mar. 5, 2014). At birth, most intersex people are assigned a gender by the attending medical professional or by the parents. This assignment may or may not be an accurate selection, based on physical characteristics displayed later in life. *Id.*

49. See *DiMarco v. Wyo. Dep’t of Corr.*, 300 F. Supp. 2d 1183, 1186 (D. Wyo. 2004), *rev’d sub nom*, *Estate of DiMarco v. Wyo. Dep’t of Corr.*, Div. of Prisons, 473 F.3d 1334 (10th Cir. 2007) (“[A] person is intersexual if they have both male and female characteristics, including in varying degrees reproductive organs, secondary sexual characteristics, and sexual behavior.

This condition is the result of an abnormality of the sex chromosomes or a hormonal imbalance during the development of the embryo.”)

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and genitalia; and/or in chromosomal structures and hormones.”⁵⁰ These characteristics can appear in a combination that demonstrates the unique biological makeup of the intersex person, i.e., facial hair indicative of a male and developed breast tissue more indicative of a female, or in any series of combinations.

II(C). A WORKING DEFINITION OF TRANSGENDER

With the twin goals of inclusivity and specificity in mind, this article adopts the definition of transgender set forth by Agius and Tobler in *Trans and Intersex People: Discrimination on the Grounds of Sex, Gender Identity, and Gender Expression*—the most inclusive and detailed of the definitions, which thus lends itself to better legal analysis.⁵¹ Agius and Tobler’s definition of “transgender” includes people who identify as transsexual, transgender, transvestite and cross-dressing, androgyne, polygender, genderqueer, agender, gender variant or have any other gender expression which is not standard male or female, and persons “who express their gender through their choice of clothes, presentation or body modifications, including the undergoing of multiple surgical procedures.”⁵²

As a point of clarification, it seems prudent to point out that within Agius and Tobler’s definition, the issue of gender identity, i.e., the sense of whether a person is male or female, is determined internally, and this gender identity need not be outwardly expressed in any way, shape, or form. This contention is supported by *Schroer v. Billington*, where Schroer, although born male, had “a female gender identity—an internal, psychological sense of herself as a woman.”⁵³ Thus, our working definition of transgender includes all people who consider themselves to be transgender, whether or not they externally demonstrate their internal, psychological sense of a gender identity that does not coincide with the sex assigned to them at birth.

Agius and Tobler consider intersex persons to be a separate and distinct group because their status is related to biological makeup and is not gen-

50. AGIUS & TOBLER, *supra* note 19, at 12.

51. In selecting the definition set forth by Agius and Tobler, I also considered that a number of non-western societies have culturally specific articulations of transgender that differ from the male/female dyad considered mainstream in the western world. Agius and Tobler’s inclusion in their definition of transgender of a catch-all category, namely “any other gender expression that is not standard male or female,” seems to address any concerns that a European Community report would not properly consider such non-western gender notions captured in the notions of Kathoey in Thailand, Hijras in South Asia, and Two-Spirit persons of indigenous North Americans, among others.

52. AGIUS & TOBLER, *supra* note 19, at 12.

53. *Schroer v. Billington*, 577 F. Supp. 2d 293, 295 (D.D.C. 2008). This internal diagnosis as sufficient to establish one’s transgender nature is supported by *Oiler v. Winn-Dixie Louisiana, Inc.*, where “[p]laintiff defines transgendered as meaning that his gender identity, i.e., his sense of whether he is a male or female, is not consistently male.” *Oiler v. Winn-Dixie Louisiana, Inc.*, No. Civ. A. 00-3114, 2002 WL 31098541, at *1 n.9 (E.D. La. Sept. 16, 2002).

der-related.⁵⁴ While this distinction is duly noted, for ease of reading, intersex persons will be discussed as part of the discussion of transgender persons whenever possible, and will only be discussed separately in the below discussion of demographics and in Article 7(h) when the issue of biological makeup versus gender status is a distinguishing factor in our legal analysis.

III(A). DEMOGRAPHICS OF TRANSGENDER PERSONS

A discussion of the demographics of the transgender community is important not only as an examination of an understudied population but also for the discussion of Article 7 of the Rome Statute of the ICC and the requirement that such violence must be “widespread and systematic” to qualify as a crime against humanity. For these dual purposes, we will explore, to the extent possible, the issue of demography as it pertains to transgender persons.

Unfortunately, even within the allegedly more tolerant liberal democratic traditions of the United States and Western Europe, the demographics of the transgender community are difficult to capture. Dr. Gary J. Gates attributes this difficulty to a number of factors, including the debate over who is considered a member of the transgender community, challenges in survey methods, and potential respondents’ concerns about confidentiality, anonymity, and being exposed as a member of a vulnerable population.⁵⁵ With these caveats, Dr. Gates uses the 2007 and 2009 Massachusetts Behavioral Risk Factor Surveillance Survey (which suggested that 0.5% of adults aged 18 through 64 identified as transgender) and the aggregated information from 2003 California LGBT Tobacco Survey and the 2009 California Health Interview Survey (that implied that approximately 0.1% of adults in California are transgender), and estimates that 697,529 American adults identify as transgender. This total equates to approximately 0.3% of the adult population in the United States.⁵⁶

While detailed estimates of the size of the European transgender community are also in short supply, some anecdotal information is available. For example, in the 2012 *European Union Lesbian, Gay, Bisexual and Transgender Survey* conducted by the European Union Agency for Fundamental Rights, over 93,000 self-identified LGBT persons participated in an online

54. AGIUS & TOBLER, *supra* note 19, at 12.

55. GARY J. GATES, HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 2 (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>.

56. *Id.* at 5. It is with some caution that I cite Dr. Gates’s use of California and Massachusetts as the two examples in the above text. The reputation of these two states are quite liberal in regards to acceptance of human differences, generally, and thus more transgender people might decide to live in these more tolerant states, skewing any attempt of extrapolation of these numbers to estimate the size the national transgender population. On the other hand, the more tolerant nature of California and Massachusetts might allow for more accurate demographical information, in that transgender persons in these two states might feel that self-identification as transgender is an action without potential repercussion, thus allowing for a more accurate assessment of the size of transgender community.

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survey.⁵⁷ Of the 93,079 respondents, 6,771 identified as transgender.⁵⁸

The challenge of demographics is compounded in countries where the safety and security of the transgender community is compromised by higher levels of transphobia, which can force the transgender community underground. According to Jack Harrison-Quintana, Policy Institute Manager at the National Gay and Lesbian Task Force, there is a considerable lack of global data on transgender demographics, and the culturally-specific articulations of transgender identity vary too much for it to be appropriate to apply United States or European population estimates to other countries.⁵⁹ With these cautions in mind, this article will not attempt to capture the size of the transgender community in other countries.

III(B). DEMOGRAPHICS OF INTERSEX PERSONS

The demographics of the intersex community are also difficult to establish, as the discovery that a newborn displays intersex characteristics is often met with a private parental and medical decision to choose a gender for a child, along with the companion emotions of embarrassment and shamed silence.⁶⁰ Otherwise put, as a new parent of an intersex child, imagine the potential discomfort experienced when people ask the standard question of whether you had a boy or a girl, and you don't know exactly how to answer. Even the decision to dress the baby in the traditional gendered colors of pink or blue would be cause for potential distress and confusion. Also, the presence of intersex characteristics may not be recognized until later in life, making an accurate mapping of the intersex community a difficult task.⁶¹

In *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, Taylor Flynn estimated that one in every 2,000 children are born intersex.⁶² Gender Spectrum, a United States based education, training and support organization for trans-

57. EUR. UNION AGENCY FOR FUNDAMENTAL RIGHTS, EUROPEAN UNION LESBIAN, GAY, BISEXUAL AND TRANSGENDER SURVEY, RESULTS AT A GLANCE, 27 (2013), available at http://fra.europa.eu/sites/default/files/eu-lgbt-survey-results-at-a-glance_en.pdf. According to the survey, "[w]ithin the transgender group (6,771 respondents), the largest subgroups were persons who were currently transsexual or had a transsexual past (1,813), transgender (1,066), queer (1,016) and 'other' (1,683). Two thirds (62 %) of transgender respondents said that they had been assigned a male sex at birth, whereas 38 % had been assigned a female sex." *Id.* at 27 n.17.

58. *Id.*

59. E-mail from Jack Harrison-Quintana, Policy Institute Manager, Nat'l Gay and Lesbian Task Force, to Research Assistant Sandy James (May 10, 2013, 14:09 EST) (on file with author).

60. Elizabeth Weil, *What if It's (Sort of) a Boy and (Sort of) a Girl?*, N.Y. TIMES, Sep. 24, 2006, available at <http://www.nytimes.com/2006/09/24/magazine/24intersexkids.html>.

61. Nat'l Library of Med., *Intersex*, MEDLINE PLUS (Feb. 26, 2014), <http://www.nlm.nih.gov/medlineplus/ency/article/001669.htm>. Otherwise put, if there exists a discrepancy between external genitals (penis/vagina) and internal genitals (testes/ovaries), such a discovery of the internal findings might not be realized until puberty, when inconsistent sexual characteristics manifest themselves.

62. Flynn, *supra* note 46, at 393 n.5.

gender issues, uses a more expansive definition of intersex that encompasses a wider range of conditions and asserts a significantly higher incidence. The organization maintains that approximately 1% of children are born with chromosomes, hormones, genitalia and/or other sex characteristics that are not exclusively male or female as defined by the medical establishment.⁶³ In *How Sexually Dimorphic Are We? Review and Synthesis*, the authors concluded that the frequency of intersexuality “might be as high as 2% of all live births” while the percentage of persons receiving “corrective genital surgery” probably “runs between 1 and 2 per 1000 (0.1 to 0.2%).”⁶⁴

IV. INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT

Transgender legal protections were not a piece of the conversation during the earliest contemplation of a permanent international criminal court. The notion of a standing international court to deal with the prevention and punishment of mass atrocity dates back to December 11, 1946, with United Nations General Assembly Resolution 96 (I).⁶⁵ The achievement of an actual permanent court with such jurisdiction took a mere fifty-two years to accomplish, with the establishment of the ICC on July 17, 1998.⁶⁶ During the Cold War era, the cooperative effort required to establish an international court with general jurisdiction over the crimes of genocide, crimes against humanity, and war crimes was decidedly lacking, and significant steps forward for international justice for victims of mass atrocity did not occur.

Due in part to the end of the Cold War and a new spirit of international cooperation, two ad hoc criminal courts were established by the U.N. Security Council to reestablish international peace and security in the former Yugoslavia (ICTY) in 1993 and Rwanda (ICTR) in 1994.⁶⁷ These two ad hoc courts were an important development in the search for justice after mass atrocity and also serve as an important gauge of how the ICC judges might deal with the issues attendant to the consideration of genocide and crimes against humanity against a transgender population. Thus, cases from the

63. *A Word About Words*, *supra* note 48.

64. Melanie Blackless, et. al., *How Sexually Dimorphic Are We? Review and Synthesis*, AM. J. HUMAN BIOLOGY, 12:151-166 (2000).

65. The Crime of Genocide, G.A. Res. 96 (I), U.N. Doc. A/96/I (Dec. 11, 1946), available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/47/IMG/NR003347.pdf?OpenElement>.

66. *About the Court*, INT'L CRIMINAL COURT, http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx (last visited Mar. 5, 2014).

67. U.N Security Council Resolution 808 (1993) established the International Criminal Tribunal for the Former Yugoslavia (ICTY). The full text of Resolution 808 is available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_808_1993_en.pdf. U.N. Security Council Resolution 955 (1994) established the International Criminal Tribunal for Rwanda (ICTR). The full text of Resolution 955 is available at <http://www.unicttr.org/Portals/0/English%5CLegal%5CResolutions%5CEnglish%5C955e.pdf>.

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ad hoc tribunals will be discussed at length below, even though they lack precedential authority in the ICC.⁶⁸

At least hypothetically, the possibility exists that the U.N. Security Council could establish an ad hoc tribunal to address mass atrocity against a transgender population.⁶⁹ However, the establishment of the permanent International Criminal Court on July 17, 1998 created general jurisdiction to prosecute and punish the Crime of Genocide (Article 6), Crimes Against Humanity (Article 7), and War Crimes (Article 8).⁷⁰ Thus, the focus of this article is on assessing the ability of the ICC to protect the global transgender community from genocide and crimes against humanity. Since the specter of mass atrocity against transgender persons seems unlikely to come attendant to “an armed conflict” as required by Article 8, this paper will not assess the ICC’s ability to pursue war crimes charges in the event of mass atrocity against a transgender population.

The jurisdiction of the ICC is set forth in Article 5 of the Rome Statute, which states that the Court has jurisdiction over two crimes relevant to our discussion: Genocide under Article 6 and Crimes Against Humanity under Article 7.⁷¹ Although this paper concludes that neither Article 6 nor Article 7 significantly protects transgender persons, and the court’s non-binding dicta in the *Bashir* case does not signal that the court is seriously considering expanding such protection, the analysis in this article remains important because considerable violence is perpetrated against transgender persons, all around the world, every day. With this violence and the fear of an increase in future violence in mind, this article discusses the gaps or grey areas in the law in the hope that the combined efforts of the legal, political, diplomatic, and advocacy communities could result in greater international criminal legal protection for transgender persons going forward.

V. GENOCIDE AND TRANSGENDER AND INTERSEX PERSONS

The crime of genocide is defined in Article 6 of the Rome Statute as follows:

For the purpose of this Statute, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a na-

68. Article 21 of the Rome Statute spells out the applicable law for the ICC. Nowhere in Article 21 does it express that the court is bound to follow the rules of the ad hoc tribunals, although the article does indicate that the court shall apply “principles and rules of international law.” Rome Statute at Art. 21.

69. For a complete examination of the power of the United Nations to establish an ad hoc criminal tribunal, see Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) available at <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>.

70. Rome Statute at Art. 5. Neither War Crimes under Article 8, nor the still prospective Crime of Aggression, will not be discussed in this article, which is concerned with societal violence rather than armed conflict.

71. *Id.*

tional, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁷²

It does not require considerable imagination to conclude that a number of the *actus rei* enumerated in Article 6 could be committed against transgender persons, with the intent to destroy, in whole or in part, the group. Indeed, killing and causing serious bodily and mental harm and deliberate infliction of conditions of life calculated to bring about its physical destruction have all been inflicted upon transgender populations in recent history.⁷³ However, the contentious and restrictive negotiations that resulted in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter “The Genocide Convention”) and the Rome Statute suggest that such violence against transgender persons cannot be considered genocide.

A. Prima Facie Limitations on the Crime of Genocide

As noted in the previous section, the 1948 Genocide Convention and Article 6 of the Rome Statute both specify that genocide is committed with “the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group.”⁷⁴

Thus, in order to be protected on the face of The Genocide Convention and Article 6 of the Rome Statute, transgender persons would have to be considered a national, ethnical, racial, or religious group. This analysis,

72. *Id.* at art. 6.

73. See *supra* note 10 for details about transgender killings in Iraq and the estimated number of transgender killings globally. As to violence more generally, physical violence against transgender persons is common in the United States. A study surveying nearly 6,500 transgender Americans found that thirty-five percent of transgender persons had experienced some type of physical assault because they were transgender. JAMIE M. GRANT, NAT’L CTR. FOR TRANSGENDER EQUAL. & NAT’L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2011), available at http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf, at 3. For a comprehensive report on violence against transgender women in Latin America, see INTERNATIONAL HIV/AIDS ALLIANCE, THE NIGHT IS ANOTHER COUNTRY: IMPUNITY AND VIOLENCE AGAINST TRANSGENDER WOMEN HUMAN RIGHTS DEFENDERS IN LATIN AMERICA (2012), available at http://issuu.com/aids_alliance/docs/thenightisanothercountry.

74. Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Jan. 12, 1951, 1021 U.N.T.S. 78 (hereinafter “Genocide Convention”); Rome Statute, art. 6, July 17, 1998, 2187 U.N.T.S. 90.

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conducted below, proves impossible.

The issue of protected group membership has been the topic of significant international debate since its earliest implementation in the 1948 Genocide Convention, and was also discussed in the Preparatory Committees leading up to the creation of the Rome Statute.⁷⁵ Neither the Rome Statute nor the accompanying Elements of Crimes have further defined the four groups protected under the statute.⁷⁶ Thus, in order to determine whether the ICC might consider transgender persons to be a national, ethnic, racial or religious group, we must look to other sources of law.

1. Can Transgender Persons Be Considered a “National Group?”

The ICTR in *Prosecutor v. Akayesu* held “that a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship”⁷⁷ Scholars such as Christine Byron have concurred that the purpose of protecting national groups is to protect groups with a particular citizenship that might be targeted with violence⁷⁸—for example, Americans living in Pakistan or Rwandans living in Uganda.

This definition of a national group does not protect the global transgender community, because the global transgender population shares no legal bond of common citizenship. Even if the transgender population of a particular nation were targeted—for example, if transgender Italians were targeted with any of the *actus rei* listed above—they would not be protected as *transgender Italians*, but rather as *Italians*, that is, as part of a group that shares a legal bond based on common citizenship. Their transgender status would be irrelevant.

2. Can Transgender Persons Qualify as an “Ethnic Group”?

The ICTR in *Prosecutor v. Rutaganda* stated that there is no generally and internationally accepted definition of an ethnic group.⁷⁹ Seeking to provide some clarity, in *Prosecutor v. Akayesu*, the ICTR defined an ethnic group as “a group whose members share a common language or culture.”⁸⁰

Using the *Akayesu* test, the global transgender community cannot be considered an ethnic group, as transgender persons are a meta-group that spans boundaries of language and culture. Continuing the example of the transgender Italian community, if the Italian-American community were targeted with violence, they may qualify as an ethnic group due to their Italian-American origins and the indication of shared language and culture.

75. The crime of genocide, and the list of groups protected, is identically defined in the Genocide Convention, the ICTR and ICTY, and the Rome Statute of the ICC.

76. Christine Byron, *The Crime of Genocide*, in *THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES*, 143, 155 (Dominick McGoldrick et al. eds., 2004).

77. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 512 (Sept. 2, 1998).

78. Byron, *supra* note 76, at 157.

79. *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment, ¶ 55.

80. *Akayesu* ¶ 513.

However, if the transgender Italian-American community were targeted because they are transgender, they would receive no protection as an ethnical group, as transgender group membership does not require shared language or culture.

An argument could be made that transgender persons, regionally or nationally, might share a culture, and thus exist as an ethnic group, revolving around their identification as transgender persons. However, there is presently no language common to a regional or national group of transgender persons that is not also shared by the non-transgender population of the same region or nation. For example, simply because the transgender population of the United States, by and large, shares the common language of English, this would not qualify them as an ethnic group under the *Akayesu* decision. What would seem to be required by *Akayesu* is that the transgender population share a language distinct from the language of other groups inhabiting the same region or nation. This is evidenced by the fact that the court in *Akayesu* could not determine that the Tutsi were an ethnic group, in part because they did not speak a different language than the Hutu of Rwanda (both groups speak Kinyarwanda).

Thus, what is left to consider is whether there is a more broadly defined shared transgender culture, forged with transgender identity at its center. This contemplation deserves greater consideration and study as to whether a regional or national transgender group can truly be considered to share in a “transgender culture.” However, as our working definition of transgender is incredibly broad and encompasses such disparate groups as transsexuals, transgender persons, transvestites, cross-dressers, androgyne, polygender, genderqueer, agender, and gender variant persons, it seems difficult to establish the existence of a shared culture encompassing all groups under the transgender umbrella term. The culture argument is further complicated by taking into account that many transgender persons display no outward and visible signs of their transgender nature

3. Are Transgender Persons a “Racial Group?”

Both the *Akayesu* case and the *Kayishema and Ruzindana* case from the ICTR defined a racial group “based on the hereditary physical traits often identified with a geographical region.”⁸¹ In the case of the global transgender community, there is no commonality of hereditary physical traits based on geography that binds the group together. If, for example, African-Americans were targeted for violence based on the fact that the members were African-American, they would be protected as a “racial group.” However, if African-Americans were targeted because they were transgender and *not* because they were African-Americans, they would not be protected under the statute because their transgender group membership is not based on hereditary physical traits. It seems curious, if not perverse,

81. *Akayesu* ¶ 514; Prosecutor v. Kayishema and Ruzindana, Judgment, Case No. ICTR-95-1-T, ¶ 98 (May 21, 1999).

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that a group of African-American transgender persons targeted because they are African-American are protected from genocide, while the same exact group of African American transgender persons targeted not because of their race but because they are transgender would not be so protected. However, this considerable gap demonstrates the current state of the law.

4. Are Transgender Persons a Religious Group?

It seems clear from the above three sections, as well as from basic logic, that transgender persons are not a religious group for the purposes of Article 6 protection from genocide. However, the term “religion” remains undefined as a matter of international law.⁸² Thus we again look to case law from the ICTR for guidance on the meaning of “religious group,” which “suggests that a religious group is one whose members share the same religion, denomination or mode of worship.”⁸³ The global transgender community shares none of these commonalities and thus does not qualify as a religious group. Nor would, for example, transgender Muslims receive protection as a religious group if they were targeted due to their status as transgender persons.

5. Conclusion

In summary, while a transgender population may be considered a group and may be targeted as a group for violence by malefactors, they are not protected by the plain text of either the 1948 Genocide Convention or the 1998 Rome Statute. They do not qualify as a national, ethnic, racial or religious group for purposes of Article 6, and are thus outside the protective ambit of protection from genocide.

B. The Legacy of the *Akayesu* Case—An Avenue for Protection Against Mass Atrocity for Transgender Persons

As discussed above, the plain text of the Genocide Convention and the Rome Statute clearly state that four groups—national, ethnic, racial and religious in nature—are protected.⁸⁴ However, debate since 1948 has put into question whether the protections of the Genocide Convention and Rome Statute are limited to these four groups. The ICTR’s *Akayesu* ruling

82. T. Jeremy Gunn, *The Complexity of Religion and the Definition of “Religion” in International Law*, 16 HARV. HUM. RTS. J. 189, 189-90 (2003).

83. Byron, *supra* note 76, at 159 (citations omitted).

84. While transgender persons certainly exist within all national, ethnic, racial and religious groups, their mere existence within each of the four groups protected by the Genocide Convention and Article 6 would not afford them protection from genocide. The key to any genocide prosecution is that the perpetrators intended to destroy the “group” and that “group” is protected. Since transgender persons are not an explicitly protected group, they are outside of the ambit of the statute.

offers a ray of hope for the transgender population, as the Court displayed a willingness to expand protection beyond the groups initially set forth in the definition of the ICC.

With almost fifty years of discussion as to the scope of group membership protection before it, the ICTR in *Akayesu* found it difficult to place the Tutsi firmly within the four groups protected by Article 6, but nonetheless decided that the Tutsi were entitled to protection, stating: “it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the negotiating history, was patently to ensure the protection of any stable and permanent group.”⁸⁵ The court held that:

[T]he crime of genocide was allegedly perceived as targeting only “stable” groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more “mobile” groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.⁸⁶

This ruling, which expanded group membership protection to “any stable and permanent group,” may lend hope to the protection of transgender persons if they can be considered a stable and permanent group.

1. Are Transgender Persons a Stable and Permanent Group?

The threshold issue, before permanence and stability, is whether transgender persons qualify as a group in the first place. In *Akayesu*, the Court relied upon two main factors to establish an identifiable group: identification as a group by others, and self-identification.⁸⁷ Using these dual criteria, the court found that others identified the Tutsi as a group (in their case, an ethnic group). The court also found it dispositive that the Tutsi self-identified as an ethnic group, regardless of whether or not they actually were an ethnic group using the language and culture test of ethnicity set forth above.

Using the twin *Akayesu* test, transgender persons seem to demonstrate a significant level of cohesive group membership. The targeted and intentional violence against transgender persons, in a multitude of countries, demonstrates that others identify transgender persons as a group. In addi-

85. *Akayesu* ¶ 516; see also Byron, *supra* note 76, at 157; David Lisson, *Defining “National Group” in the Genocide Convention: A Case Study of Timor-Leste*, 60 STAN. L. REV. 1459 (2008).

86. *Akayesu* ¶ 511.

87. *Akayesu* ¶ 702.

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tion, the multitude of local, national, regional, and global transgender activist organizations, support groups, and related resources signal that transgender persons self-identify as a group. As the analysis seems to support the proposition that transgender persons constitute both an identified and self-identified group, the next level of analysis looks at whether this group is stable and permanent.

A. Has the Transgender Community Enjoyed Permanence and Stability?

In *Akayesu*, the Court found the Tutsi to be a stable and permanent group, and in doing so, traced the uninterrupted existence of the Tutsi from back to the pre-colonial era, which started in 1897, until the start of the 1994 genocide.⁸⁸ With an approximately 100-year detailed group history deemed sufficient to show permanence of the Tutsi, could transgender persons show similar evidence to be considered a stable and permanent group under the *Akayesu* decision?

Although the international headline-making news of Christine Jorgensen's successful sex reassignment surgery in December 1952 brought popular attention to the transgender population for the first time, research has demonstrated that the transgender population has existed for a significant period of time.⁸⁹ Transgender people have been acknowledged and documented in numerous ancient civilizations and have achieved varying levels of significance in a number of cultures at different periods throughout history.⁹⁰ Transsexual priestesses having been documented in Mesopotamian, Assyrian, Akkadian, and Babylonian records from as early as the third millennium B.C.E.⁹¹ Transgender people have also been documented in ancient Greece and Rome.⁹²

Moving forward to the 1500s, explorers documented their encounters with cultures in which individuals lived as members of the opposite gender.⁹³ One such explorer, Pedro de Magalhaes, recounted his experience during an expedition to Brazil in 1576 in which he documented women

88. *Akayesu* ¶¶ 80-126.

89. Christine Jorgensen was a former United States G.I. who had served in World War II and later underwent genital transformation surgery in Copenhagen, Denmark, to emerge as a "blond bombshell." SUSAN STRYKER, *TRANSGENDER HISTORY* 47 (2008). The reason for her popularity has been attributed to her being the "first transgender person to receive significant media attention who happened to be from the United States, which had risen to a new level of international geopolitical importance in the aftermath of World War II." *Id.*

90. *See generally* LESLIE FEINBERG, *TRANSGENDER WARRIORS: MAKING HISTORY FROM JOAN OF ARC TO RUPAUL* (1996) (outlining the history of transgender people).

91. *Id.* at 40. The male-to-female transsexual priestesses served multiple deities in these civilizations. *Id.* Some classical texts have reported as many as 5,000 transsexual women priestesses known as *gallae* in Anatolia, a part of modern-day Turkey. *Id.* at 41.

92. *Id.* at 55-57. *See also* Richard Green, *Mythological, Historical, and Cross-Cultural Aspects of Transsexualism*, in *CURRENT CONCEPTS IN TRANSGENDER IDENTITY* 3, 5 (Dallas Denny ed., 1998) (Roman emperor Heliogabalus is "said to have offered half the Roman Empire to the physician who could equip him with female genitalia.").

93. *See* FEINBERG, *supra* note 90, at 22.

among the Tupinamba who lived and were accepted as men.⁹⁴ Other individuals have also documented their experiences as they traveled and encountered different cultures, such as French missionary Joseph Francois Lafitau, who described Two-Spirit people in the western Great Lakes, Louisiana, and Florida in 1724: “they believe they are honored . . . they participate in all religious ceremonies, and this profession of an extraordinary life causes them to be regarded as people of higher order”⁹⁵ In many cultures, transgender people have been integrated into society and have occupied roles of great significance, such as transgender shamans that were documented in southern Chile and parts of Argentina.⁹⁶ Similarly, transgender people have been found to perform religious functions in some traditional Asian societies.⁹⁷

Additional reports of transgender people have been documented in 16th through 19th century French history, such as the case of Mlle. Jenny Savalette de Lange, who lived as a woman and died at Versailles in 1858 and was “discovered to be a man.”⁹⁸ Evidence of transgender people also existed during that period of time in America,⁹⁹ where officials in a number of cities passed ordinances making it illegal for men or women to publicly appear in “dress not belonging to his or her sex.”¹⁰⁰ Reports indicate that up to 400 male Civil War soldiers were in fact born female,¹⁰¹ including Congressional Medal of Honor recipient, Dr. Mary Walker, a Union surgeon.¹⁰²

The 20th century saw an increase in the documentation of the transgender population with numerous medical and psychological advances and the work of scientists such as Magnus Hirschfeld and Harry Benjamin, who devoted a significant amount of their practice to transgender people.¹⁰³ De-

94. *Id.*

95. *Id.* at 23.

96. Leslie Feinberg, *Transgender Liberation: A Movement Whose Time Has Come*, in THE TRANSGENDER STUDIES READER, 205, 215 (Susan Stryker & Stephen Whittle eds., 2006).

97. FEINBERG, *supra* note 90, at 44-45 (“Transgendered identities and practices have been documented in every traditional Asian society. In some Asian traditions, transgendered figures perform religious or quasi-religious functions.”). These include the *basaja* of Indonesian island of Sulawesi, *hijra* of India, and *mudang* of Korea. *Id.*

98. Richard Green, *supra* note 92, at 7. Mlle. Savalette de Lange also acquired a substitute birth certificate with a female gender, was engaged to men six times, and “was given a thousand francs a year pension by the King of France with a free apartment at the Chateau of Versailles.” *Id.*

99. See GORDENE OLGA MACKENZIE, TRANSGENDER NATION 32 (1994). Reports of trans people can be found in newspapers, legal records, medical journals and writings of early sexologists, such as the 1881 *Chicago Medical Review* report of the first Colonial governor of NY, Edward Hyde (aka Lord Cornbury) frequently appearing in public wearing women’s clothing. *Id.* at 32.

100. STRYKER, *supra* note 89, at 31.

101. FEINBERG, *supra* note 90, at 37.

102. VICKI L. EAKLOR, QUEER AMERICA: A GLBT HISTORY OF THE UNITED STATES 29 (2008). Dr. Mary Walker “differed from the passing women. Her intention was not to disguise herself as a man, but to wear male clothing as a woman.” *Id.* She continued cross-dressing after the war until her death in 1919. *Id.*

103. Magnus Hirschfeld coined the term “transvestite” and wrote *The Transvestites* in 1910, which is described as “the first book-length treatment of the phenomena.” STRYKER, *supra* note 86, at 39. Psychiatrist Max Marcuse described a “*Geschlechtsumwandlungstreib* (drive for sex transformation)” in 1913. *Id.* at 38. Endocrinologist Harry Benjamin moved to the U.S. in 1913

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spite Christine Jorgensen's prominence, she was not the first transgender woman to undergo surgery. The first gender reassignment surgery is commonly believed to have been conducted in the 1920s when Einar Wegener underwent male-to-female surgery to become Lili Elbe.¹⁰⁴ Dora Richter's male-to-female genital transformation surgery in 1931 is reported to be the first documented surgery of its kind.¹⁰⁵ In addition to medical advances, the middle of the 20th century also brought about social and technological advances that allowed the transgender population to "interconnect with networks of socially powerful people in ways that would produce long-lasting organizations and provide the base of a social movement."¹⁰⁶ These historical markers are merely examples of the existence of transgender persons throughout human history—potentially constituting sufficient evidence to satisfy the standard articulated in the *Akayesu* decision.

B. Is Transgender Status Irremediable?

In order to prove that transgender persons are a stable and permanent group under the *Akayesu* test, it must also be established that being a transgender individual is irremediable. Membership in the group must not be voluntary, such as in a political group, or transient, such as (potentially) in an economic group. While there are no proven scientific explanations for why people are transgender, it is clear that many transgender persons believe that they were born transgender, and that it is an innate part of who they have been since birth.¹⁰⁷ Some transgender persons report being aware that they are transgender from their earliest conscious thoughts and memories.¹⁰⁸ Such testimonies demonstrate the irremediable nature of being a transgender person. Medical theories also point to this irremediable nature, attributing it to fluctuations or imbalances in hormones or the use of certain medications during pregnancy.¹⁰⁹ Other research indicates that there are links between transgender identity and brain structure.¹¹⁰

In any case, there is a strong argument that transgender identification is neither voluntary nor transient. This argument would conclude that transgender persons are transgender permanently, not as a passing phase or fancy. Thus, if the ICC were to follow *Akayesu*, transgender persons may be

and became the leading medical authority on transsexuality in the 1950s. *Id.* at 40. Dr. Benjamin published *The Transsexual Phenomenon* in 1966, EAKLOR, *supra* note 102, at xxiii, and established the Harry Benjamin International Gender Dysphoria Association (currently the World Professional Association for Transgender Health-WPATH) in 1980. *Id.* at xxv.

104. RICHARD F. DOCTER, *TRANSVESTITES AND TRANSSEXUALS: TOWARD A THEORY OF CROSS-GENDER BEHAVIOR* 7 (1988).

105. STRYKER, *supra* note 89, at 39.

106. *Id.* at 41.

107. NAT'L CTR. FOR TRANSGENDER EQUALITY, *UNDERSTANDING TRANSGENDER: FREQUENTLY ASKED QUESTIONS ABOUT TRANSGENDER PEOPLE 1* (2009), *available at* http://transequality.org/Resources/NCTE_UnderstandingTrans.pdf.

108. *Id.*

109. *Id.*

110. *Id.*

protected under the auspices of Article 6 of the Rome Statute.

2. Will the ICC Follow *Akayesu*?

The *Akayesu* court considered the Tutsi to be a stable and permanent group protected by the spirit of the Genocide Convention. This ruling represents an opportunity for the ICC to add protected groups *ejusdem generis* instead of maintaining a closed list of four protected groups, but the rulings of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the discussions of the Preparatory Committee of the ICC (PrepCom) and the ICC's own rulings in the *Bashir* case indicate that an expanded definition is an unlikely outcome.¹¹¹

In the first ruling on the scope of protected group membership since the *Akayesu* case, the ICTY declined to follow *Akayesu* and expand the Genocide Convention to cover non-enumerated groups, holding in *Krstić* that the application of the Genocide Convention is confined to the four enumerated groups. In its ruling, the Court stated that "the Genocide Convention does not protect all types of human groups. Its application is confined to national, ethnical, racial and religious groups."¹¹²

In an ominous signal for the prospects of inclusion of transgender persons under the Rome Statute, the Preparatory Committee on the Establishment of an ICC (PrepCom) indicated that the expansive *Akayesu* definition would not necessarily be followed by the ICC.¹¹³

While no precedential relationship exists between rulings of the ICC, the majority's discussion of protected groups in the *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* may also indicate its reluctance to include non-enumerated groups within Article 6. At Paragraph 114, the majority court "highlights that the crime of genocide is characterised by the fact that it targets a specific national, ethnic, racial or religious group."¹¹⁴ At Paragraph 134, the majority court states that "victims must belong to a particular national, ethnic, racial or religious group;" and the court restates the point almost identically in Paragraph

111. In addition, scholars such as Christine Byron have declared *Akayesu*'s approach to not be supported by the ordinary meaning of Article 2 of the Genocide Convention and its *travaux préparatoires*. Byron, *supra* note 87, at 161. Paul Bettwy called the *Akayesu* decision "bold and controversial" and said that it captured only part of the objects and purposes of the Genocide Convention. Paul Shea Bettwy, *The Genocide Convention and Unprotected Groups: Is the Scope of Protection Expanding Under Customary International Law?*, NOTRE DAME J. INT'L & COMP. L. 167, 181 (2011).

112. Prosecutor v. Krstić, Case No. IT-98-33, Judgment, ¶ 554 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2011). Of course, the ICC is not bound to follow the rulings of the ad hoc tribunals, but might be inclined to consider their rulings in their deliberations.

113. Preparatory Committee on the Establishment of an Int'l Criminal Court, UN REPORT OF THE PREPARATORY COMMITTEE ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT, available at U.N. Doc.PCNICC/2000/1/Add.2 (Nov. 2, 2002) (listing exhaustively the elements of crimes under the Rome Statute).

114. Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 114 (Mar. 4, 2009).

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135.¹¹⁵

Similarly, the partially dissenting opinion of Judge Anita Ušacka clearly limits the definition of protected groups by stating that “Article 6 of the Statute . . . extends protection only to national, ethnical, racial or religious groups.”¹¹⁶

While the ICC is not bound by its prior rulings, the sympathies of the court seem, at the moment, to lie with a strict textual reading of the Rome Statute allowing only the four enumerated groups to enjoy protection under Article 6. These sympathies, if unchanged, would keep violence against transgender persons, no matter how extensive or horrible, unprotected by genocide law. The problem is compounded by the reality that the global transgender community, thanks both to its small population and its unique composition, is also significantly left outside of Article 7 protection against crimes against humanity.

VI. CRIMES AGAINST HUMANITY AND TRANSGENDER PERSONS

Article 7 of the Rome Statute defines a “Crime Against Humanity” as:

[A]ny of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (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 referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physi-

115. *Id.* ¶ 134; in paragraph 135, the court states that “the Majority is of the view that the targeted group must have particular positive characteristics (national, ethnic, racial or religious), and not a lack thereof.” *Id.* ¶ 135.

116. *Id.* ¶ 21.

cal health.¹¹⁷

Again, it is all too easy to imagine the commission of any number of crimes against a transgender community that would satisfy one or more *actus reus* required to satisfy Article 7. The problem for the transgender community, whether local, domestic, regional, or international, is that due to the limited numbers of transgender persons, and the expansive and inclusive definition of “transgender,” it is practically impossible to satisfy the requirement for prosecution under Article 7. In other words, it is hard to imagine an attack against a transgender civilian population, that is sufficiently widespread and/or systematic to constitute a crime against humanity.

A. Widespread *and* Systematic or Widespread *or* Systematic?

A successful prosecution under Article 7 requires satisfaction of a *chapeau* element: that the conduct was committed as part of a widespread or systematic attack.¹¹⁸ On its face, it seems clear that Article 7 and the companion Elements of Crimes requires an attack on a civilian population to either be widespread *or* systematic, not both widespread *and* systematic. The *Akayesu* case from the ICTR supported this conclusion, holding that “the act can be part of a widespread or systematic attack and need not be a part of both.”¹¹⁹ Similarly, the *Kayishema and Ruzindana* case, also from the ICTR, held that the “attack must contain one of the alternative conditions of being widespread or systematic.” Both the *Vukovar Hospital Decision* and the *Tadic* cases from the ICTY also held that only one or the other is required.¹²⁰ In another example, in the *Djordjević Trial Chamber Judgment*, the Court found that “the attack must be widespread or systematic, the requirement being disjunctive rather than cumulative.”¹²¹

However, academic discourse that took place between these ad hoc rulings and the first ICC ruling on this “and/or issue” indicated that the ICC might interpret Article 7(1) to require something in between the disjunctive

117. Rome Statute Art. 7.

118. The requirement that a civilian population must be the directed target of a crime against humanity is also required. Thus, it must be proved that a civilian population, in our case a civilian population of transgender persons, was a directed target of a crime against humanity. The requirement that a civilian population must be the directed target of a crime against humanity was non-controversial for the Working Group on Crimes Against Humanity, and did not encounter significant debate during the creation of Article 7. For a general discussion of the negotiation sessions, see Darryl Robinson, *Defining “Crimes Against Humanity” at the Rome Conference*, 93 AM.J.INT’L L. 45 (1999).

119. *Akayesu*, Case No. ICTR-96-4-T, ¶ 579.

120. *Kayishema and Ruzindana* ¶123, ICTY, Trial Chamber II, Prosecutor v. Mile Mrkšić Veselin Šlijivančanin, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-95-13-R61, T.Ch.I, 3 Apr. 1996 (“Vukovar Hospital Decision”), *Prosecutor v. Dusko Tadic*, IT-94-1-T, Judgment of May 7, 1997, at 646.

121. *Djordjević Trial Chamber Judgment*, ¶1590.

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and conjunctive based on the requirements of Article 7(2)(a).¹²² In the years between the ad hoc tribunals and the first on point rulings of the ICC, this issue was very much in limbo, with the possibility that the ICC might simply require that an attack be widespread or systematic as a proverbial floor, and something between the disjunctive and the conjunctive as a proverbial ceiling.

Finally, the ICC had the opportunity to rule on this issue in *Prosecutor v. Jean Bemba Gombo*.¹²³ While keeping in mind that the ICC's rulings lack *stare decisis*, it seems that the ICC is currently requiring a widespread or systematic attack. In the *Bemba* case, Pre-Trial Chamber II ruled "if it finds the attack to be widespread, it need not consider whether the attack was also systematic."¹²⁴ With the *Bemba* "or" ruling clearly in mind, we must now ask what the terms widespread and systematic actually mean.

B. The Meaning of Widespread

As was noted by the *Katanga* case, The Rome Statute and its accompanying Elements of Crimes do not define the terms widespread and systematic.¹²⁵ In the absence of such guidance, we are left to consider cases out of the ad hoc tribunals, the 1996 International Law Commission Report on the Draft Code of Crimes Against the Peace and the Security of Mankind (hereinafter, "ILC Draft Code"), a small handful of rulings from the ICC itself, and common sense as potential sources of guidance.¹²⁶

Case Law from the Ad Hoc Tribunals on the Meaning of Widespread

In the *Akayesu* case, the ICTR ruled that "the concept of 'widespread' may be defined as massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims."¹²⁷ The *Ruzindana and Kayishema* court also opined on the meaning of "widespread", finding that a "widespread attack is one that is directed against a multiplicity of victims."¹²⁸ This requirement of a multiplicity of

122. Essentially, the academic discussion is whether the requirement of Article 7(2)(a) "has the practical effect of rendering the qualifying terms 'widespread' and 'systematic' as joint requirements rather than in the alternative as the use of the disjunctive 'or' . . . would suggest. See Timothy LH McCormack, *Crimes Against Humanity*, in THE PERMANENT INTERNATIONAL CRIMINAL COURT 187 (Dominick McGoldrick et al. eds., 2004).

123. *Prosecutor v. Bemba Gombo*, Decision on the Charges of the Prosecutor, Pre-Trial Chamber II, ICC-01/05-01/08, June 15, 2009.

124. *Id.* ¶ 82.

125. *Prosecutor v. Katanga*, Decision on the Confirmation of Charges, Pre-Trial I, ICC-01/04-01/07-717, 1 October 2008, ¶ 394.

126. *Id.*

127. *Akayesu* ¶ 580.

128. *Kayishema and Ruzindana* ¶ 123.

victims was also followed by the ICTY in the *Tadic* decision.¹²⁹ In the *Kunarac* and *Kordic* cases, the ICTY found that the “term ‘widespread’ refers to the large scale nature of the attack and the number of victims.”¹³⁰ The ILC Draft Code also decided to use the term “large scale” in lieu of “widespread,” but also determined that for an attack to be large scale, it would require a multiplicity of victims.¹³¹ Inconveniently for our purposes, the ad hoc tribunals were silent on what constitutes a “multiplicity.” Thus, the state of the law seems ultimately unclear as to the number of victims, or scope of an attack, required to satisfy the requirement of a multiplicity. So, with the limited guidance above in mind, the following section will explore whether the ICC has clarified the meaning of the term widespread.

Case Law from the ICC on the Meaning of Widespread

In the *Katanga* case, the Chamber held, while citing ICTY jurisprudence, that the adjective ‘widespread’ connotes the large-scale nature of the attack and the number of targeted persons, but declined to provide any definition of what these terms actually meant in terms of raw numbers of victims.¹³² The *Katanga* Pre-Trial Chamber does discuss the issue of widespread in terms of geography or territory in some detail, stating that the term “widespread” can encompass either a small or large geographical area but gave only general guidance that an attack must be directed against a “large number of civilians.”¹³³ Other ICC Chambers have indicated the number of victims to be an important indicator of “widespread” but they have also declined to give any guidance as to what raw numbers constitute enough victims to qualify as widespread for Article 7 purposes.¹³⁴ So, in summary, it is quite unclear the exact number of victims that would be required for an attack to be considered widespread. This quandary will be revisited in greater detail below when we ask the question of whether an attack against a transgender and/or intersex population could be considered to be widespread. Before we begin that discussion, we must first explore the issue of what would make an attack systematic, the alternative requirement to a widespread attack, under Article 7.

129. The Prosecutor v. Dusko Tadic, IT-94-1-T, Judgment of May 7, 1997, at 648; 1996 ILC Report on the Draft Code of Crimes Against the Peace and the Security of Mankind, Article 18, commentary ¶ 4.

130. *Kunarac* Appeal Judgment, ¶ 96, and *Kordic* Appeal Judgment, ¶ 94.

131. *Tadic* ¶ 648, 1996 ILC Report on the Draft Code of Crimes Against the Peace and the Security of Mankind, Article 18, commentary ¶ 4.

132. *Katanga* ¶ 394.

133. *Id.* ¶ 395.

134. *Prosecutor v. Gbagbo*, Public Redacted version of “decision of the Prosecutor’s application pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo,” Pre-Trial Chamber III,

ICC-02/11-01/11-19, Nov 30, 2011, ¶ 49; *Prosecutor v Bemba Gombo*, Decision on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, ICC-01/05-01/08, 15 June 2009, ¶ 83.

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C. The Meaning of Systematic

Case Law from the Ad Hoc Tribunals and Guidance from the ILC Draft Code on the Meaning of Systematic

The court in *Akayesu* ruled that the “concept of ‘systematic’ may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy.”¹³⁵ The court in *Kayishema and Ruzindana* found that a “systematic attack means an attack carried out pursuant to a preconceived policy or plan.”¹³⁶ The ILC Draft Code defined systematic as “meaning pursuant to a preconceived plan or policy. . . . The thrust of this requirement is to exclude random acts that were not committed as part of a broader plan or policy.”¹³⁷ The requirement of a pattern or methodical plan or policy was also supported by the *Tadic* decision.¹³⁸ In the *Djordjević Judgment*, the court cited the *Kunarac Appeal Judgment* and the *Kordic Appeal Judgment*, in finding that “the phrase ‘systematic’ refers to the organized nature of the acts of violence and the improbability of their random occurrence.”¹³⁹

Case Law from the ICC on the Meaning of Systematic

In the *Katanga* case, the Pre-Trial Chamber ruled that the adjective “systematic” refers to the organized nature of the acts of violence and the improbability of their random occurrence.¹⁴⁰ Discussing the term in greater detail, the Chamber understood the term as “either an organized 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.”¹⁴¹ In the Ivory Coast decision, the ICC equates “systematic” with “not spontaneous, isolated events” and held that the “planned nature of these offences, the identities of the victims and the perpetrators and the way particular individuals were selected during the attacks (i.e., those perceived to be disloyal to the government), support the

135. *Akayesu* ¶ 580.

136. *Kayishema and Ruzindana* ¶ 123.

137. ILC Draft Code, at Article 18, commentary ¶ 3.

138. *Tadic* ¶ 648.

139. *Djordjevic Judgment* ¶ 1590.

140. *Katanga* ¶ 394.

141. *Id.* ¶ 397. The Kenya Pre-Trial Chamber reiterated all of the above criteria for systematic and then also included a helpful synthesis of the on point rulings of the ad hoc tribunals. See Situation in the Republic of Kenya, Decision pursuant to article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Kenya, March 31, 2010, ICC-01/09, ¶ 96.

conclusion that these were not spontaneous, isolated events.”¹⁴²

As a signpost for what will follow in the proceeding paragraphs, these legal standards will be discussed in greater detail below when the rulings of the ad hoc tribunals and the ICC on the meaning of widespread systematic are applied to the theoretical case of targeted group violence against a transgender and/or intersex population. As a brief preview, the requirements of a significant numbers of victims, organization, policy and plan in order to prove that an attack is widespread or systematic will make it difficult to establish that a targeted attack on a transgender and/or intersex population constitutes a crime against humanity under Article 7 of the Rome Statute.

D. The Potential Application of Crimes Against Humanity Law to an Attack on a Transgender or Intersex Population

A Widespread Attack on Transgender and/or Intersex Civilians

As was made clear by the *Tadic* case, international criminal law recognizes that an Article 7 attack by one person against one civilian within the ambit of a widespread or systematic attack against a larger civilian population can clearly qualify as a crime against humanity, assuming a clear connection between the individual incident of violence and the widespread and systematic attack.¹⁴³ Otherwise put, the widespread or systematic requirement applies to the attack, writ large. To clarify, further ICTY jurisprudence seems apropos: “[t]his requirement only applies to the attack itself, not to the individual acts of the accused. Only the attack, not the accused’s individual acts, must be widespread or systematic.”¹⁴⁴

Thus, in our case, in a scenario of widespread societal violence that encompasses multiple victim groups of which trans/intersex violence is a mere portion, it is clear that existing crimes against humanity law could indeed protect transgender and intersex persons as per *Tadic* and *Djordjevic*. Such an attack against multiple target groups could very well qualify as “massive, frequent, large-scale action, carried out collectively with considerable seriousness” as per *Akayesu*, directed at a multiplicity of victims as per *Tadic*, or directed at a “large number of victims” as per *Katanga*.¹⁴⁵

However, what is the legal outcome if the scope of violence is limited to violence only against a transgender and/or intersex population? Are transgender and/or intersex populations protected by international criminal law against an Article 7 attack *only* against their limited numbers? The answer might depend on whether the ICC defines “widespread” as a “mul-

142. *Ivory Coast Decision*, ICC-02/11.

143. *Prosecutor v. Dusko Tadic*, ICTY, Trial Chamber II, IT-94-1-T, Judgment of May 7, 1997, at 649.

144. *Djordjevic Judgment*, ¶ 1590.

145. *Akayesu* ¶ 580; *Kayishema and Ruzindana* ¶ 123; *Tadic* ¶ 648; *Katanga* ¶ 394.

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tiplicity of victims,” as required by the *Kayishema and Ruzidana* and *Tadic* rulings, or follows the more stringent *Akayesu* test where an attack on a transgender and/or intersex population would have to qualify as “massive, frequent and large-scale action, carried out with considerable seriousness” and also be directed against a multiplicity of victims in order to be considered widespread, or follows the *Katanga* case, requiring the vague and undefined “large number of victims.”¹⁴⁶

Can Transgender Persons Qualify as a Multiplicity as per *Kayishema* and *Ruzindana* and *Tadic*?

If the ICC chooses to follow the *Kayishema* and *Ruzindana* and *Tadic* test of what it means to have a widespread attack, the ICC would require a “multiplicity of victims.” Without an international legal definition of the term “multiplicity,” it seems logical that one can look at whether a transgender or intersex population qualifies, on its own, as a multiplicity by combining raw numbers with common sense. Using Dr. Gates’ estimate that 0.3% of the American population is transgender would allow for a potential victim class of 697,529 transgender Americans. Surely, if almost 700,000 American transgender persons were targeted and murdered, exterminated, enslaved, deported or forcibly transferred, unlawfully imprisoned, tortured, or suffered sexual violence, enforced disappearances, apartheid, or other inhuman acts of a similar character, such a staggering number of victims would qualify as a “multiplicity.” Similarly, in other countries with large populations, an attack on the entirety of that nation’s transgender population would surely qualify as a multiplicity of victims. For if a multiplicity is considered a “state of being many,” surely these types of number qualify as such.¹⁴⁷

However, consider the very different optics if we are to consider an attack on the transgender population of small or smaller States and similar *sui generis* entities. To use the most extreme example of this predicament, Vatican City (The Holy See) is estimated to have a population of 920 persons.¹⁴⁸ Using Dr. Gates’ estimate that transgender persons make up 0.3% of a given population, it is statistically likely that there should be 2.76 transgender citizens of The Holy See.¹⁴⁹ Rounding up to three persons for the obvious reasons, can the national transgender population of Vatican City be considered a “multiplicity?” As another extreme example of this “population predicament,” the smallest State in the world in terms of population is

146. *Akayesu* ¶ 580.

147. *Multiplicity*, BLACK’S LAW DICTIONARY FREE ONLINE LEGAL DICTIONARY (2nd Ed.) <http://thelawdictionary.org/multiplicity/> (last visited Sept. 21, 2014).

148. *Countries of the World*, WORLD ATLAS, <http://www.worldatlas.com/aatlas/populations/ctypopsl.htm>. (last visited Sept. 21, 2014).

149. Dr. Gates estimated the transgender population of the United States only, but his estimate seems accurate enough to use for all purposes in this section.

Tuvalu, with a population of a mere 11,640 persons.¹⁵⁰ Again using Dr. Gates' 0.3% estimate, there should be 34.92 transgender Tuvaluans. Rounding up to an even 35 transgender persons in Tuvalu, the question must be asked whether, if each and every of these thirty-five transgender persons suffered as victims of an Article 7 crime, would this number of victims constitute a "multiplicity," as thirty-five is not a particularly large number. What about Nauru's estimated thirty-nine potential transgender victims?¹⁵¹ This mathematical exercise could go on all the way up to China's 1,306,313,800 persons and potential transgender population of 3,918,941 persons.¹⁵² At what gross number of transgender victims would the ICC determine the existence of a multiplicity? If there is such a magic number where a multiplicity occurs, are we left to assume that the American, Indian, or Chinese transgender population is protected as a multiplicity because the population achieved this magic number when the Tuvaluan or Nauruan transgender population is not? Using the international criminal law requirement of a multiplicity of victims, we run into this potential inconsistency of unequal protection for national transgender populations based on no more than the size of the population of any given nation. This unequal protection should give us great pause on a number of levels, most pointedly as to the ability of international criminal law to protect the entirety of the global transgender population from crimes against humanity.

To further complicate the issue of proving a multiplicity in an Article 7 attack on a transgender population, what happens if the entire transgender population of a State is not targeted, merely the transgender population of a region within a State, a region or sub-region, a town, or a village? In this hypothetical, the number of potential transgender victims plummets as the area targeted for trans violence shrinks, making the existence of a multiplicity of victims ever increasingly harder to prove.

Can an Intersex Population Qualify as a Multiplicity?

As you may recall, Blackless et. al. concluded that the frequency of intersexuality might be as high as 2% (overall deviation from ideal male/female) or as low as between 0.1 to 0.2% (the percentage of those receiving corrective genital surgery).¹⁵³ With this wide scope of prevalence firmly in mind, the determination of whether an intersex population qualifies as a multiplicity might hinge upon whether one uses a broad definition of intersexuality (the 2% figure) or a more narrow definition of the meaning of intersexuality (the 0.1% to 0.2%). Using the 2% figure, it seems quite possible that the ICC would find 2% of the overall population that are deemed to be intersex to be a multiplicity (18.4 intersex persons out of the 920 in Vatican City, 232.8 out of 11,640 in Tuvalu, 261 out of 13,050 in

150. *Countries of the World*, *supra* note 148.

151. *Id.*

152. Blackless et al., *supra* note 64, at 151.

153. *Id.*

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Nauru, and so on). However, if intersexuality is narrowed to those who receive corrective genital surgery, such a 0.1 to 0.2% of the population might very well not be considered a multiplicity.

Can Trans Violence be Widespread, if Widespread Means Massive,
Frequent or Large-Scale as per *Akayesu*?

If the ICC chooses to follow the more stringent *Akayesu* test that widespread means “massive, frequent, large-scale action, carried out collectively with considerable seriousness,” the potential outcome is even more likely to leave transgender populations on the outside of international criminal law, looking in.¹⁵⁴ Certainly, it would be a challenge of both fact and law to prove that crimes against the small number of potential transgender victims in Vatican City (three), and Tuvalu (thirty-five) would constitute massive, frequent or large-scale action carried out collectively with considerable seriousness. How about Palau, San Marino, Monaco, Lichtenstein, St. Kitts and Nevis, the Marshall Islands, and on up the line from the least to most populous of nations (always assuming their transgender population follows Dr. Gates’ 0.3% estimate)? At what point would an attack on the entire transgender population of a State become massive enough, frequent enough, or large-scale enough to satisfy this requirement? The answer is not clear, and let us hope, for the sake of transgender persons who would have to suffer significant victimhood in order to find such an answer, that we never find out where the ICC would decide to draw the line.

Can an Attack on an Intersex Population be Widespread if Widespread
Means Massive, Frequent, or Large Scale as per *Akayesu*?

Out of fear of redundancy, it seems prudent to not reproduce the above discussion of what makes an attack widespread if widespread means massive, frequent or large scale as per *Akayesu*. It seems sufficient to write that the question of whether an attack on an intersex population could qualify as massive, frequent or large scale would seem to hinge upon how the ICC would define the scope of intersexuality. Recalling again our earlier discussion of the prevalence of intersexuality in *How Sexually Dimorphic Are We? Review and Synthesis*, the authors concluded that the frequency of intersexuality “might be as high as 2% of all live births” while the percentage of persons receiving “corrective genital surgery” probably “runs between 1 and 2 per 1000 (0.1 to 0.2%).¹⁵⁵ Using our earlier logic, it seems that targeting 0.1 to 0.2% of the overall population, assuming for a moment that targeting each and every person who had received corrective genital surgery

154. *Akayesu* ¶ 580.

155. *Blackless et al.*, *supra* note 64, at 151.

was even feasible (as such surgical details would surely be private details known only to the individual who received the surgery, close family and a small handful of medical professionals), might not qualify as massive, frequent or large scale, especially in countries with smaller overall populations. Using Blackless's 2% estimate of overall deviation from standard male and female, establishing that an attack on 2% of the population qualified as massive, frequent or large scale would certainly be easier to accomplish. However, since intersexuality is biological/chromosomal/hormonal in nature, and often manifests itself around sexual anatomy that combines both male and female physical characteristics, it seems likely that these deviations from the norm will most often remain out of the public eye, making many intersex persons unidentifiable and thereby not targetable by potential malefactors, lowering the percentage of identifiable intersex persons below Blackless's 2% estimate.

As a summary to this section, it seems that the challenge of establishing that an attack on an intersex population is massive, frequent, or large scale in nature is akin to that of a transgender population. Thus, while the challenge of proving that an attack on a transgender population is widespread would be great, the difficulty of establishing the same for an intersex population would be similarly difficult. Thus, it may also be difficult for an attack on an intersex population to qualify as a crime against humanity.

Can an Attack on a Transgender Population be Widespread if it Requires a Large Number of Victims as per *Katanga*?

In a case of group violence against a transgender population, the ICC could very well choose to follow the ruling by the *Katanga* Chamber, requiring a "large number of victims" in order to establish a crime against humanity under Article 7. An examination of whether an attack on a transgender population could reach the threshold of a "large number of victims" seems significantly similar to whether such an attack would qualify as a multiplicity as required by *Ayayesu*, *Ruzindana and Kayishema* and *Tadic*. To the extent that the application of the demographics and other particulars of a transgender population to the legal requirements set forth above are the same, they will not be repeated here. However, some interesting legal questions, currently unanswered, arise while considering this question. Is the requirement of a large number of victims effectively the same as the requirement of a multiplicity of victims, or does the requirement of a large number of victims require more or fewer victims than would a multiplicity? Also, the question of unequal protection for the transgender population of small and large States again arises, in that it will be difficult to demonstrate that the transgender population of Vatican City, Tuvalu, or Nauru could qualify as "a large number," even assuming, *arguendo*, that their entire numbers were victimized.

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Can an Attack on an Intersex Population be Widespread, if Widespread Means a Large Number of Victims?

After the above discussions, it seems cumulative to add more than a few sentences on whether an attack on an intersex population could qualify as having a large number of victims. Again, intersexuality is a rare occurrence, affecting 0.1/0.2 to 2% of the population, depending on how broadly one defines intersexuality. The challenges of proving a large number of victims in an attack on a transgender population are only magnified in an attack on an intersex population if only the 0.1 to 0.2% who have had genital corrective surgery are targeted. If everyone who deviates from the ideal male and female is targeted, certainly victimization in large numbers is more possible, assuming that all such potential victims are identifiable and, thereby, targetable.

A Systematic Attack on Transgender or Intersex Civilians

The requirement that an attack be “thoroughly organized” and “following a regular pattern” on the basis of a “common policy” involving “substantial public or private resources” or the alternative *Katanga* test that an attack must be “either an organized 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” are more questions of the motives and planning of the perpetrators of trans violence than questions of the victims themselves.¹⁵⁶ Thus, it is difficult to discuss, with any specificity, a hypothetical case of a crime against humanity against a civilian transgender or intersex population and analyze its systematicness. The most that can be said at this point is that criminal actions amounting to “random acts that were not committed as part of a broader plan or policy” would not qualify as systematic and would not be crimes against humanity. However, at some point of organization, methodical planning or creation of a policy, a campaign of anti-transgender or intersex violence will transform from a series of mere hate crimes into an organized campaign constituting crimes against humanity. At that point, the ICC would potentially have the mandate to get involved, but not before.

VII. PERSECUTION OF TRANSGENDER AND INTERSEX PERSONS

Under Article 7(h), it is a crime against humanity to persecute any identifiable group or collectivity on a host of grounds including gender.¹⁵⁷

156. *Prosecutor v. Katanga*, Decision on the Confirmation of Charges, Pre-Trial I, ICC-01/04-01/07-717, 1 October 2008, ¶ 397.

157. Rome Statute art. 7(h).

Thus, it would seem that persecuting transgender persons as a group or collectivity could be an Article 7 crime on these grounds. However, the negotiations which created Article 7(h) and Article 7(3) reveal that the contemplated definition of gender might actually exclude transgender and intersex persons from protection under its auspices.

While Article 7(h) clearly bans persecution based on gender, Article 7(3) states that “[f]or the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.” Essentially, the wording of Article 7(3) was formed to assuage the fears and concerns of two disparate lobbying groups to the Rome Conference, women’s groups and The Catholic Church. The reference to “the two sexes, male and female” was a concession to The Vatican, while the reference to gender “within the context of society” was a concession to women’s groups, who wanted to include as fluid a concept, and as many iterations, of the term gender as possible. The fascinating interplay during these negotiations, and the potential application and interpretation of these two portions of the statute, could have a great effect on the global transgender and intersex populations and whether they can be protected under Article 7(h).

Strict application of Article 7(h)’s reference to gender as meaning “male and female” might leave many transgender and intersex persons outside of the purview of protection of the statute. This male/female dyad may indeed protect those transgender persons who identify as a member of the sex not assigned to them at birth (they are protected as a self-identified women, even though they were declared male at birth, or vice versa). However, this definition does not seem to include transgender people that, for example, identify as agender, do not have a gender identity, or refuse to be classified as male or female. Nor would it protect those who have a combination of masculine and feminine characteristics, consider themselves “gender fluid” or move between genders, or have indistinct boundaries between their gender identity, gender expression and sexual orientation. Similarly, intersex persons may be considered outside the binary male/female dyad required by Article 7(3), and therefore are left unprotected.

Even the “legal concession” to women’s groups that gender refers to the two sexes, male and female, “within the context of society,” may not protect transgender persons. Surely, it can be argued that in the United States, Canada and Western Europe transgender persons have become sufficiently mainstreamed to become at least somewhat woven into the fabric of those societies. In fact, as I write this sentence, Laverne Cox, a transgender actress in the hit television series, *Orange is the New Black*, is on the cover of *Time Magazine*.¹⁵⁸ However, has transgender life become mainstreamed in all countries throughout the globe? Similarly, how about intersex persons? The answer seems a resounding “no.” If transgender and in-

158. Katy Steinmetz, *Laverne Cox Talks to TIME About the Transgender Movement*, TIME, May 29, 2014, available at <http://time.com/132769/transgender-orange-is-the-new-black-laverne-cox-interview/>.

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tersex persons are, in dozens upon dozens of nations, killed, beaten, ostracized, threatened, and harassed, can we really argue that their gender fits within the context of these societies? If notions of transgender and intersex do not fit gender notions in these individual societies, it is hard to argue that transgender and intersex life fits within our combined global societal notions of male and female, thereby not fitting within our global “context of society.” Thus, even with the designation that gender refers to male and female “within the context of society,” transgender and intersex persons may be left outside of what society, writ large, considers to be “male and female.”

After all of the above, it seems safe to say that the negotiations that created the Rome Statute were not progressive enough to acknowledge the fluidity of the gender spectrum, let alone that violence against transgender and intersex persons should be clearly punishable under crimes against humanity law. Thus, it seems entirely possible that the ICC could not protect transgender and intersex persons from a targeted attack under the current definitional strictures of Articles 7(h) and 7(3).

VIII. CONCLUSION

In 1946, The U.N. General Assembly eloquently stated in Declaration 96 (I) that the crime of genocide “shocks the conscience of mankind, results in great losses to humanity . . . and is contrary to moral law and to the spirit and aims of the United Nations.”¹⁵⁹ It further declared that the crime is punishable whether committed on religious, political or *any other* grounds.¹⁶⁰ It would seem from that declaration that all groups—whether Jews, Tutsi, transgender persons or other—would be protected by a body of comprehensive mass atrocity treaty law in the near future. However, this article demonstrates that such a broad understanding is unfortunately not today’s reality. In fact, the developments in mass atrocity law, from this inclusive 1946 General Assembly Declaration, to the more limited 1948 Genocide Convention, to the strictures of the ad hoc tribunals, seem to demonstrate ever-increasing exclusion.¹⁶¹

With the creation of the ICC, the States Parties to the Rome Statute had the opportunity for a new era of protection for all groups. “Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,” the ICC vowed to prevent and punish perpetrators of mass atrocity, and to protect “men, women, and children” from the horrors that occurred in the twentieth century.¹⁶²

Whether intentional or unintentional, their choice of the words “men, women and children” are emblematic of the exclusivity with which the

159. The Crime of Genocide, G.A. Res. 96 (I), *supra* note 65.

160. *Id.*

161. With the notable exception of *Akayesu*.

162. Rome Statute Preamble (emphasis omitted).

Rome Statute offers protection from genocide and crimes against humanity. From the analysis set forth in this article, it is clear that the global transgender and intersex communities may not be protected from genocide and crimes against humanity under Articles 6 and 7 of the Rome Statute. This potential lack of protection for a group of people who, in many countries, are routinely beaten, murdered, tortured, and persecuted is a violation of the spirit of equality before the law, not to mention a violation of the basic human rights of the global transgender and intersex populations.

Without equality on the international criminal legal landscape, we as an international legal society cannot claim to truly have “common bonds” or a “shared heritage” that accepts and includes our differences as human beings. Without the full inclusion of transgender and intersex persons in the ambit of the Rome Statute, our “delicate mosaic” of common bonds and shared heritage will be shattered, if it ever truly existed.¹⁶³

163. *Id.*