Criminalising LGBT persons under national criminal law and Article 7(1)(h) and (3) of the ICC Statute

Michael Bohlander[*]
Chair in Comparative and International Criminal Law, Durham University

The Elephant in the Room

International criminal justice has a problem with the protection of sexual orientation. During the negotiations around the International Criminal Court's (ICC) Statute (ICCS) there was a fierce debate about the use and definition of the term "gender", with a sizeable number of states opposing the use of the term as a synonym for sexual orientation, which could have included lesbian, gay, bisexual and transgender[1] persons (LGBT)[2]. Art. 7(3) ICCS finally was given the following wording:

> For 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.

The phrase "within the context of society" could lead one to think that it may have left the door open for the Court to slip sexual orientation[3] in through the backdoor when interpreting the Statute; however, it appears that this phrase was more a of a fig-leaf to broker a textual compromise between the two camps, and that it was the intention of the drafters that sexual orientation was excluded as a component of the term gender in Art. 7(3) ICCS[4], despite the fact that previous international practice had already adopted a wider interpretation of the term[5]. Some have argued that the wording is sufficiently flexible to allow the ICC to interpret it in order to encompass sexual orientation, or that one might use the residual category of Art. 7(1)(h) ICCS, i.e.

> other grounds that are universally recognized as impermissible under international law[6].

The wording of Art. 7(1)(h) and 7(3) ICCS has been adopted unchanged in the recent 2010 Draft Convention for Crimes Against Humanity, not without some criticism[7].

This paper is going to argue that the drafting compromise was ultimately an exercise in moral failure for the sake of the political feasibility, cementing one of the most glaring instances of discrimination, and that it is high time to correct that error, especially in the context of the rising tide of state-sponsored homophobia that can be noticed in certain countries whose politics have drifted to the (far) right[8]. Ironically, many of the Arab states who opposed the extended use of the term gender during the negotiations will still have to sign up to the ICCS,

although it should be made clear that the evidence indicates that this is far from being a problem only of Islamic countries.

The study departs from the underlying premise that it is about a particular incident of consensus-finding in international law, not about an exploration of the tensions between principled, deontological decision-making and definitions of human rights on the one hand, and theories of toleration on the other. It takes the position that in the context of an international criminal jurisdiction with a global reach which prides itself on a specific gender awareness – as evidenced among other things by the Draft Policy Paper of the ICC's Prosecutor on sexual and gender-based crimes of 7 February 2014[9] – a toleration-based approach leads to unacceptable double standards. The author is aware that such a view is, of course, debatable. The paper also only looks at criminalisation as the most glaring example, not at other forms of direct or indirect discrimination which do, of course, occur over a much wider range of jurisdictions. The data used in this paper about which countries criminalise LGBT persons and how were taken from the interactive map of the Human Dignity Trust[10]. This revealed that criminalisation as such is not an issue in the USA or the EU. Cross-checks with the International Lesbian, Gay, Bisexual, Trans and Intersex Association's website[11] confirmed this picture in that there was either no law criminalising male-to-male or female-to-female sexual contacts or there were no data. A recent report by the European Union from 2013 on the increase of negative experiences of LGBT persons within EU Member States shows that this is an issue even in the so-called developed industrial countries[12]. It is clear that if one included such wider data, the picture would change drastically. However, the author believes that the focus on criminalisation as a reasonably distinguishable category of serious discrimination is justifiable and that in that context the data selection does not skew the overall picture.

We will not look at conflict-related offences under international criminal law, when victims are being targeted by militants based on their sexual orientation, but at the pervasive worldwide practice in a large number of domestic jurisdictions of prosecuting people in peace-time for the mere fact of living LGBT lives – in essence a much bigger scandal. In this context, we will also leave aside the somewhat thornier and no less controversial policy issue of protecting juveniles in their sexual development where the reason for the sanction is not merely the fact of being LGBT but also the concern over the "normal" development of young persons – regardless of what the evidence may be for that. Equally, we will not address the matter of whether states should allow formalised same-sex unions, i.e. civil partnerships or "gay marriage" or adoption. Despite the fact that these may also be considered by the LGBT community as unjustified state intrusions into the individuals' right to privacy and their gender identity, there would appear to be a marked difference between not allowing same-sex partners the same privileges as heterosexual partners under family law on the one hand, and sanctioning them for simply being what they are by imprisonment, corporal punishment or even death on the other[13]. We will examine the claim alluded to above whether the existing international criminal law does allow for the characterisation of domestic criminalisation as a crime against humanity[14], with or without the invocation of the term gender, and how to take the debate forward.

Domestic criminalisation of LGBT persons – The scope of the problem

Table 1 (see Annex 1) lists the countries which in 2013 still penalise the sexual conduct of LGBT persons. Of the total number (83) of states which criminalise LGBT persons, 37 are States Parties of the ICC (44.6%) and 46 are not (55.4%). Broken down by regions, the relations are as follows:

Table 2.1
Criminalisation by region and membership of ASP

Region	ASP member	Non-ASP member
Latin America & West Pacific	11 (84.6%)	2 (15.4%)
Africa & Indian Ocean	22 (56.4%)	17 (43.6%)
Middle East, Asia & East Pacific	4 (12.9%)	27 (87.1%)

Table 2.2
Criminalisation by region, membership of ASP and main religion

Region	ASP member			Non-ASP member		
Latin America & West Pacific	I	C	O	I	C	O
	-	11	-	-	2	-
Africa & Indian Ocean	I	C	O	I	C	O
	9	14	2	8	6	3
Middle East, Asia & East Pacific	I	C	O	I	C	O
	1	2	-	20	5	3
Total	10	27	2	28	13	6

Notes:

1. These tables are drawn from Table 1.
2. I = Islam; C = Christianity; O = others, including Buddhism, Hinduism, traditional and natural religions
3. If the percentage of religions was roughly equal, they all received a point, thus n = 83 does not apply.

These statistics show that the concentration of countries criminalising LGBT per region is the highest in Africa, with almost 47% of the entire sample and 59.5% of the States Parties. The main religion in the majority of the states criminalising LGBT persons is not Islam but Christianity, if only by a small margin. Thus the stereotype sometimes voiced that it is the influence of Shari'a law which makes up for most of the criminalisation seems unfounded; Islam roughly equals Christianity in the sample. Indeed, the historical missionary influence of the Christian churches will have had a similarly conservative influence in many countries. However, the Islamic cultural outlook may have something to do with the fact that in the Middle East and Asian region the number of States Parties is almost negligible, despite the fact that some North African Islamic countries have now signed up to the Rome Statute[15]. The more or less unspoken, lingering religious background in many of the countries is linguistically expressed in the reference to acts that are "unnatural", "against the order of nature" (or even "abominable"), with that order historically being mostly deduced from a

certain interpretation of their Holy Scriptures. Similarly, the use of the very word "sodomy" has roots in the Old Testament referring to the story of the fall of Sodom as a punishment, among other things, for the unbridled (homo)sexual excesses of its inhabitants[16].

The relative severity of punishments in members of the ASP and non-members is set out in Table 3.

Table 3
Severity of penalties by maximum and type, and ASP membership

Penalty	ASP members	Non-ASP members
Death	2	9
Imprisonment for life	6	3
Imprisonment over 10 yrs.	8	7
Imprisonment over 5 yrs.	10	9
Imprisonment under 5 yrs.	10	18
Corporal punishment	3	6
Security measures	-	3
Hard labour	3	2
Mental hospital order	1	1
Fine	6	9
Other (banishment, tribal sanctions etc.)	2	2

Notes:

1. When jurisdictions allowed for different sanctions for men and women, the harshest overall penalty was recorded.
2. Not all country information was specific on maximum sanctions, so n=83 does not apply for this table.

As far as the death penalty is concerned, all jurisdictions that employ it are Islamic states; it is remarkable that even two ASP members still threaten the death penalty, again a consequence of their application of Shari'a law. Twice as many ASP members than non-ASP members use life imprisonment. The maximum fixed-term imprisonment categories over 10 and between 5 – 10 years are almost evenly divided between both categories, with a slightly higher use for ASP members in both. A striking fact is that the use of imprisonment for fixed terms under 5 years is much more prevalent in non-ASP members than in ASP jurisdictions: 35.7% versus

64.3% of this category. Similarly the use of fines is higher in non-ASP members by a degree of 50%. More ASP members use hard labour as a penalty than non-ASP members. The relation vis-à-vis corporal punishment is again driven by the fact that most jurisdictions that use it are Islamic ones. Overall, however, the picture which emerges is that being a signatory to the Rome Statute does not necessarily mean an impact on domestic sentencing attitudes, leave alone on general principles of criminalisation. Positive complementarity seems to miss a foothold in that respect.

The problem of Art. 7(3) ICCS

The negotiating history around Art. 7(3) ICCS was based on political comity, not on principled reasoning. Obviously, one may say that the perfect is the enemy of the good. However, this will be no consolation for the LGBT persons caught in the anomaly caused by the restrictive phrasing of the term "gender". For the 37 States Parties to the ICC who criminalise LGBT persons, this drafting outcome was also important to avoid running afoul of the complementarity principle should the Prosecutor entertain the idea of looking at the persecution of LGBT persons in those countries. Because were it not for Art. 7(3) ICCS that is precisely what it would be: persecution as a crime against humanity. As we will see below, international law in general is not in principle averse to viewing sexual orientation as a gender-related or group-related human rights concept, even though Schabas calls the current state of the law "primitive"[17] – a characterisation with more than one connotation in this context. It needs no elaboration that the enforcement or even mere existence of a state-sponsored law which allows for the killing, imprisonment and corporal punishment etc. of certain groups of people based on their sexual orientation is a systematic attack on a civilian population on discriminatory grounds based on a state policy resulting in the commission of acts subsumable, for example, under Art. 7(1)(a), (e), (f) and (k) ICCS. However, as long as these acts are the consequences of lawful sanctions under domestic law and do not violate cogent international law they cannot be offences under the ICCS.

For this very reason it appears unconvincing to assume that the drafters engaged in a conspiratorial exercise of "constructive ambiguity"[18] with the intention of leaving the door open to the ICC judges to interpret a wider meaning into the term gender in Art. 7(3) ICCS, namely to include sexual orientation. It cannot have been in the interest of the opposing states to allow for such a possibility because the consequences under the complementarity principle would have been obvious: As soon as the ICC would have interpreted gender to include sexual orientation, all the opposing states in the negotiation phase – and any state signing up to the Rome Statute later – with laws criminalising LGBT persons would automatically have to be considered unable to conduct their own prosecutions for that potential crime against humanity, because the judiciary and law enforcement authorities would merely apply the state's law – a classic case when a state cannot fix the problem on its own short of decriminalisation. It is also unlikely that a state would leave any loophole open that might at some stage expose it to the allegation of a crime against humanity, which speaks against an open-ended formulaic compromise. Note, however, that a number of States Parties do not use the definition in Art. 7(3) ICC in their implementing legislation[19] but seem to rely on the simple term gender[20].

It is much more plausible that the compromise formula in Art. 7(3) ICCS actually meant a defeat for the states advocating the inclusion of sexual orientation. Valerie Oosterveld, who

had had a contemporary insight into the negotiation process, in a comment to the author[21] on an earlier draft made the following point:

> Both those supportive of the term "gender" and those opposed to its use had reasons to ultimately agree to ambiguous wording in article 7(3). Those opposed to the inclusion of the term were in the minority, and therefore they faced the possibility of losing if 7(3) was put to a vote or left to the final package: recall that negotiations on the term "gender" went until almost the very last day of the Diplomatic Conference and there was the possibility that the opposing states would have no say on the Chair's resolution of all outstanding issues. Thus, it was in their interests to try to seek wording that could be ambiguous enough to be read narrowly. Conversely, while those supportive of the term were in the majority, they were also from states opposed to voting. Thus, they sought wording that could be understood in light of future developments within international law in support of LGBT rights.

That may be so, but the majority states which favoured the novelty of the inclusion of sexual orientation would have run the same risk as it may be queried whether the Chair would really have taken such a major policy decision which would have seriously alienated the opposing states and put them in a quandary under the complementarity principle. The fact that the majority states were opposed to voting on the issue is neither here nor there as far as drawing consequences for the interpretation of Art. 7(3) ICCS is concerned. At best, one might say there was no real consensus at all, a dissent hidden in the semantically redundant second sentence of Art. 7(3) ICCS. It appears highly doubtful against this background that the judges should have been empowered to substitute their own policy choice for the intentional omission of choice by the States Parties, merely because a progressive attitude to the development of the law is deemed appropriate[22]. Art. 7(3) ICCS uses both words, gender *and* sex – and more to the point the latter to explain the meaning of the former –, and it would seem very odd given the controversy's moral and traditional background that this choice of words was a matter of chance.

Nor is this a case which could be compared with open and unspecific language found elsewhere in the Rome Statute, for example, as to what exactly the meaning of the elements of an offence's actus reus, mens rea or defences in the ICCS will be: Those are technical matters of law and doctrine, not overall policy. The question of sexual orientation, however, is eminently a highly sensitive question of overall policy. To leave it to the judges to fill that element would in fact mean no less than allowing them to rewrite the negotiation outcome and hence the policy content of the Rome Statute. It is hard to imagine that the opposing states would have countenanced the prospect of such an interpretation of the negotiations and their outcome. In other words, the wording, the context and the history of the negotiations around Art. 7(3) ICCS all point in the opposite direction from the one favoured by what we could call the "inclusionists".

Art. 7(3) ICCS therefore in fact possesses a gatekeeper function for the liability of actors in the ASP member jurisdictions for all underlying offences. This gatekeeper function against the introduction of LGBT references into the term gender, which according to some was the express intention[23] of the drafters, is a cogent argument against the views of those who advocate the use of the residual clause in Art. 7(1)(h) ICCS to bring in sexual orientation through the back door. The Rome Statute must be seen as a whole and its drafters must be considered as having taken a holistic and informed approach to its creation. It would fly in the face of common sense and accepted principles of legal interpretation to suggest that the drafters would struggle over the restriction of the very term relevant to the issue and then intend to leave it open to the judges to interpret the residual clause in a way that would countermand their hard-fought compromise.

The only reasonable conclusion must be that Art. 7(3) ICCS is dispositive of the matter and leaves no room for the use of the residual clause; this is supported by the general maxim that a special law derogates a general law. To allow the judges to substitute their own interpretation, either of Art. 7(3) or (1)(h) ICCS, for that of the drafters and the states who signed up to the Rome Statute would also run counter in a major fashion to one clear underlying policy in the Rome Statute and its secondary laws, which is to curb the excesses of judicial discretion which occurred at the *ad hoc* tribunals when those applied what their judges considered to be customary law. The Rome Statute restricts the use of judicial discretion compared to the *ad hocs*. If we take issue with the law of the ICC, it must therefore be through a revision of Art. 7(3) ICCS, not a strained re-interpretation that disregards the highly controversial debate about the issue.

That does by no means imply that the interplay of Art. 7(3) and (1)(h) ICCS and the compromise negotiated by the drafters make sense as the provision stands. Quite the contrary: Imagine, for argument's sake, a political, cultural or religious group which has as one of its main tenets of identity-building the encouragement of homo- or bisexual relationships. Its adherents who engage in same-sex relations according to its teachings, it can be argued, would then be attacked on the basis of belonging to one of the protected groups and for exercising their culture, religion or ideology. The restriction in Art. 7(3) ICCS related to the term gender would be moot, because it cannot be seen as also restricting the ambit of other specifically mentioned protected groups as opposed to the general residual clause. Gender is only one of them and does not stand in any hierarchical relationship to them. In fact, however, the only reason which would actually trigger the prosecution of these people would be their sexual behaviour, not their mere membership of the group, which despite the encouragement might leave them the free choice to engage in same-sex relations. Do we really need such a farcical argumentative detour to see the problem with the existing law from the perspective of principle as opposed to politics?

Sexual orientation in international law

While there is no full consensus in the international community about the treatment of sexual orientation, particularly when issues such as same-sex partnerships and adoption of children by homosexual persons or couples are concerned, the modern trend has for some time clearly been in favour of recognising the role and effects of sexual orientation in the context of domestic laws which attach any significant legal consequence to it. Only recently the ECtHR had the opportunity to address the issue of adoption by same-sex couples in *X and Others v Austria*[24]. The Court reviewed its previous case law towards sexual orientation under the ECHR and reiterated:

> The Court has dealt with a number of cases concerning discrimination on grounds of sexual orientation in the sphere of private and family life. Some were examined under Article 8 alone, namely cases concerning the prohibition under criminal law of homosexual relations between adults … and the discharge of homosexuals from the armed forces … . Others were examined under Article 14 taken in conjunction with Article 8. The issues at stake included differing ages of consent under criminal law for homosexual relations…, the granting of parental rights … , authorisation to adopt a child …, the right to succeed to the deceased partner's tenancy… , the right to social insurance cover … and the question of same-sex couples' access to marriage or to an alternative form of legal recognition … .
> Sexual orientation is a concept covered by Article 14. The Court has repeatedly held that, just like differences based on sex, differences based on sexual orientation require particularly

> serious reasons by way of justification or, as is sometimes said, particularly convincing and weighty reasons …. Where a difference of treatment is based on sex or sexual orientation the State's margin of appreciation is narrow … . Differences based solely on considerations of sexual orientation are unacceptable under the Convention … .[25]

Cultural differences or reservations in society alone had already previously been regarded by the Court as an insufficient[26] criterion to base any discriminatory sanctions on. The European Court of Justice (ECJ) in 1996 took a similar stance to reliance on sexual orientation with regard to discrimination[27], as did the Inter-American Court of Human Rights[28]. In a decision of 7 November 2013, the ECJ held in the context of refugee law:

> "1. Article 10(1)(d) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or Stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted must be interpreted as meaning that the existence of criminal laws, such as those at issue in each of the cases in the main proceedings, which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group.
> 2. Article 9(1) of Directive 2004/83, read together with Article 9(2)(c) thereof, must be interpreted as meaning that *the criminalisation of homosexual acts per se does not constitute an act of persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied* in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution.
> 3. Article 10(1)(d) of Directive 2004/83, read together with Article 2(c) thereof, must be interpreted as meaning that only homosexual acts which are criminal in accordance with the national law of the Member States are excluded from its scope. When assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation"[29].

The Court's view that criminalisation as such was not persecution and only became so once prison sentences were involved and actually applied in practice, is highly questionable, because it implies that criminalising homosexual behaviour as such is in the realm of the legitimate. Yet, for our purposes the recognition of homosexual persons as a social group is of particular relevance.

The matter has apparently not been discussed explicitly in the practice of international criminal tribunals yet: A court record search of, for example, the ICTY website with the search term "sexual orientation" did not deliver any hits. Other international bodies[30] have expressed similar sentiments. In the landmark case of *Toonen v. Australia*[31], the UN Human Rights Committee in 1994 held that the term "sex" in Art. 2(1) and Art. 26 ICCPR included sexual orientation and that a criminalisation on that basis was a violation of the right to privacy under Art. 17(1) ICCPR and of non-discrimination under Art. 2(1) ICCPR. The Human Rights Committee has since consistently reiterated its stance of the criminalisation of persons based on sexual orientation[32]. The UN Committees against Torture[33] and on the Elimination of Discrimination Against Women[34], as well as the UN Commission on Human Rights[35] have followed suit in this approach, as have the UN Special Rapporteurs on Human Rights Defenders, on the Promotion and Protection of the Right to Freedom of Opinion and Expression[36] and on Extrajudicial, Summary or Arbitrary Executions[37], the Inter-American Commission on Human Rights[38] and the African Commission on Human and People's Rights[39]. Domestic case law in a number of countries has also seen a development of either inclusive interpretation[40] or declarations of unconstitutionality coupled in some cases with a reading-down of the laws in question to make them compatible with the constitutional framework[41]. The German Federal Constitutional Court on 19 February 2013, i.e. the same

date as the ECtHR in the decision quoted above, declared a federal law unconstitutional which prohibited the successive adoption of the child of one partner to a same-sex partnership by the other partner[42]. On 26 June 2013, The United States Supreme Court in the case of *US v. Windsor et al.*[43] added its own support to the struggle for recognition of marriage equality. The Philippines passed a law on international crimes on 2009 which in section 6(h) reproduces the wording of Art. 7(1)(h) ICCS but crucially adds "sexual orientation" after gender[44]. Timor Leste's Penal Code of 2009 contains a general sentencing provision in Art. 52(2)(e) which makes it an aggravating factor if the crime was committed based on discrimination because of sexual orientation[45]. All of this is of relevance in the context of the sources of international law under Art. 38(1) of the ICJ Statute. There is also a growing body of literature which draws particularly on the situation in refugee and asylum law[46]. In 2007, the International Commission of Jurists adopted the Yogyakarta Principles on the application of human rights law in relation to sexual orientation and gender identity[47] which did, however, receive a rather cold response[48] from some members of the UN General Assembly's Third Committee[49] in the context of a report by the former Special Rapporteur on education, Vernor Muñoz.

Finding Orientation

This state of affairs presents a deeply unsatisfactory picture: The international community's legal experts virtually unanimously and strongly advocate ending the use of sexual orientation as a trigger to criminal sanctions, calling it a violation of human rights. It is accepted as a ground for refugee and asylum claims. Yet, the states who make up the international community still do not speak with one voice in this regard, which can only have to do with traditional and/or religious attitudes, and in the case of Islamic countries, with a certain interpretation of Shari'a law. Javaid Rehman and Eleni Polymenopoulou have recently shown that LGBT rights and Islam can be reconciled to a large extent by a more compassionate treatment of the source material[50].

These traditional views in essence equate to saying that you can take away a person's liberty, physically maltreat or even kill them merely because they have a different sexuality, even if no-one was hurt in any meaningful sense of the word. This would appear to be on a par with punishing people for engaging in extramarital (hetero)sexual relationships, something which a lot of the countries which find the same or similar treatment acceptable for LGBT persons would probably condemn as barbaric and outdated. These views *are* in essence medieval and barbaric in the LGBT context and no longer suitable for any developed society in the 21st century. Koskenniemi once called international law "the gentle civilizer of nations"[51]. The problem with that is that international law is made by states' consensus and can thus only be as civilised as the states that make it. Art. 7(3) ICCS in the interpretation one must currently regrettably give it, is evidence of a civilisation deficit in 37 states who nonetheless profess to follow the principles laid out in the Preamble to the ICCS, among them the following:

> 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,
>
> Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity…

For any LGBT person in those 37 countries, this must sound very hollow, if not downright duplicitous. The lack of consensus at the ICC negotiations on this point is an indictment of the state of the entire international community, too. The emphasis on gender violence in international criminal law in recent years needs to be widened from the current main focal point of violence against women to violence because of gender, and gender needs to include sexual orientation. Imprisonment, corporal punishment and executions are forms of violence, the last two of which should be banned in any context. All penal sanctions for consensual same-sex activities between adults are unacceptable in a modern society which claims to be governed by the rule of law and the respect for the autonomy of the individual.

Traditions are an important part of the human psyche, both individually and as a community, and one should not meddle with them lightly. Some traditions, however, stem from a less enlightened era and are based on a less compassionate interpretation of their sources than was and is necessary. They need to be seriously revised or abandoned entirely. The treatment of LGBT persons under some criminal jurisdictions is one of them. International criminal law – especially if it based on a treaty like the ICC Statute and not on customary law – as a fledgling creature with high moral ambitions, should not start out with the baggage from a bygone time but instead pro-actively aim to be a "civilizer". Art. 7(3) ICCS in the meaning it was meant to have is not civilised. The ASP should repeal it and any reference to it in the Rome Statute sooner rather than later. That explicit repeal would then indeed leave it open to the judges of the ICC to interpret the remaining word "gender" progressively.

ANNEX 1

Table 1

Countries which criminalise LGBT persons (for LGBT-specific acts[52])

Country	ASP member	MR	Male/Female	Offence	Penalty
Latin America & West Pacific					
Cook Islands	Y	C	M	Indecency between males; sodomy	Imprisonment not exceeding 5/7 yrs
Kiribati	N	C	M/F	Buggery; attempts to commit unnatural offences and indecent assaults; gross indecency	Imprisonment not exceeding 14/7/5 yrs
Belize	Y	C	M/F	Having carnal intercourse against the order of nature with any person	Imprisonment not exceeding 10 yrs
Jamaica	N	C	M	Buggery; attempted buggery; gross indecency	Imprisonment not exceeding 10/7/2 yrs; all with or without hard labour
St. Kitts and Nevis	Y	C	M	Buggery	Imprisonment not exceeding 10 yrs; with or without hard labour
Antigua and Barbuda	Y	C	M/F	Buggery; serious indecency; specific homosexual acts ("unnatural" or "abominable")	Imprisonment not exceeding 15/5/10/4 yrs.; in part with or without hard labour
St. Lucia	Y	C	M/(F)	Buggery; gross indecency	Imprisonment not exceeding 10 yrs.
Dominica	Y	C	M/F	Buggery; gross indecency	Imprisonment not exceeding 10/5 yrs; optional mental hospital order
Barbados	Y	C	M/F	Buggery; indecent assault; serious indecency	Imprisonment for life or not exceeding 5/10 yrs.
Grenada	Y	C	M	Unnatural crimes	Imprisonment not exceeding 10 yrs.
St. Vincent and the Grenadines	Y	C	M/F	Buggery; gross indecency	Imprisonment not exceeding 10/5 yrs.

Trinidad & Tobago	Y	C	M/F	Buggery; serious indecency	Imprisonment not exceeding 25/5 yrs.
Guyana	Y	C	M	Acts of serious indecency with male persons; attempt to commit unnatural offences; buggery	Imprisonment not exceeding 2/10 yrs./for life
Africa & Indian Ocean					
Senegal	Y	I	M/F	Unnatural sexual acts	Imprisonment not exceeding 5 years/ fine not exceeding 1,500,000 F.
Mauritania	N	I	M/F	Acts against nature	M: death by public stoning; F: Imprisonment not exceeding 2 yrs.
Morocco	N	I	M/F	Lewd and unnatural acts	Imprisonment not exceeding 3 yrs.; fine not exceeding 1,000 DHS.
The Gambia	Y	I	M/F	Unnatural offences	Imprisonment not exceeding 14 yrs.
Guinea	Y	I	M/F	Indecent acts; acts against nature	Imprisonment not exceeding 3 yrs.; fine not exceeding 1,000,000 F.
Sierra Leone	Y	I	M	Buggery	Imprisonment for life.
Liberia	Y	C	M/F	Sodomy	Imprisonment not exceeding 1 yr.
Ghana	Y	C	M	Unnatural carnal knowledge	Imprisonment not exceeding 25 yrs.
Togo	N	N (Strong C and I minorities)	M/F	Crimes against nature	Imprisonment not exceeding 3 yrs.; fine not exceeding 500,000 F.
Benin	Y	C (= 42%) (I = 28%) (N = 23%)	M/F	Indecent acts; acts against the order of nature	Imprisonment not exceeding 3 yrs.; fine not exceeding 500,000 F.
Nigeria	Y	C/I = 50/50% North = I	M/F	Carnal knowledge against the order of nature/attempt; gross indecency	Federal Code: Imprisonment not exceeding 14/7/3 yrs. Maximum under Shari'a law in Northern states: M: death; F: lashes and/or imprisonment

Cameroon	N	C	M/F	Unnatural offences	Imprisonment not exceeding 5 yrs.; fine not exceeding 200,000 F.
Sao Tome & Principe	N	C	M/F	Acts against the order of nature	Security/education measures; e.g. labour camp
Angola	N	C	M/F	Acts against the order of nature	Security/education measures; e.g. labour camp
Namibia	*Y*	*C*	*M*	*Sodomy*	*Unclear*
Lesotho	Y	C	M	Sodomy	Imprisonment not exceeding 10 yrs.
Botswana	Y	C/N = 50/50%	M/F	Unnatural offences/attempt; indecent practices between persons	Imprisonment not exceeding 7/5 yrs.
Swaziland	*N*	*C*	*M*	*Sodomy*	*Imprisonment; fine – both unclear; eviction from home under tribal law*
Zimbabwe	N	C	M	Indecent acts	Imprisonment not exceeding 1 yr.; fine of 5,000 USD (may be exceeded)
Mozambique	N	N (= 47%) (C = 35%) (I = 18%)	M/F	Acts against the order of nature; vices against nature	Imprisonment not exceeding 3 yrs.; security measures for habitual offenders: hard labour, internment in asylum, ban from exercising profession
Zambia	Y	C (= 50%) (N < 49%)	M/F	Sodomy/attempt; gross indecency	Imprisonment for life/not exceeding 14/14 yrs.
Malawi	Y	C	M/F	Unnatural offences; indecent practices	Imprisonment not exceeding 14 yrs with or without corporal punishment/5 yrs.
Tanzania/Zanzibar	Y	Tanzania: C/I = 30-40/30-40% Zanzibar: I	M/F	Unnatural offences/attempt; gross indencency	Tanzania: Imprisonment of no less than 30 yrs. to life/not exceeding 20 yrs./5 yrs.; fine not exceeding 300,000 Shilling Zanzibar: M: Imprisonment not exceeding 25 yrs. F: Imprisonment not exceeding 7 rs.

Burundi	Y	C	M/F	Same-sex relations	Imprisonment not exceeding 2 yrs.; fine not exceeding 100,000 F
Kenya	Y	C	M/F	Carnal knowledge against the order of nature; indecent acts	Imprisonment not exceeding 14/5 yrs.
Uganda	Y	C	M/F	Carnal knowledge against the order of nature; attempt to commit indecent acts; gross indecency	Imprisonment for life/not exceeding 7/7 yrs.
Somalia	N	I	M/F	Carnal same-sex intercourse	Imprisonment not exceeding 3 yrs.; in Southern parts under Shari'a law: death
Ethiopia	N	C (proportion I unclear)	M/F	Homosexual acts; other unnatural acts	Imprisonment not exceeding 3 yrs./5 yrs. for repeat offences/15 yrs. if known venereal disease transmitted, if acts of 'sadism', or if other party subsequently commits suicide owing to 'distress, shame or despair'.
South Sudan	N	N	M/F	Carnal intercourse against the order of nature	Imprisonment not exceeding 10 yrs.; fine
Sudan	N	I	M/F	Sodomy; gross indecency	Sodomy: Imprisonment not exceeding 5 yrs./100 lashes; 3rd offence: death/life imprisonment; Indecency: Imprisonment not exceeding 1 yr./40 lashes
Eritrea	N	I	M/F	Same-sex sexual acts; unnatural acts	Imprisonment not exceeding 3 yrs.
Egypt	N	I	M/F (unclear – only men prosecuted so far)	Debauchery and prostitution; contempt for religion; shameless public acts	Imprisonment not exceeding 3 yrs.; fine not exceeding 300 EgP
Libya	N	I	M/F	Sexual intercourse and lewd acts outside marriage	Imprisonment not exceeding 5 yrs.

Tunisia	Y	I	M/F	Sodomy	Imprisonment not exceeding 3 yrs.
Algeria	N	I	M/F	Homosexual acts	Imprisonment not exceeding 2 yrs.; fine not exceeding 2,000 Dinar
Comoros	Y	I	M/F	Unnatural acts	Imprisonment not exceeding 5 yrs.; fine not exceeding 1,000,000 F
Maldives	Y	I	M/F	Uncodified Shari'a law on homosexual acts	Banishment not exceeding 1 yr; imprisonment not exceeding 3 yrs.; 39 lashes.
Seychelles	Y	C	M	Unnatural acts	Imprisonment not exceeding 14 yrs.
Mauritius	Y	H (=50%) (C = 32.5%) (I = 17 %)	M	Sodomy	Imprisonment not exceeding 5 yrs.
Middle East, Asia and East Pacific					
Yemen	N	I	M/F	Anal intercourse between men; sexual stimulation between women	Death by stoning for married men; 100 lashes and imprisonment not exceeding 1 yr. for unmarried men; imprisonment not exceeding 3 yrs. for women
Saudi Arabia	*N*	*I*	*M/F*	*Sodomy; sexual relationships outside marriage under Shari'a law*	*Death by stoning for married men; 100 lashes/banishment not exceeding 1 yr. for unmarried men; women unclear*
Oman	N	I	M/F	Sexual same-sex acts	Imprisonment not exceeding 3 yrs.
UAE	*N*	*I*	*M/F*	*Sexual acts outside marriage under Shari'a law*	*Imprisonment not exceeding 10 yrs. (Dubai)/14 yrs. (Abu Dhabi/ death under Shari'a law (unclear)*
Qatar	N	I	M/F	Sexual acts outside marriage under Shari'a law (Muslims only); same-sex sexual acts	Penal Code: imprisonment not exceeding 7 yrs.; Shari'a law: flogging for unmarried persons; death for married persons (adultery)

Kuwait	N	I	M	Consensual intercourse between men	Imprisonment not exceeding 7 years
Iraq	N	I	unclear	Unclear – no penal code law, but instances of Shari'a court convictions	Death
Syria	N	I	M/F	Unnatural sexual intercourse	Imprisonment not exceeding 3 yrs.
Gaza	N	I	M	Sexual acts between´men	Imprisonment not exceeding 10 yrs.
Lebanon	N	I	M/F	Sexual intercourse against nature	Imprisonment not exceeding 1 yr.
(Turkish Republic of Northern Cyprus – only recognised by Turkey)	N	I	M	Sexual intercourse against the order of nature/attempt	Imprisonment not exceeding 5/3 yrs.
Iran	N	I	M/F	Sodomy; 'Tafhiz' (the rubbing of the thighs or buttocks between two men); two men being naked under one cover; two men kissing 'with lust'; lesbianism; two women not related by blood being naked under one cover.	Sodomy: death; Tafhiz: 100 lashes/ death on 4th offence; Lesbianism: 100 lashes/death on 4th offence
Turkmenistan	N	I	M	Sodomy	Imprisonment not exceeding 2 yrs.
Uzbeskistan	N	I	M	Consensual male intercourse	Imprisonment not exceeding 3 yrs.
Pakistan	N	I	M	Unnatural offences	Imprisonment not exceeding 10 yrs.; sodomy under Hudood Ordinance: death by stoning/ imprisonment for life
Afghanistan	Y	I	M/F	Adultery and pederasty ('pederasty' = sexual relations between males of any age)	Penal Code: long-term imprisonment; Sharia law: maximum sentence of death.
India (State of Jammu & Kashmir)	N	I	M	Unnatural offences	Imprisoment for life
Bhutan	N	B	M/F	Sodomy; sexual conduct against the order of nature	Imprisonment not exceeding 1 yr.

Bangladesh	Y	I	M	Voluntary carnal intercourse against the order of nature	Imprisonment for life/not exceeding 10 yrs./fine.
Myanmar	N	B	M/F	Carnal intercourse against the order of nature	Detention in isolated penal colony for life/imprisonment not exceeding 10 yrs./fine.
Indonesia (South Sumatra and Aceh)	N	I	M/F	Sexual acts outside marriage under Shari'a law	Imprisonment for life
Malaysia	N	I	M/F	Carnal intercourse against the order of nature; outrages on decency; Muslims: also Shari'a law	Penal Code: Imprisonment not exceeding 20/2 yrs; lashes
Singapore	N	B	M	Outrages on decency	Imprisonment not exceeding 2 yrs.
Brunei	N	I	M	Unnatural offences	Imprisonment not exceeding 10 yrs./fine
Palau	N	C	M	Unnatural same-sex relations	Imprisonment not exceeding 10 yrs.
Papua New Guinea	N	C	M	Unnatural offences/attempt; indecent practices	Imprisonment not exceeding 14/7/3 yrs.
Solomon Islands	N	C	M/F	Buggery/attempt; gross indecency	Imprisonment not exceeding 14/7/5 yrs.
Nauru	Y	C	M	Unnatural offences/attempt; indecent practices	Imprisonment with hard labour not exceeding 14/7/3 yrs.
Tuvalu	N	C	M	Buggery/attempt; gross indecency	Imprisonment not exceeding 14/7/5 yrs.
Samoa	Y	C	M	Sodomy; indecency between males	Imprisonment not exceeding 5 yrs.
Tonga	N	C	M	Sodomy/attempt; indecent assault on a male	Imprisonment not exceeding 10 yrs.; with or without lashes

Note:

1. The data in this table were collected from the interactive map on the website of the Human Dignity Trust, from the list of States Parties on the website of the International Criminal Court and from individual online country reports in April 2013. The list does not pretend to be exhaustive and could not take into account changes after April 2013.
2. MR = main religion; I = Islam; C = Christianity; B= Buddhism; H = Hinduism; N = traditional and natural religions.
3. The exact offence descriptions and penalty ranges were in a very few cases difficult to verify from the web, either in their entirety or partially; these entries have been put into italics.

4. Some of the laws in individual countries have been read down by courts to cover only non-consensual acts and are thus in effect rape and assault laws, yet they remain on the statute book in their original form and thus open to judicial re-interpretation.

References

Michael Bohlander, "There is no compulsion in religion" - Freedom of religion, responsibility to protect (R2P) and crimes against humanity at the example of the Islamic blasphemy laws of Pakistan, (2012) 8 Journal of Islamic State Practices in International Law, 36

Machteld Boot/Christopher K Hall, in Otto Triffterer (ed.) Commentary on the Rome Statute of the International Criminal Court, 2nd ed., 2008

Anne-Marie de Brouwer, Supranational Criminal Prosecution of Sexual Violence, 2002, 20

Veronica Carlino, Fairness considerations: The impact of sexual orientation on asylum, refugee states, and persecution, (2012) 18 New Eng. J. Int'l & Comp. L. 477

Ken Gallant, *On the Record* , 7 July 1998, online at www.legal-tools.org/doc/ld5276/.

Ritu Ghai, Deciphering Motive: Establishing sexual orientation as the "one central claim" for persecution in asylum claims, (2012) 43 Colum. Hum. Rts. Rev. 521

Martti Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870 – 1960, 2001

Adel Maged, Arab Perspectives on the Current System of International Criminal Justice (2008) 8 International Criminal Law Review, 477

Valerie Oosterveld, The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?, 18 (2005) Harv. Hum. Rts. J. 55

Valerie Oosterveld, Gender-Based Crimes Against Humanity, in Leila Sadat (ed.) Forging a Convention for Crimes Against Humanity, 2011, 81.

Carole J Peterson, Sexual orientation and gender identity in Hong Kong (2013) 14 Asian-Pac. L & Pol'y J. 28

Javaid Rehman/Eleni Polymenopoulou Is Green a part of the Rainbow? Sharia and homosexuality in the Muslim World, (2013) 36 Fordham International Law Journal 1.

William Schabas, The International Criminal Court – A Commentary on the Rome Statute, 2010

Cate Steains, Gender Issues, in Roy S. Lee (ed.) The International Criminal Court – The Making of the Rome Statute, 1999, 374.

Renáta Uitz, Lessons from sexual orientation discrimination in Central Europe, (2012) 60 Am. J. Comp. L. 235.

Julia Martínez Vivancos, LGBT and the International Criminal Court, 2010, online at www.amicc.org/docs/LGBTandICC.pdf

Sharon Yecies, Sexual orientation, discrimination and the Universal Declaration of Human Rights, (2011) 11 Chi. J. Int'l L. 789

---

[*] All websites listed in this paper were last accessed on 14 February 2014. – The author would like to thank Valerie Oosterveld and Javaid Rehman and the journal's reviewers for commenting on an earlier draft of the paper. The usual disclaimers apply.

[1] The category of transgender persons naturally has different connotations than gay, lesbian and bisexual but may, of course, in certain instances involve sexual behaviour by the transgender person that may be classed as phenotypically homosexual and thus attract criminal sanction. To that extent, it seems fair to include this category in the study.

[2] For the purposes of this paper the more recent addition of LGBTQ, with Q standing for "queer", would not seem be to be of major relevance and in any event, similar sentiments as those expressed in the previous footnote would apply.
[3] Incidentally, it is also open to question what the position of the opposing countries would have been in the case of persons who have undergone a sex change operation and are thus also biologically in a new category.
[4] Steains, 1999, 374 374: de Brouwer, 2002, 20 and 152 ff and 152 ff. – Note, however, Oosterveld, 2005 footnote 132 .
[5] Steains, 1999., 372 referring to fn. 11 – 13 on 360.
[6] See e.g. de Brouwer, 2002., 160 fn. 353; Vivancos, 2010,.
[7] Oosterveld, 2011, 81 – 83..
[8] See the recent enactment in June 2013 of a law in Russia banning promotion of LGBT life-styles to minors: http://www.independent.co.uk/news/world/europe/russias-duma-waves-through-antigay-law--by-436-votes-to-0-8654582.html.
[9] Online at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-policy-07-02-2014.aspx
[10] www.humandignitytrust.org/.
[11] http://ilga.org.
[12] See EU LGBT survey - European Union lesbian, gay, bisexual and transgender survey. Results at a glance, 2013.- Online at http://fra.europa.eu/sites/default/files/eu-lgbt-survey-results-at-a-glance_en.pdf,
[13] This has been the consistent position of the ECtHR with regard to Articles 8, 12 and 14 ECHR; see only recently the case of *X and Others v. Austria*, Application no. 19010/07, Judgment of 19 February 2013, at para. 106.
[14] See for a similar argument regarding the practice of blasphemy laws in Islamic countries Bohlander, 2012.
[15] See on the views of Arab states more generally Maged, 2008,.
[16] Genesis, ch. 18 – 19.
[17] Schabas, 2010, 177 177.
[18] See Oosterveld, 2005. at fn. 14.
[19] Boot/Hall, 2008, Article 7 marginal no. 36
[20] As far as the implementing legislation available on the ICC's Legal Tools website (www-legal-tools.org) and www.iccnow.org is concerned, the following countries have, for example, opted for implementing an equivalent of Art. 7(3): Malta, Canada; United Kingdom; Republic of Ireland; Trinidad and Tobago; Mauritius; Burkina Faso; Samoa; Uganda; South Africa. A mere reference to gender or gender-related is found in Georgia; Norway, Spain; Belgium; Germany; the Netherlands; Panama; Portugal; Australia and South Korea. The most progressive approach is taken by the Philippines who use gender and sexual orientation.
[21] Email by Valerie Oosterveld of 24 May 2013 – on file with the author.
[22] See Oosterveld, 2005.
[23] Schabas, 2010, 177 and 186 with further references. – See also Gallant, 1998, in which the author bemoans the fact that the precursor to Art. 7(1)(h) and (3) ICCS – identical with the final text – did "not prevent discrimination in the definition of crimes on the basis of sexual orientation".
[24] Application no. 19010/07, Judgment of 19 February 2013.
[25] Ibid., at paras 92 and 99.
[26] *Alekseyev v Russia*; Application nos. 4916/07, 25924/08 and 14599/09, Judgment of 21 October 2010,
[27] *P v S and Cornwall County Council*, Case No. C 13-94; [1996] ECR I – 2143.
[28] *Atala Riffo and Daughters v Chile*, 24 February 2012, Series C No. 239.
[29] *Minister voor Immigratie en Asiel v X and Y* and *Z v Minister voor Immigatie en Asiel*; Joined Cases C-199/12 to C-201/12, of 17 November 2013, at para 79.
[30] The website www.humandignitytrust.org under the tab "Library", from which many of the references were selected in the first instance, contains links to the full texts of the sources cited below and a range of other reports and statements.
[31] Case No. CCPR/C/50/D/488/1992; views of 31 March 1994.
[32] Consideration of reports submitted by State parties under article 40 of ICCPR: Barbados: information received from Barbados on the implementation of the concluding observations of the Human Rights Committee, 2 June 2009, CCPR/C/BRB/CO/3/Add.1; Concluding Observations: Kenya, 29 April 2005, CCPR/CO/83/KEN; Concluding Observations: Romania, 28 July 1999, CCPR/C/79/Add.111; Concluding Observations: Lesotho, 7 April 1999, CCPR/C/79/Add.106; Concluding Observations: Chile, 30 March 1999, CCPR/C/79/Add.104; UN Concluding Observations: Cyprus, 6 April 1998, CCPR/C/79/add.88.
[33] Conclusions and recommendations of the Committee against Torture: Egypt, CAT/C/CR/29/4, 23 December 2002.
[34] Concluding Observations on Uganda, UN Doc. CEDAW/C/UGA/CO/7, 22 October 2010.

[35]Addendum to the Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to Nigeria, 7 January 2006, E/CN.4/2006/53/Add.4.
[36] Joint Statement on Uganda's Anti-Homosexuality Bill, 1 March 2010.
[37] Addendum to the Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to Nigeria, 7 January 2006, E/CN.4/2006/53/Add.4.
[38] *Marta Lucía Álvarez Giraldo (Colombia*), Case 11.656, IACHR, Report No. 71/99 (1999).
[39] *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200; *Amnesty International v Zambia* (2000) AHRLR 325.
[40] *Vriend v Alberta* [1998] 1 S.C.R. 49 (Canada*); HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; *Massachusetts v. United States Department of Health & Human Services*, 682 F.3d 1 (USA).
[41] See *Kanane v State* 2003 (2) BLR 64 (Botswana); *Nadan & McCoskar v State* [2005] FJHC 500 (Fiji); *Leung v Secretary of Justice* [2006] 4 H.K.L.R.D. 211 (Hong Kong); *Secretary of Justice v Yau Yuk Lung Zigo* [2007] 10 HKCFAR 335 (Hong Kong); *Naz Foundation v Government of NCT of Delhi* 160 (2009) DLT 277 (India); *Sunil Babu Pant and Others v Nepal Government and Others* [2008] 2 NJA L.J. 261-286 (Nepal); *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15 (South Africa) as well as a spate of cases from the USA: *Commonwealth of Kentucky v Watson* (1992) 842 S.W.2d 487*; Lawrence v Texas*, 539 U.S. 558 (2003); *Perry v Schwarzenegger et al.*, US District Court for the Northern District of California, 4 August 2010, Case No. C 09-2292 VRW; *Romer v Evans*, 517 U.S. 620 (1996).
[42] See www.bverfg.de/entscheidungen/ls20130219_1bvl000111.html. - An English press release can be found at www.bundesverfassungsgericht.de/pressemitteilungen/bvg13-009en.html.
[43] 133 S. Ct. 2675.
[44] Republic Act No. 9851, An Act defining and penalizing crimes against international humanitarian law etc., available at www.legal-tools.org/doc/8c74cc/.
[45] Decree Law No. 19/2009, available at www.legal-tools.org/doc/ad0f8a/.
[46] See for some recent publications in this context Peterson, 2013 Nagle, 2012 Luz E. Nagle, Giving shelter from the storm: Colombians fleeing persecution based on sexual orientation, (2012) 48 Tulsa L Rev. 1; Ghai, 2012; Uitz, 2012; Carlino, 2012; Yecies, 2011.
[47] International Commission of Jurists, Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007, available at: www.refworld.org/docid/48244e602.htm.
[48] See www.ishr.ch/archive-general-assembly/933-majority-of-ga-third-committee-unable-to-accept-report-on-the-human-right-to-sexual-education.
[49] United Nations General Assembly, Official Records, Third Committee, Summary record of the 29th meeting held in New York, on Monday, 25 October 2010, UN Doc. No. A/C.3/65/SR.29 of 13 December 2010 at paras. 9, 11, 14 – 15, 22 – 23. The most severe criticism came in particular from four groups: African States, Caribbean Community, Arab States and Organization of the Islamic Conference.
[50] Rehman/Polymenopoulou, 2013.
[51] Koskeniemmi, 2001
[52] Some offences may also apply to non-LGBT persons of both sexes, e.g. with anal intercourse, but the LGBT-specific effect of the criminalisation would affect only one.