

BOOK REVIEW

RAINBOW JURISDICTION AT THE INTERNATIONAL CRIMINAL COURT: PROTECTION OF SEXUAL AND GENDER MINORITIES UNDER THE ROME STATUTE BY VALÉRIE V SUHR (ASSER PRESS, 2022) 400 PAGES. PRICE EUR 117.69 (EBOOK) ISBN 9789462654839

Violence committed against people on the basis of their sexual orientation and gender identity is a persistent and widespread reality across the globe. Discrimination and persecution of lesbian, gay, bisexual, trans, queer, intersex, asexual, and other non-normative gender identities, sexual orientations and practices ('LGBTQIA+') are waged with impunity and perpetrators are rarely held accountable. The 2016 terrorist attack in an Orlando gay nightclub which killed 49 people,¹ the case of a US pastor and anti-gay activist persecuting sexual minorities in Uganda² and the arbitrary arrest, torture and rape of a trans woman by police in Peru based on her gender identity³ are just some examples of the gendered and sexualised forms of violence targeting LGBTQIA+ people. More recently, Human Rights Watch released a report detailing the fear, persecution and abuse of LGBT Afghans and people who do not conform to gender norms under Taliban rule since their takeover in 2021.⁴ In the context of pervasive homophobic and transphobic violence, Valérie V Suhr's book, *Rainbow Jurisdiction at the International Criminal Court*, represents a much-needed discussion about the protection of 'sexual and gender minorities' ('SGM'). In particular, the book aims to '[examine] whether the worst human rights violations specifically directed at SGM are punishable under international criminal law, as codified in the *Rome Statute of the International Criminal Court* (ICC)'.⁵ The author engages academic and legal scholarship from the fields of international criminal law, international human rights law and international refugee law in order to reveal the specific legal articles and interpretations through which anti-SGM violence can be prosecuted at the ICC. Through a close examination of universal and regional human rights instruments, the *Rome Statute*, its drafting and ICC jurisprudence, Suhr presents a well-supported and persuasive case for the legal potential to prosecute anti-SGM violence as the crime against humanity of persecution.

The book's key strength lies in its ground-breaking contribution to international criminal law scholarship and practice, offering a blueprint for international lawyers and activists seeking to advance and protect SGM rights at the ICC. The author offers a clear and comprehensive account of how these crimes can be prosecuted at the ICC. The question of whether such crimes *will*

¹ Valérie V Suhr, *Rainbow Jurisdiction at the International Criminal Court: Protection of Sexual and Gender Minorities under the Rome Statute* (Asser Press, 2022) 305.

² Ibid 7.

³ Ibid 43.

⁴ 'Afghanistan: Taliban Target LGBT Afghans', *Human Rights Watch* (Web Page, 26 January 2022) <<https://www.hrw.org/news/2022/01/26/afghanistan-taliban-target-lgbt-afghans>>, archived at <<https://perma.cc/5M7P-WVG5>>.

⁵ Suhr (n 1) 2, citing *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) ('*Rome Statute*').

be prosecuted at the ICC, in light of political contestations over gender issues and SGM rights, unfolds in the conclusion chapter.

Rainbow Jurisdiction at the International Criminal Court is organised into four parts with a total of 11 chapters. Chapter 1 introduces the scope and significance of the book and argues that both historical and contemporary examples of anti-SGM violence establish the need to prosecute them at the ICC. The author engages in nuanced discussions regarding the terminology used throughout the book, reflecting on the predominantly Western use of LGBTI (instead opting for the term ‘sexual and gender minorities’)⁶ and the need to take an intersectional approach to embodied violence.⁷ The author skilfully problematises homophobic and transphobic violence as ‘ways of thinking and behaving that are linked to social structures of dominance and violence’.⁸ Chapter 1 provides an effective overview and justification for the book’s focus, although I was left wondering if the politics of international criminal law, including its cis-heteronormative foundations, would be addressed in later chapters. The author situates her contribution as one informed by feminist and queer theories, an influence that is evident particularly in Chapter 6. While I found that the Chapter could have further explored and elaborated on these feminist and queer approaches, overall, the author successfully positions the significance of the book for SGM rights and international criminal law scholarship.

Part I details the factual and legal background, serving the basis for establishing whether violence against SGM can be prosecuted at the ICC as the crime against humanity of persecution. Chapter 2 ‘describes the reality of violence and discrimination against sexual and gender minorities’,⁹ canvassing a broad range of crimes committed both historically and contemporarily. The author offers a welcome spotlight on forms of violence not usually recognised by international criminal mechanisms such as anti-SGM laws,¹⁰ ‘[c]orrection [c]enters’ and ‘conversion’ or ‘aversion therapies’.¹¹ These are forms of institutionalised and state-sanctioned homo-, trans- and inter-phobic violence that are rarely discussed in the context of international criminal law. In Chapter 3, Suhr provides a close legal analysis and breakdown of the *Rome Statute*. More specifically, this Chapter grapples with the tensions between the *nullum crimen* principle (which provides that ‘only conduct that the *Rome Statute* considers to be a crime can result in individual criminal responsibility’)¹² and a human rights interpretation, which can more easily allow for the inclusion of SGM protections within ICC practice. Indeed, the author centres this tension as something that must be addressed throughout the book, that is, ‘how to reconcile the evolutive, dynamic, teleological human rights interpretation with international criminal law’s need for a strict construction’.¹³ Thus, while sexual orientation and diverse

⁶ Suhr (n 1) 15.

⁷ Ibid 14.

⁸ Ibid 16.

⁹ Ibid 33.

¹⁰ Ibid 39–41.

¹¹ Ibid 46.

¹² Ibid 66.

¹³ Ibid 84.

gender identities are not explicitly encoded in the *Rome Statute*, the author insightfully reveals how international human rights law interpretations can allow the ICC's legal practitioners to include them without endangering *nullum crimen*.

Part II constitutes the most significant contribution of the book, containing six chapters that advance the argument that persecution of sexual and gender minorities can be prosecuted as the crime against humanity of persecution. Chapter 4 establishes the contextual element for meeting the threshold of crimes against humanity, namely that the conduct must be widespread and/or systematic, perpetrators must demonstrate mens rea, and that a state or non-state actor can be held criminally responsible. The author accessibly explains how, by way of examples, anti-SGM violence can meet these contextual elements and therefore be prosecuted as crimes against humanity before the ICC. In Chapter 5, the author hones in her focus to the crime against humanity of persecution because, as she argues, '[it] raises the most specific questions concerning crimes committed *specifically* against sexual and gender minorities'.¹⁴ This focus is well-justified in light of the book's aim to establish — through the clearest legal justification — that crimes against SGM can be prosecuted at the ICC. Throughout, Suhr examines examples of persecutory acts that could meet this legal category, including criminalisation of same-sex relationships, 'concentration camps, extra-legal arbitrary arrests, killings and violence'.¹⁵ The author reveals that SGM 'can constitute an identifiable group or collectivity within the meaning of the *Rome Statute*'s crime of persecution',¹⁶ drawing on existing cases and jurisprudence from universal and regional human rights instruments which have found this to be true under law.¹⁷ Importantly, the Chapter establishes that international criminal law recognises that persecution can take place based on either the real or perceived grounds for discrimination. This means that regardless of whether the victim of persecutory violence identifies as a sexual and/or gender minority, the perpetrator's perception of them as such is enough to fulfil the crime against humanity of persecution.¹⁸ This finding serves an important function later in the book, through which the author establishes the grounds by which anti-SGM conduct can be prosecuted.

Chapter 6 argues that 'most instances of persecution of persons targeted based on their real or perceived sexual orientation or gender identity qualify as gender-based persecution' under the *Rome Statute*.¹⁹ It is this Chapter that I found most fascinating and the strongest contribution of the book. Suhr urges readers to consider the 'expressive value' and importance of designating persecution of SGM as a distinct crime:

Qualifying persecution based on sexual orientation and gender identity as gender-based persecution ... captures the underlying reasons for this kind of injustice and shows that they have the same foundations as the traditional cases of gender-based discrimination and persecution. The principle of fair labeling requires harm

¹⁴ Ibid 154 (emphasis added).

¹⁵ Ibid 153.

¹⁶ Ibid 154.

¹⁷ Ibid 159–63. See, eg, United Nations Human Rights Committee, European Court of Human Rights, Asia Pacific Forum of National Human Rights Institutions: at 159–62.

¹⁸ Ibid 196–9.

¹⁹ Ibid 209.

to be prosecuted under the crimes that most accurately describe and reflect it. Consequently, when persecution is based on multiple intersecting grounds, this can, and should, be reflected in its prosecution.²⁰

The author artfully traces the contested gendered politics of the *Rome Statute*'s drafting history, focusing specifically on the tensions between feminist activists' socially constructed definition of gender and the biological binary definition pushed by conservative states party.²¹ Such an analysis illuminates the fraught position of sexual orientation within the gender definition,²² and the culmination of a final definition that while being prima facie biological and essentialist, enables room for a human rights interpretation to recognise persecution of SGM as gender-based persecution.²³ It is also here, in Chapter 6, where the author returns to her feminist and queer theoretical orientation (influenced by Judith Butler), espousing a more normative and nuanced perspective on the interrelated, socially constructed and entangled relationship between sex, gender, sexual orientation and gender identity.²⁴ Indeed, discussions of gendered, sexed and sexualised norms and the institutionalised violence and normalisation of homophobic and transphobic violence serve a powerful role in elevating the arguments of this Chapter.²⁵ While more explicit attention could have been paid to the cis-heteronormative systems of power that organise these concepts,²⁶ overall this Chapter is a compelling legal and gendered analysis of the possibility for anti-SGM violence to be prosecuted as gender-based persecution. The author is attuned to the potential as well as the limitations of the gender definition to enable such prosecution and critiques the 'arguably outdated distinction between sex and gender' and its 'binary gender system, which excludes transgender and intersex persons'.²⁷

The author continues these more critical discussions in Chapter 7, an equally strong contribution which focuses on the possibility of anti-SGM violence to be prosecuted as persecution on 'other grounds that are universally recognized as impermissible under international law'.²⁸ While in the previous Chapter, the author revealed how anti-SGM violence can qualify as gender-based persecution, here the author argues that 'even to the extent that persecution of SGM can already be characterized as gender-based persecution, the following analysis explores whether SGM can be protected based on their gender identity and

²⁰ Ibid 212.

²¹ Ibid 215–21. For further discussions on the drafting process of the *Rome Statute* and feminism activism, see Louise Chappell, *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy* (Oxford University Press, 2016); Rosemary Grey, *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court: Practice, Progress and Potential* (Cambridge University Press, 2019); Juliana Santos de Carvalho, 'The Powers of Silence: Making Sense of the Non-Definition of Gender in International Criminal Law' (2022) 35(4) *Leiden Journal of International Law* (advance). Conservative states party and actors who opposed including the term gender included the Holy See, other Catholic and Islamic countries and anti-choice NGOs.

²² Suhr (n 1) 218.

²³ Ibid 223.

²⁴ Ibid 231–2.

²⁵ Ibid 239–42.

²⁶ Heteronormativity is briefly discussed by the author: *ibid* 236–7.

²⁷ Ibid 261–2.

²⁸ Ibid 275–6, quoting *Rome Statute* (n 5) art 7(1)(h).

sexual orientation *alone*'.²⁹ Such a legal possibility can occur through recourse to art 7(1)(h) of the *Rome Statute* and its delineation that persecution can take place on 'other grounds that are universally recognized as impermissible under international law'.³⁰ To do so, the author engages in an important and necessary discussion regarding what constitutes universally recognised human rights. She identifies some of the tensions between universalism and cultural relativism, carefully debunking a common criticism of universalising SGM rights that 'homosexuality ... [is] a Western construct'.³¹ Instead, the author traces a history of colonially-imposed rigid gender and sexual norms that gave rise to anti-SGM laws and norms in countries that, prior to colonisation, accepted diverse gender and sexual identities.³² Suhr is careful not to exculpate former colonies and Global South countries from being held accountable for the contemporary continuation of anti-SGM laws and violations,³³ although her overall discussion here provides needed exposure to the Western and colonial foundations of homophobic and transphobic violence. These discussions contribute to the author's argument in this Chapter that both SGM rights and the persecution of SGM are a universal 'struggle'³⁴ and one that demands recognition through international criminal law. The Chapter proceeds to engage with examples from various universal and regional human rights instruments to show how sexual orientation and gender identity are protected grounds and could therefore be prosecuted as such at the ICC. Notwithstanding the critical and persuasive attention given to the colonial roots of anti-SGM norms, the author could have incorporated relevant discussions around pinkwashing, homonationalism and homocapitalism, that is, how SGM rights can be co-opted in ways that contribute to capitalist and/or (settler) colonial practices, and undermine marginalised or Indigenous queer rights movements.³⁵ Acknowledging the risk of particular (Western capitalist) visions of SGM rights to condemn and/or erase marginalised expressions of non-normative sexualities and gender practices is a necessary caveat to the author's critique of cultural relativism.

Chapters 8 and 9 are both brief interventions, the former detailing how political persecution of human rights defenders dealing with issues of SGM

²⁹ Suhr (n 1) 276 (emphasis added).

³⁰ *Rome Statute* (n 5) art 7(1)(h).

³¹ Suhr (n 1) 282.

³² *Ibid* 283–4.

³³ *Ibid* 284.

³⁴ *Ibid* 284–6.

³⁵ For examples of critical discussions about pinkwashing, homonationalism, homocolonialism and homocapitalism: see Anna M Agathangelou, M Daniel Bassichis and Tamara L Spira, 'Intimate Investments: Homonormativity, Global Lockdown, and the Seductions of Empire' [2008] (Winter) *Radical History Review* 120; 'Say No To Pinkwashing', *BDS* (Web Page), <<https://bdsmovement.net/pinkwashing>>, archived at <<https://perma.cc/LAQ2-2P3H>>; Nivi Manchanda, 'Queering the Pashtun: Afghan Sexuality in the Homo-Nationalist Imaginary' (2015) 36(1) *Third World Quarterly* 130; Scott Lauria Morgensen, 'Settler Homonationalism: Theorizing Settler Colonialism within Queer Minorities' (2010) 16(1–2) *GLQ: A Journal of Lesbian and Gay Studies* 105; Jasbir K Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press, 2007); Momin Rahman, 'Queer Rights and the Triangulation of Western Exceptionalism' (2014) 13(3) *Journal of Human Rights* 274; Rahul Rao, *Out of Time: The Queer Politics of Postcoloniality* (Oxford University Press, 2020); Rahul Rao, 'Global Homocapitalism' (2015) 194 (November/December) *Radical Philosophy* 38.

rights constitutes the crime of persecution under the *Rome Statute*. The latter offers a succinct summary of Part II of the book.

Part III consists of Chapter 10, which uses anti-SGM legislating as a case study and test for whether anti-SGM laws, implemented or otherwise, can constitute a crime against humanity under the *Rome Statute*. This is a unique focus, one that the author herself underscores is ‘usually not discussed in academia’.³⁶ The Chapter explores notions of macro-criminality³⁷ and that the prosecution of anti-SGM legislators fits well within an international criminal legal system that targets system-level and ‘big fish’ perpetrators.³⁸ Suhr develops her argument by first tracing both historical and contemporary cases of examples where legislators have been held criminally responsible for crimes under international criminal law, using this as a basis to consider how anti-SGM legislators might be similarly prosecuted.³⁹ The Chapter details the different levels of individual criminal responsibility — including indirect perpetration, joint indirect perpetration, co-perpetration, ordering and instigating, and assistance — that legislators in both authoritarian and democratic systems (eg members of Parliament) could be classified as when establishing anti-SGM laws. Crucially, the author finds that whether these laws are enforced or unenforced, anti-SGM ‘legislating *per se* can amount to a crime against humanity’.⁴⁰

Finally, in Part IV, consisting of Chapter 11, Suhr offers a summary, conclusions and recommendations in light of the overall finding of the book that ‘the ICC can reasonably prosecute persecution against SGM as a crime against humanity’.⁴¹ This final Chapter circles back to the question of the political feasibility of crimes against SGM being prosecuted at the ICC, offering a pragmatic reflection of the fiercely contested and ‘controversial’ issues of sexual orientation and gender identity globally.⁴² In the context of these contestations and the ongoing perpetration of anti-SGM crimes, the author provides a realistic prediction that the question of including or excluding ‘sexual orientation and gender identity as grounds of persecution ... will most likely only [be answered by the ICC] ... when the whole case depends on it’.⁴³ The recommendations that follow are thus cautious, but retain an optimism that inclusion of anti-SGM crimes is both possible and desired. The author suggests that the *Rome Statute* be amended ‘in a way that it is clear that all SGM are included’⁴⁴ and this can be achieved by repealing the binary gender definition currently in place, using an entirely new gender definition or adopting the ICC Prosecutor’s definition (which espouses a social constructivist interpretation).⁴⁵ She also recommends that art 7(1)(h) be amended to include sexual orientation and gender identity as explicit grounds for persecution.⁴⁶ These recommendations are tempered as the

³⁶ Suhr (n 1) 339.

³⁷ Ibid 345.

³⁸ Ibid 346.

³⁹ Ibid 347–9.

⁴⁰ Ibid 343 (emphasis in original).

⁴¹ Ibid 391.

⁴² Ibid 393–4.

⁴³ Ibid 391.

⁴⁴ Ibid 392.

⁴⁵ Ibid 393.

⁴⁶ Ibid.

author acknowledges that such amendments are unlikely to occur, but her final words remain hopeful, preferring to take stock of all the advances so far achieved in the areas of SGM rights, activism and recognition under international law.

Overall, *Rainbow Jurisdiction at the International Criminal Court* is an impressive contribution to a growing body of scholarship on the protection and advancement of LGBTQIA+ rights. Suhr succeeds in her aim of examining whether anti-SGM violence constitutes the crime against humanity of persecution under the *Rome Statute* and her book answers this in the affirmative through a well-evidenced, persuasive and legally sophisticated argument. Suhr's legal analysis and level of detail is robust. The commitment to evidencing how anti-SGM crimes can be prosecuted at the ICC through recourse to existing cases and findings in universal and regional human rights instruments is a real strength of this book. While I am thoroughly convinced by the author's core arguments and findings, there are a few limitations that warrant further consideration. As noted, the book takes the project of international criminal law itself for granted. While at one point the author acknowledged the violence of international criminal law reflected in how imprisonment violates human rights,⁴⁷ I was hoping to see further reflection on international criminal law's limitations and violence, including its Eurocentric, carceral and cis-heteronormative foundations. While cognisant that the book is primarily directed at international legal scholars and practitioners, a more normative argument, anchored in feminist and queer theories of law and violence, represented an element of the book that was somewhat evident in Chapter 6, but missing in other chapters. Despite these limitations, *Rainbow Jurisdiction at the International Criminal Court* is an original and comprehensive analysis relevant to scholars, practitioners and students of international criminal law and international human rights law. In particular, it offers a rich contribution to a developing body of feminist, queer and critical scholarship investigating the protection and advancement of LGBTQIA+ rights in international criminal and transitional justice mechanisms.⁴⁸

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⁴⁷ Ibid 75–6.

⁴⁸ For examples in this area of scholarship: see Pascha Bueno-Hansen, 'The Emerging LGBTI Rights Challenge to Transitional Justice in Latin America' (2018) 12(1) *International Journal of Transitional Justice* 126; Katherine Fobear, 'Queering Truth Commissions' (2014) 6(1) *Journal of Human Rights Practice* 51; Rosemary Grey, 'Seen and Unseen: Sexual and Gender-Based Crimes in the Khmer Rouge Tribunal's Case 002/02 Judgment' (2019) 25(3) *Australian Journal of Human Rights* 466.

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