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BOARD OF EDITORS

CLAIMING QUEER LIBERTY

JAMES C. HATHAWAY*

ABSTRACT

Sexual liberty must come out of the international legal closet. While non-discrimination and privacy law have been the basis for some very important queer rights victories, they cannot deliver that which is most central to queer sexuality: the right to have consensual sex outside the confines of the classic marital, procreative model. Bringing international law into conversation with liberatory queer theory, this Article argues for codification in international human rights law of a right to sexual liberty under which sexual choice and diversity are celebrated. Beyond enabling international human rights law more fully to advance human dignity, this shift would afford an opportunity to refurbish the international human rights edifice in a globally inclusive way—something that continued pursuit of an identity-based, integrative queer rights agenda cannot achieve

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Authoritarian states—both religious and secular—fear, and therefore seek to constrain, the power of sex.[1] Sex is frightening for them because it is perhaps the ultimate liberating experience: in the throes of desire and passion people are at their least manipulable and most fully determined to maximize pleasure, whatever the risks.[2] Indeed, taking some risk in sex may enhance excitement, pushing us deeper into the moment and farther from the orderly confines that authoritarians prefer.[3] Because sexual longing is so deeply hardwired into our systems, it is an act of resistance that is difficult to regulate or constrain. Yet because the visceral power of sex is so palpable, it is in practice a nearly irresistible target for authoritarian action.[4]

Even states that would not ordinarily be viewed as authoritarian sometimes are when it comes to queer[5] sex. So-called "liberal" states have not hesitated to impose rules that deny people the right to have consensual sex in the ways natural to them or that limit the circumstances or context within which sex is deemed acceptable.[6] Aberrant, if nonetheless visceral, sexual desire drives people to act at odds with conventions. It is thus often perceived as a threat to

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[1] Eric Heinze, *Sexual Orientation and International Law: A Study in the Manufacture of Cross-Cultural "Sensitivity,"* 22 MICH J. INT'L L. 283, 284 (2001) ("[A]utocratic regimes [seek to] bolster their domestic authority by promoting nationalistic campaigns based on ideas of moral (i.e., sexual) purity.").

[2] URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION 193 (1995) ("[W]e are threatening because our movement represents the liberation of the most powerful and untamed motivating force in human life: desire.").

[3] MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE 211 (1999) ("Those who want to clean up sex, like those who want merely to celebrate it, commonly forget that sexiness cannot be divorced from things that we really dislike about sex: irrationality, impulse, shamefulness, disgust. To this list we should add: risk.").

[4] SHANE PHELAN, SEXUAL STRANGERS: GAYS, LESBIANS, AND DILEMMAS OF CITIZENSHIP 46–47 (2001) ("The most important republican passion is love—for one's country, for its laws, and for one's fellow citizens . . . One of the primary threats to such citizenly love is the particular love for another, especially romantic love . . . [which] has the potential to destroy polities.").

[5] In referring to "queer" sex, I mean simply to identify sex that is outside the heteronormative (marital, procreative) model. *See*, *e.g.*, VAID, *supra* note 2, at 287; DAVID HALPERIN, SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY 62 (1997). "Queer" may also be used to denote a non-normative *identity. See* CARL STYCHIN, LAW'S DESIRE: SEXUALITY AND THE LIMITS OF JUSTICE 141 (1995) ("Central to a queer identity . . . is the problematisation of categories of sexual identity and boundaries of sexual propriety, as they have been historically constituted."). The queer commitment to challenging that which is assumed to be normal has inspired a broader theoretical project (queer theory) that "has come to represent an anti-normative or non-conformist project that rejects the possibility of operating within the structures of power." Odette Mazel, *Queer Jurisprudence: Reparative Practice in International Law*, 116 AM. J. INT'L L. UNBOUND 10, 11 (2022). Indeed, it may be said to comprise ". . . a more fundamental critique of . . . regimes of the normal that, together, regulate our relations with each other and the planet." Dianne Otto, *Queerly Troubling International Law's Vision of "Peace*," 116 AM. J. INT'L L. UNBOUND 1, 2 (2022).

[6] *See generally* Avani Uppalapti et al., *International Regulation of Sexual Orientation, Gender Identity, and Sexual Autonomy*, 18 GEO. J. OF GENDER & L. 635 (2017).

social cohesion—and is therefore to be resisted, or at least carefully regulated,[7] even by otherwise relatively benign governments.[8]

The fact that queer sexual desire challenges social norms points to a third concern. It is not just states (of either the authoritarian or liberal stripe) that attempt to keep sex within particular confines. Groups that exercise forms of social authority within states—for example, religious, ethnic, political, or other factions[9]—are often as determined as states to maximize their hold on power. Leaders are prone to stigmatize those who differ or dissent from dominant norms as disrespectful, iconoclasts, dangerous, or apostates.[10] Nowhere is this more true than as regards non-conforming forms of sex,[11] which run up against the very definitions of family and community that many social groups depend upon for their own authority.[12] In many cases, therefore, the official effort to limit sexual options is supported, indeed even demanded, by major parts of society itself.[13]

The response of international human rights law to the frequent denial of autonomy in making decisions about one's sex life has been muted at best. International human rights law does not yet codify a right to sexual liberty. In contrast to other critical aspects of self-realization (for example, conscience, speech, movement, or work choice) a right to sexual liberty can only be indirectly

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[7] "The separation of bodies in public space is the cornerstone of segregation policy and has long been practiced to regulate bodies in relation to race, especially, but also gender, age, class[,] disability and sexuality." Sally Hines, *The Feminist Frontier: On Trans and Feminism*, 28 J. GENDER STUD. 145, 154 (2019). More specifically, "marriage is a public institution that creates a right to private sexual relations, and yet is defined by public policy." Indeed, "[i]n the modern era, marriage has become the central legitimating institution by which the state regulates and permeates people's most intimate lives; it is the zone of privacy outside of which sex is unprotected. In this context, to speak of marriage as merely one choice among others is at best naive." WARNER, *supra* note 3, at 96.

[8] For example, "nativist nationalist politicians [in Eastern Europe] began to use LGBT rights as a way of reestablishing a sovereignty they felt had been conceded to Europe." MARK GEVISSER, THE PINK LINE: JOURNEY ACROSS THE WORLD'S QUEER FRONTIERS 22 (2020).

[9] John Mburu, *Awakenings: Dreams and Delusions of an Incipient Lesbian and Gay Movement in Kenya*, *in* DIFFERENT RAINBOWS 179, 184 (Peter Drucker ed., 2000) ("[D]iatribes [in parts of Africa] by politicians, clergy and intellectuals [have resulted in] the construction of a powerful mechanism for social control and imposition of a heterosexist ideology.").

[10] In the biblical story of Sodom and Gomorrah, for example, the "chameleon terms" of the parable "make it particularly useful for 'oppressive legislation and demagoguery.'" Nan Seuffert, *Queering International Law's Stories of Origin: Hospitality and Homophobia*, *in* QUEERING INTERNATIONAL LAW: POSSIBILITIES, ALLIANCES, COMPLICITIES, RISKS 213, 223 (Dianne Otto ed., 2018).

[11] VAID, *supra* note 2, at 383.

[12] PHELAN, *supra* note 4, at 62 ("[F]amilies must be both defended and used as weapons against sexual chaos . . . Nuclear families provide the only template for sexual order in our society."); DAVID BELL & JON BINNIE, THE SEXUAL CITIZEN: QUEER POLITICS AND BEYOND 145–46 (2000) ("The trouble with family . . . is that it is a term with too many things attached to it; it is too embedded in ideas about love, sex, relationships, privacy, ownership, responsibility and so on.").

[13] "Popular culture is permeated with ideas that erotic variety is dangerous, unhealthy, depraved, and a menace to everything from small children to national security . . . All these hierarchies of sexual value—religious, psychiatric, and popular—function in much the same ways as do ideological systems of racism, ethnocentrism, and religious chauvinism. They rationalize the well-being of the sexually privileged and the adversity of the sexual rabble." Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *in* PLEASURE AND DANGER 143, 151–52 (Carole Vance ed., 1984).

and partially claimed.[14] Advocates have invoked cognate rights (in particular, to non-discrimination and to privacy) to vindicate at least some components of sexual liberty.[15] But sexual liberty in a complete and affirmative sense—celebrating and protecting our right autonomously to decide how best to live our sex lives[16]—remains very much the proverbial right that dare not speak its name.[17]

The reluctance to claim sexual liberty moreover transcends the traditional progressive-conservative divide. Some extreme conservatives simply shudder at the thought of sex outside the confines of private procreative activity.[18] More articulate conservatives invoke history or tradition to argue against sexual liberty, alleging that sex has always been understood to be a valuable, if purely private, activity restricted to the matrimonial bedroom.[19] Neither of these objections should, however, give international human rights law pause. The revulsion of some people to a particular form of protection is not only legally irrelevant,[20] but is often at the root of precisely the disfranchisement international human rights law seeks to remedy—as in the case of miscegenation laws or *apartheid*.[21] Nor does international human rights law treat history or tradition as

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[14] *See, e.g.*, VAID, *supra* note 2, at 179 ("The goal to liberate the homosexual in every one of us is now phrased as the modest right to live without discrimination based on homosexual orientation.").

[15] *See* discussion *infra* at Parts I and II.

[16] Rosalind Petchesky, *Sexual Rights: Inventing a Concept, Mapping an International Practice*, *in* FRAMING THE SEXUAL SUBJECT: THE POLITICS OF GENDER, SEXUALITY, AND POWER 81, 88 (Richard Parker et al. eds., 2000) ("Why is it so much easier to assert sexual freedom in a negative than in an affirmative, emancipatory sense; to gain consensus for the right not to be abused, exploited, raped, trafficked, or mutilated in one's body, but not the right to fully enjoy one's body?").

[17] Int'l Council on Hum. Rts. Pol'y, *Sexuality and Human Rights* 7 (2009) ("Early efforts to bring human rights and sexuality together suffered from an initial focus on protecting people from harm . . . While initially justified as necessary, the abuse focus contributed to a lack of coherent rights-based claims that affirmed diverse sexualities.").

[18] MARTHA NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION & CONSTITUTIONAL LAW, at xiii (2010) ("For a long time, our society, like many others, has confronted same-sex orientations and acts with a politics of disgust, as many people react to the uncomfortable presence of gays and lesbians with a deep aversion akin to that inspired by bodily wastes, slimy insects, and spoiled food—and then cite that very reaction to justify a range of legal restrictions, from sodomy laws to bans on same-sex marriage.").

[19] Jyl Josephson, *Citizenship, Same-Sex Marriage, and Feminist Critiques of Marriage*, 3 PERSPECTIVES ON. POL. 269, 272 (2005) ("For the Christian Right and other social conservatives . . . restricting marriage to heterosexuals preserves an ascriptive version of citizenship, one that ensconces a particular form of intimate relationship as the state-recognized norm.").

[20] Some rights in the International Covenant on Civil and Political Rights, Dec. 16, 1996, 999 U.N.T.S 171 (hereinafter "ICCPR") may be limited, but only for only specifically enumerated reasons. While the protection of "public morals" might be asserted as justification, the Human Rights Committee has insisted that "the concept of morals derives from many social, philosophical and religious traditions: consequently limitations . . . for the purpose of protecting morals must be based on principles not deriving from a single tradition." U.N. Hum. Rts. Comm., Gen. Comment No. 22: Freedom of Thought, Conscience or Religion, ¶ 8, UN Doc. HRI/GEN/1/Rev.7 (2004). And even if that standard were somehow met, any limitation on a Covenant right must also be "consistent with the other rights recognized in the present Covenant," including of course the duty of non-discrimination—a notion that includes myriad permutations of sexuality and sexual identity as described in Part I below.

[21] *See* Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America*, *in* SOUTH AFRICA: THE RISE AND FALL OF APARTHEID (Nancy Clark ed., 2016).

a bulwark against protection.[22] To the contrary, practices such as slavery and torture with long historical pedigrees have been explicitly outlawed in part because their pervasive and long-standing natures exacerbated their perceived wrongfulness.[23]

A more nuanced conservative position steeped in libertarian thought might, however, be imagined. Those devoted to autonomy and skeptical about state power might be legitimately concerned that a right to sexual liberty could compromise efforts to ensure the (real) consent of those who participate in sex, to guard against abuse as an assault on true autonomy, and to respect the liberty of non-participants.[24] These are all fair and important issues, but the normative structure of international human rights law already caters to these concerns. It recognizes the importance of disallowing protection of even some very important forms of protected conduct to the extent that they infringe the rights and freedoms of others.[25] Moreover, its supervisory bodies, over roughly a half-century of practice, have been at pains to circumscribe protected freedoms in ways necessary to do justice to both countervailing rights and to pressing reasons of security and safety.[26] Because these concerns are so readily addressed, they ought not to obscure the overarching autonomy-enhancing nature of a right to sexual liberty.

In many ways, it is the progressive reluctance to claim sexual autonomy (both for queer people and more generally) that is more stubborn and more worrisome. Progressive reluctance to advocate a right to sexual liberty stems in part simply from fear that the effort would be pointless given the interest convergence described above among so many states and multiple powerful social actors committed to sexual conformity.[27] While this might prove to be the case, states do on occasion consent to the codification of rights not aligned with prevailing practice—especially where they can see that broader economic or other interests are served. Critically, they have done so even on issues that make many governments very uncomfortable—for example, on the elimination of all forms of discrimination against women, a duty that now binds all but seven countries in

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[22] VAID, *supra* note 2, at 338 ("The burden is on the religious right's leaders to demonstrate how their views are compatible with a democratic political system.").

[23] *See* LYNN HUNT, INVENTING HUMAN RIGHTS: A HISTORY (2008).

[24] *See generally,* Cass Sunstein & Richard Thaler, *Libertarian Paternalism is Not an Oxymoron*, 70 U. Chi. L. Rev. 1159 (2003).

[25] Multiple civil and political rights—including to liberty of movement, to manifest religion or belief, to freedom of expression, to engage in peaceful assembly, and to enjoy freedom of association—are expressly subject to limitations necessary to protect the rights of others. ICCPR, *supra* note 20, at arts. 12, 18, 19, 21, 22. Economic, social and cultural rights may be limited where necessary to promote the general welfare in a democratic society. International Covenant on Economic, Social and Cultural Rights, art. 4, Dec. 16, 1996, 999 U.N.T.S 171 [hereinafter "ICESCR"].

[26] *See* NIHAL JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL REGIONAL AND INTERNATIONAL JURISPRUDENCE 146–64 (2017).

[27] "[I]t is no accident that gay people viewed gay identity under a very thin description. Survival dictated as much. It argued for a strategy of denial—not just of the particular difference that prevailing external descriptions imposed, but of all difference . . . [so that] gay people came to describe themselves as just like everyone else . . . They sought to establish gay sex as a fundamental right by generalizing, abstracting, and sanitizing it. In short, they tried to offer a very thin, unthreatening, and largely desexualized description of gay identity." Daniel Ortiz, *Creating Controversy: Essentialism and Constructivism in the Politics of Gay Identity*, 79 VA. L. REV. 1833, 1850–51 (1993).

the world.[28] In a perhaps ironic sense, the relative weakness of international human rights *enforcement* may actually be a strength on the *accession* front, neutralizing at least some of the resistance to joining the normative conversation in the first place.[29] And yet, once that conversation is engaged, the subtle pressure of the ongoing dialogue of justification at the heart of the enforcement system of international human rights law has often been surprisingly effective. It often stimulates improvements in state practice, at least incrementally and at the margins.[30]

The more concerning version of progressive reluctance to argue for a right to sexual liberty is often rationalized as pragmatic. Why advocate a clearly controversial right to sexual liberty when sexual minorities can access so much—for example, spousal benefits, parenting rights, sex reassignment—by invoking already codified rights, in particular protections against discrimination? Is it not risky to push the envelope in ways that are virtually guaranteed to generate opposition?[31]

This view is, however, highly partial—privileging claims for the *integration* of those seen to be sexually different[32] over claims that seek the

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[28] Holy See, Iran, Somalia, Sudan, and Tonga are the only countries that have not signed the Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13. Palau and the United States have signed, but not ratified, the Women's Convention. *Status of Treaties: Convention on the Elimination of All Forms of Discrimination Against Women*, UNITED NATIONS TREATY COLLECTION (last visited Dec. 20, 2021), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4

[29] Indeed, it has been perhaps skeptically observed that "human rights have to date transformed the terrain of idealism more than they have the world itself." SAMUEL MOYN, HUMAN RIGHTS AND THE USES OF HISTORY 100 (2017).

[30] For example, a decision of the UN Human Rights Committee on same-sex pension rights was critical to convincing Colombia to change its domestic pension regime, while an advisory opinion from the Interamerican Court of Human Rights persuaded Costa Rica to legalize same-sex marriage and to recognize transgender rights. Bruce Wilson & Camila Gianella-Malca, *Overcoming the Limits of Legal Opportunity Structures: LGBT Rights' Divergent Paths in Costa Rica and Columbia*, 61 LAT. AM. POL. & SOC'Y 138, 147–48, 153 (2019). Adopting the process-based performance framework (namely, the ability of an organization to reach smaller-scale objectives, which might be helpful towards the achievement of the overall goals) a recent analysis demonstrates the utility of the UN periodic reporting system to both create learning opportunities and generate pressure on states. Valentina Carraro, *Promoting Compliance with Human Rights: The Performance of the United Nations' Universal Periodic Review and Treaty Bodies*, 63 INT'L STUD. Q. 1196 (2019).

[31] *See generally* ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY (1996); *see also* Andrew Sullivan, *The End of Gay Culture: Assimilation and Its Meaning*, THE NEW REPUBLIC (Oct. 23, 2005), https://newrepublic.com/article/61118/the-end-gay-culture; VAID, *supra* note 2, at 377 ("Our squeamish liberal allies would grant us 'civil rights' but would reject our claim that we are morally equivalent to straight people in every way.").

[32] BELL & BINNIE, *supra* note 12, at 49 ("[T]he gay conservative's dream [was] . . . invisibility and total assimilation into mainstream (for which read: white, middle-class, suburban) America."); Michael Warner, *Normal and Normaller: Beyond Gay Marriage*, 5 J. LESBIAN & GAY STUD. 119, 131 (1999) ("Marriage . . . would make for good gays—the kind who would not challenge the norms of straight culture, who would not flaunt their sexuality, and who would not insist on living differently from ordinary folk.").

explicit *validation of sexual difference and choice* itself.[33] While integration for those who seek it should of course be available,[34] a full-throated right to sexual liberty is not just about disallowing the social exclusion of sexual outliers, enabling them to enjoy whatever things are valued by the sexually compliant.[35] It is rather about the proclamation of sexual choice and divergence as positive things[36]—in the same way that diversity engendered by freedoms of belief or speech or work choice is understood to be a positive thing. Sexual liberty should be protected as a matter of principle because it is a big part of what makes life worth living, and because it enables us to connect and to experience emotion in ways that are natural and important.

Codifying a right to sexual liberty is also a strategically critical means of decentering the significance of majority preferences.[37] Whereas majoritarian values inform both non-discrimination and privacy rights,[38] a right to sexual liberty would ensure that individual autonomy is the starting point for analysis.[39] Because any conversation about balancing of interests would necessarily start from the premise that *all* persons—particularly those outside the circle of power—must be able to live fulfilling sex lives,[40] the weight of even clearly dominant social preferences would be dramatically reduced.[41]

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[33] VAID, *supra* note 2, at 4 ("The irony of gay and lesbian mainstreaming is that more than fifty years of active effort to challenge homophobia and heterosexism have yielded us not freedom but 'virtual equality,' which simulates genuine civil equality but cannot transcend the simulation.").

[34] Yet, as Joshi rightly observes, the quest for inclusion and respectability may make sexual minorities "publicly respectable and privately queer. These constituent desires do not sit comfortably together." Yuvraj Joshi, *Respectable Queerness*, 43 COLUM. HUM. RTS. L. REV. 415, 448 (2012).

[35] One of the main challenges is to discover "[h]ow . . . appeals [can] be made to international human rights law to make precarious queer lives more liveable without legitimising the heteronormative imperial heritage of the normative framework of international law." Dianne Otto, *Introduction: Embracing Queer Curiosity*, *in* QUEERING INTERNATIONAL LAW: POSSIBILITIES, ALLIANCE, COMPLICITIES, RISKS 1, 7 (Dianne Otto ed., 2018).

[36] WARNER, *supra* note 3, at viii ("[Q]ueer culture has long cultivated an alternative ethical culture that is almost never recognized by mainstream moralists as anything of the kind.").

[37] STYCHIN, *supra* note 5, at 29 ("The strategy, for those who seek to undermine the universality of the (hetero)sexual subject, must continue to be resistance to and subversion of, its rhetorical privileging.").

[38] *See* Parts I and II *infra*.

[39] "Most people mistake their sexual preference for a universal system that will or should work for everyone . . .We have learned to cherish different cultures as unique expressions of human inventiveness rather than as the inferior or disgusting habits of savages. We need a similar anthropological understanding of different sexual cultures." Rubin, *supra* note 13, at 154.

[40] Jeffery Kosbie, *How the Right to be Sexual Shaped the Emergence of LGBT Rights*, 22 U. PA. J. CONST. L. 1389, 1393 (2020) ("[A] right to be sexual . . . claims protection from state regulation based on the dignity of sexual choices and sexual identities. The state can regulate sexual violence and lack of consent, but its justifications cannot be about the dignity or morality of sexual conduct.").

[41] Rights-based based protection "is stronger than without rights . . . [because] curtailments and restrictions of rights must be specifically justified. Acknowledging a right places a burden of explanation and justification on the actor who wants to restrict the right." ANNE PETERS, BEYOND HUMAN RIGHTS: THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW 538 (2016).

In short, it is my view that because the imperative is real and the tools to design a fair- minded right to sexual liberty are well-known and time-tested, we should embrace the challenge.[42] Sexual liberty must come out of the legal closet.

My argument proceeds in four parts.

Part I assesses the contributions of the foundational principle of non-discrimination to realizing aspects of a right to sexual liberty. We should acknowledge that advocacy has so far opened many vitally important conceptual doors—for example, striking down gay-oriented sodomy laws; condemning homophobic killings; mandating equality in such spheres as respect for relationships and employment; guaranteeing access to health in relation to both disease and sex reassignment; and protecting sexual minorities seeking to speak and act collectively.

Part II identifies concerns about the utility of the non-discrimination paradigm to advance queer rights on the international plane. Despite its strengths, an advocacy strategy predicated on non-discrimination requires the suppression of sexuality, exposes persons who engage in queer sex to the vagaries of non-discrimination's unwieldy conceptual framework, and does not do the basic job of protecting the right to have sex.

Part III considers the possibility that the failings of the non-discrimination framework can be countered by reliance on privacy doctrine. I argue that while the international right to privacy does indeed have the power to strike down some constraints on sexual liberty, it is hopelessly entrenched in traditional assumptions about what types of sex are worthy of protection—and hence cannot be relied upon to vindicate a queer vision of sexual liberty.

Part IV addresses the question of why it makes sense to advocate an international human right to sexual liberty. Especially with international human rights law under siege for being overly prescriptive[43] and insufficiently attentive to non-Western views,[44] why push for a robust right to sexual liberty? The fundamental point is that it is important as a matter of principle for human rights law to tackle the ongoing dissonance between what people say (or are told to say) about sex and how they actually seek to live. I also explain why I believe that the establishment of a right to sexual liberty may help to meet concerns about the cultural inclusiveness of international human rights law and may refurbish the human rights edifice in a way that continued reliance on identity-based pursuit of an integrative agenda will not.

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[42] VAID, *supra* note 2, at 324 ("Our avoidance [of sexuality] merely lends credence to the lie perpetrated by the right. Since we have nothing to be ashamed of . . . let us stop acting guilty.").

[43] STEVEN RATNER, THE THIN JUSTICE OF INTERNATIONAL LAW: A MORAL RECKONING OF THE LAW NATIONS (2015); PETERS, *supra* note 41.

[44] *See generally* MICHAEL IGNATIEFF, THE ORDINARY VIRTUES: MORAL ORDER IN A DIVIDED WORLD (2017).

I. Where Non-Discrimination Has Taken Us

There is no right to sexual liberty in international human rights law.[45] Such a right has, moreover, never been formally proposed by any state or global governance body.[46] Even within the non-governmental queer rights community, the pitch for "broad sexual rights and/or bodily autonomy" remains rare.[47] It has been overshadowed by the chorus of acclaim for a patchwork approach[48] that marries a broadened understanding of the scope of non-discrimination with tailored applications of already codified human rights.[49] Under this amalgam approach,[50] sexual minorities are deemed entitled to the benefit of traditional internationally guaranteed human rights.[51] They are not, however, able to claim rights beyond the traditional catalog,[52] including to sexual liberty as such.

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[45] The closest international human rights law has come to an affirmation of sexual liberty is the view of the Committee on Economic, Social and Cultural Rights that the right to health "include[s] the right to control one's health and body, including sexual and reproductive freedom." U.N. Comm. on Econ., Soc. & Cultural Rts., Gen. Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12), ¶ 8, UN Doc. E/C.12/2000/4 (Aug. 11, 2000). But the Committee has yet to rely on that view in its review of state party reports as the basis for an affirmative duty to respect a broad-ranging right to sexual liberty, focusing instead on specific concerns such as sexual minority access to health care, avoidance of unwarranted medical interventions, and decriminalization of same-sex relations.

[46] Notably, however, the World Health Organization's (non-binding) 2002 definition of sexual rights included the rights "to decide to be sexually active or not; . . . [to] consensual sexual relations; . . . [and to] pursue a satisfying, safe, and pleasurable sexual life." Int'l Council on Hum. Rts. Pol'y, *supra* note 17, at 9.

[47] SEXUAL RIGHTS INITIATIVE, ADVANCING SEXUAL RIGHTS FOR ALL 4 (2016). Academic opinion has at times been similarly skeptical. Peters, for example, argues that some "rights proclamations seem exaggerated . . . The World Congress of Sexology has propagated rights to comprehensive sex education and to sexual pleasure, and it notes that 'sexual rights are fundamental and universal human rights' . . . These claims . . . seem too specific and/or not foundational enough to warrant the human rights label in themselves." PETERS, *supra* note 41, at 443–44.

[48] It has been suggested that the emergence of protection for sexual minorities was embedded in the women's anti-violence struggle and advocacy of HIV-related health concerns, with the multiple sources of rights and the fractured structures and processes of human rights militating against a unified conceptual development of relevant rights. Mindy Jane Roseman & Alice Miller, *Normalizing Sex and Its Discontents: Establishing Sexual Rights in International Law*, 34 HARV. J. L. & GENDER 313, 332–35 (2011).

[49] "[T]he content of the discourse generated at this stage of development shies away from the language of 'sexual rights' utilised earlier by NGOs at UN forums, to a terrain that deploys accepted terms drawn from the existing human rights system." Aeyal Gross, *Homoglobalism: The Emergence of Global Gay Governance*, *in* QUEERING INTERNATIONAL LAW: POSSIBILITIES, ALLIANCES, COMPLICITIES, RISKS 148, 164 (Dianne Otto ed., 2018). The influential non-governmental "Yogyakarta Principles" are very much in this mode, seeking simply "to capture the existing state of international law." Michael O'Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, 8 HUM. RTS. L. REV. 207, 235 (2008). The initial Yogyakarta Principles were supplemented in 2017. *See* INTERNATIONAL COMMISSION JURISTS, ADDITIONAL PRINCIPLES AND STATE OBLIGATIONS ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION, GENDER IDENTITY, GENDER EXPRESSION AND SEX CHARACTERISTICS TO COMPLEMENT THE YOGYAKARTA PRINCIPLES (2017). For a detailed analysis of the Yogyakarta Principles approach, *see* Matthew Waites, *Critique of 'Sexual Orientation' and 'Gender Identity' in Human Rights Discourse: Queer Politics Beyond the Yogyakarta Principles*, 15 CONTEMP. POL. 137 (2009).

[50] For example, UN Special Rapporteur Paul Hunt found that sexual rights could be embedded in "privacy, equality, and the integrity, autonomy, dignity, and well-being of the individual." Paul Hunt

The absence of a right to sexual liberty in international human rights law may reflect the priorities of the predominantly heterosexual male group that conceived that body of law. One can assume that their priorities did not extend to codification of sexual liberty since the variant of that liberty most important to them—access to women to satisfy their sexual desires—was both assumed to be natural[53] and, in practical terms, was not under threat. Indeed, the establishment of a right to sexual liberty *for all* might have been seen to pose a threat to their extant privileges,[54] enabling wives to decline their husbands' sexual demands and empowering sex workers to insist on safety and fairness in their sexual transactions. At least as seriously, liberating sexual minorities to pursue lives natural to them would have amounted to a direct challenge to the sanctity of family forms[55] that have long served most straight men well.[56] It is thus not surprising that, rather than codifying a right to sexual liberty, the drafters of the international human rights regime explicitly codified the centrality of traditional marriage and the heterosexual family.[57]

(Special Rapporteur), *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, ¶ 54, UN Doc. E/CN.4/2004/49 (Feb. 16, 2004).

[51] "The predominant approach in international human rights discourse has been to attach 'sexual orientation' and 'gender identity' individually or in concert to existing human rights guarantees, including privacy, non-discrimination and health." Jena McGill, *Sogi . . . So What? Sexual Orientation, Gender Identity and Human Rights Discourse at the United Nations*, 3 CAN. J. HUM. RTS. 1, 20 (2014). It has, thus, been argued that the Yogyakarta Principles "betray continued compartmentalisation, and reveal the limits of formal human rights doctrine in this area." INT'L COUNCIL ON HUM. RTS. POL'Y, *supra* note 17, at 10.

[52] "[T]he concept of equality . . . does not support differences, it only supports sameness . . . The law provides no room to argue that we are different, but are nonetheless entitled to equal protection." Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, *in* WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS 757, 759 (Mark Blasius & Shane Phelan eds., 1997). In the context of claims based on sexual orientation or identity, the goal of non-discrimination law is not "expanding the content of . . . rights or conceiving any new rights in the area of sexuality." Kristen Walker, *Capitalism, Gay Identity and International Human Rights Law*, 9 AUSTL. GAY LESBIAN L. J. 58, 67 (2000).

[53] "[Feminist] critique has suggested that not only is the body of the citizen normatively male, but also that this maleness makes it invisible in regimes of Western societies . . . The normative male body is not simply absent, but is phallic. The phallic body is impermeable, a source by never a receptacle . . . Masculinity can be phallic only because femininity is vulnerable, castrated, unfixed." PHELAN, *supra* note 4, at 41–43.

[54] WARNER, *supra* note 3, at 24 ("Normally, straight male power is covered by a tacit immunity agreement.").

[55] BELL & BINNIE, *supra* note 12, at 135 (The family is . . . the primary moral location where sexual citizenship is affirmed: families are assumed to be a good thing almost by definition."). Noting "the pre-eminence of the family in international law," Walker points to the failure of international human rights law "to challenge the ideological role of the family in international law and under global capitalism." Walker, *supra* note 52, at 69.

[56] "[T]he centering of notions of the family obviously draws on sexualized constructions of appropriate (and inappropriate) modes of living together and caring for one another." BELL & BINNIE, *supra* note 12, at 10. "[T]he home becomes a haven for men to the exact extent that women do the physical and emotional labor of the family." PHELAN, *supra* note 4, at 68. Thus, "[t]he deeper threat we present to heterosexual culture lies in the disruption that our sexuality and gender nonconformity make in a society invested in rigid gender roles and the myth that the heterosexual nuclear family should be the sole form of relationship." VAID, *supra* note 2, at 191.

[57] *See* ICCPR, *supra* note 20, art. 23 ("The family is the natural and fundamental group unit of society and is entitled to protection by Society and the state. The right of men and women of marriageable age

Keenly aware of these in-built limitations,[58] early advocates for gay and other queer rights within the UN system did not pursue a truly liberationist agenda.[59] Not only was the edifice of international human rights law unfriendly to the validation of non-traditional sexuality, but bruising defeats when claiming sexual liberty in domestic courts[60] were no doubt front of mind. As Goldberg's analysis of "risky arguments" makes clear, "a discrete argument has the potential to accomplish much of what the norm-challenging argument seeks, without the costs of that argument."[61] Viewed in this light, the non-discrimination framework—seeking *not to challenge* the rights protected but rather to gain entry for sexual minorities into the circle of those able to *claim traditional rights*—was understandably attractive. It also had a textually plausible foundation in UN human rights treaties,[62] and had already generated some victories at the national and regional levels.[63] Advocates were buoyed by the belief that, once inside the tent of entitlement, queer people could massage the content of at least some traditional rights—privacy chief among them[64]—in ways that would better the lives of sexual minorities.[65] They therefore conceived, and successfully sold, an identity-based roadmap of international queer rights.[66]

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to marry and to found a family shall be recognized."); International Covenant on Economic, Social and Cultural Rights art. 10, Dec. 16, 1996, 999 U.N.T.S 171 ("The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society . . ."); Damian Gonzalez-Salzberg, *Queering Reparations under International Law: Damages, Suffering, and (Heteronormative) Kinship*, 116 AM. J. OF INT'L L UNBOUND 5, 6 (2022) ("Despite the absence of any description as to the type of family envisioned [in the Universal Declaration of Human Rights and the Civil and Political Covenant], the context of adoption of both international instruments evidences that the family structure the drafters had in mind was that of the nuclear family, composed of the dyadic conjugal unit and their offspring.").

[58] Jasbir Puar, *Rethinking Homontationalism*, 45 INT'L J. MIDDLE EAST STUD. 336, 336 (2013).

[59] "[M]uch legal work and advocacy on sexuality draws on older, perhaps more comfortable thinking that assumes most people across the world 'naturally' have settled identities . . . [leading to invocation of] principles of non-discrimination . . . apply[ing] this principle to identities and practices that are assumed to be settled and fixed." Int'l Council on Hum. Rts. Pol'y, *supra* note 17, at 18–19; *see also*, Sonia Katyal, *Exporting Identity*, 14 YALE J. L. & FEMINISM 97, 119 (2002).

[60] "In the United States . . . identity-based strategies became uniquely necessary in the wake of Bowers v. Hardwick . . . [which] foreclosed constitutional protection for private sexual behavior between members of the same sex [thus forcing] litigants . . . to explore protections based on sexual identity as an alternate means of protection . . . [But this] masked the potentially uncomfortable reality that sexual identity is not always a fixed and central category." Katyal, *supra* note 59, at 101; *see also* Ortiz, *supra* note 27, at 1852.

[61] Suzanne Goldberg, *Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087, 2094 ("[E]ven those [judges] who agree with the litigant's ultimate claim may go out of their way to reject or otherwise disassociate themselves from arguments that directly contest norms embedded in widespread practices.").

[62] *See* ICCPR, *supra* note 20, at arts. 2, 26; *see also* ICECSR, supra note 25, at art. 2.

[63] Stewart Chang, *The Postcolonial Problem for Global Gay Rights*, 32 BOS. U. INT'L L. J. 309, 311 (2014) ("As has been the case with other 'modern' human rights, the shift in European and American [queer rights] policy tacitly becomes a cue for the remaining parts of the globe to catch up.").

[64] *See infra* Part III.

[65] STYCHIN, *supra* note 5, at 154–55 ("The assertion of coherent identity categories may . . . be legally enabling . . . Claims that the category warrants legal protection from invidious discrimination demand that it be understood as coherent, possessing some degree of stability . . .").

[66] Referring to the advent of the "Yogyakarta Principles," *see supra* note 49, Gross observes that "the idea that everyone has a sexual orientation . . . which is integral to their humanity . . . represents an

An early victory under the non-discrimination framework was the UN Human Rights Committee's 1994 decision in *Toonen v. Australia*.[67] The Committee found the anti-sodomy laws of the state of Tasmania both discriminated on the basis of sexual orientation and breached the right to privacy. Succeeding on this challenge was easier than it might have been, since Australia declined to defend Tasmania's anti-gay laws as reasonable limits justified by public morals concerns[68]—an argument that had actually been found persuasive in the earlier case of *Hertzberg v. Finland*.[69] Nor was the decision an especially clear vindication of the importance of sexual orientation or identity as such. Rather than treating sexual orientation or identity as a specific form of protected "other status" under the International Covenant on Civil and Political Rights (ICCPR),[70] the Committee found quality rights to inhere in gay men on the grounds of their "sex"[71]—seemingly adopting a view of victimized men as "sisters in suffering."[72]

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exportation of the Western model of sexual orientation." Aeyal Gross, *Queer Theory and International Human Rights Law: Does Each Person Have a Sexual Orientation?*, 101 AM. SOC. INT'L L. 129, 130. The approach taken to vindication of queer rights was thus arguably an instance in which non-governmental advocates "may work for the people in the South or in the non-Western world, but this does not mean that they represent the people in the South or in the non-Western world." YASUAKI ONUMA, A TRANSCIVILIZATIONAL PERSPECTIVE ON INTERNATIONAL LAW 76 (2010).

[67] Toonen v. Australia, Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992 (U.N. Hum. Rts. Comm. March 31, 1994).

[68] *Id.* at ¶ 6.1.

[69] The Hertzberg case determined that while advocacy of homosexuality was prima facie protected speech under the Civil and Political Covenant, Finland enjoyed a "margin of appreciation" to limit broadcast on radio and television of matters that "could be judged as encouraging homosexual behaviour," allowing it to invoke the "public morals" exception under Art. 19(3). Leo Hertzberg v. Finland, Communication No. 61/79, UN Doc. CCPR/C/OP/1, ¶ 124 (U.N. Hum. Rts. Comm. 1985). *See also* Laurence Helfer & Alice Miller, *Sexual Orientation and Human Rights: Toward a United states and Transnational Jurisprudence*, 9 HARV. HUM. RTS. J. 61, 63, 72 (1996).

[70] ICCPR, *supra* note 20, at arts. 2, 26.

[71] Toonen v. Australia, *supra* note 67, at ¶ 8(7); Helfer & Miller, *supra* note 69, at 76 ("This interpretive choice is remarkable. No party to the case had raised the sex discrimination argument, and the 'other status' clause was the obvious textual choice under both the ICCPR and analogous European precedents."); *see also*, Jack Donnelly, *Non-Discrimination and Sexual Orientation: Making a Place for Sexual Minorities in the Global Human Rights Regime*, *in* INNOVATION AND INSPIRATION: FIFTY YEARS OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 95, 108 (Peter Baeher et al eds., 1999) (characterizing the Toonen approach as "substantively problematic").

[72] Rus Funk, *Men Who Are Raped*, *in* MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME 222 (Michael Scarce ed., 1997). The reasoning is of course logically defensible on the basis of pure literalism. "The argument is simple, formal, and straightforward. If a person's sexual orientation is a dispositional property that concerns the sex of people to whom he or she is attracted, then, to determine a person's sexual orientation, one needs to know the person's sex and the sex of the people to whom he or she is primarily sexually attracted." Edward Stein, *Evaluating the Sex Discrimination Argument for Gay and Lesbian Rights*, 49 UCLA L. REV. 471, 485–86 (2001). Much the same appeal to literalism has been adopted by the US Supreme Court. *See Bostuck v. Clayton County*, 140 S. Ct. 1731 (2020) ("We agree that homosexuality and transgender status are distinct concepts from sex. But . . . discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex: the first cannot happen without the second."). But as a matter of international treaty interpretation, a purely literal interpretation of this kind is impermissible; rather, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969 1155 U.N.T.S. 331. As the International Court of

Despite its conceptual untidiness, it is undeniable that the *Toonen* decision was path- breaking. The Human Rights Committee began virtually immediately condemning states that criminalized same-sex relations. This effort drew initially on the right to privacy,[73] but subsequently invoked the duties to respect the right to life[74] and to avoid cruel, inhuman, or degrading treatment.[75] By 2012, the UN High Commissioner for Human Rights adopted a general position that international human rights law requires states to decriminalize homosexuality.[76]

Nor has progress been limited to decriminalization. The duty to guarantee sexual minorities access to rights without discrimination now includes entitlement to "special measures of protection . . . [where there are] specific threats or pre-existing patterns of violence."[77] Impartial investigations of anti-queer violence must be conducted,[78] with effective redress provided,[79] including

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Justice has made clear, "[f]or treaty interpretation rules there is no 'ordinary meaning' in the absolute or the abstract." Land, Island and Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras), Separate Opinion, 1992 I.C.J Rep. 351, 719 (Sept. 11); Constitution of the Maritime Safety Committee of the Intergovernmental Maritime (IMCO), Advisory Opinion, 1960 I.C.J. Rep. 150, 158 (June 8) ("The word obtains its meaning from the context in which it was used."). Interpretation should thus recognize that as a matter of principle, "patriarchy and heterosexual dominance are two . . . separable systems . . . [I]t mischaracterizes laws that discriminate on the basis of sexual orientation to see them primarily justified by sexism rather than homophobia . . . By failing to address arguments about the morality of same-sex sexual acts and the moral character of lesbians, gay men, and bisexuals, the sex discrimination argument 'closets,' rather than confronts, homophobia." Stein, *supra* note 72, at 500, 503–504.

[73] The Human Rights Committee's first expression of concern "at the serious infringement of private life in some states which classify as a criminal offence sexual relations between adult consenting partners of the same sex carried out in private" occurred in 1995. U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: United states of America, ¶ 287, UN Doc. CCPR/C/79/Add.50 (April 7, 1995) [hereinafter "U.S. 1995 Concluding Observations"].

[74] The Human Rights Committee first condemned the imposition of the death penalty as upon conviction for homosexual acts as a breach of Art. 6 in 2007. U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Sudan, ¶ 19, UN Doc. CCPR/C/SDN/CO/3 (Aug. 29, 2007).

[75] The Human Rights Committee first invoked Article 7 in 2010 as the basis for recommending the decriminalization of sexual activities between adult males and the extension to homosexuals of protection against violence. U.N. Hum. Rts Comm., Concluding observations of the Human Rights Committee: Uzbekistan, ¶ 22, UN Doc. CCPR/C/UZB/CO/3 (April 7, 2010).

[76] U.N. High Comm'r Hum. Rts., *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, at 28, UN Doc. HR/PUB/12/06 (2012). The conclusion was reached by reference to the duties of privacy and non-discrimination, *id.* at 30, and was restricted to "private, adult, consensual same-sex conduct." *Id.* at 37. The imposition of the death penalty to punish homosexuality by five countries was explicitly condemned. *Id.* at 34.

[77] U.N. Hum. Rts. Comm., Gen. Comment No. 36: Right to Life, ¶ 23, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018).

[78] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Peru, ¶ 8, UN Doc. CCPR/C/PER/CO/5 (April 29, 2013) (states "should provide effective protection to LGBT individuals and ensure the investigation, prosecution, and punishment of any act of violence motivated by the victim's sexual orientation or gender identity.").

[79] "For restitution to be effective, efforts should be made to address any structural causes of the violation, including any kind of discrimination related to, for example, gender, sexual orientation . . . and all other grounds of discrimination." U.N. Comm. against Torture, Gen. Comment No. 3: Implementation of Art. 14 by states Parties, ¶ 8, UN Doc. CAT/C/GC/3 (Dec. 13, 2012).

by way of hate crime legislation.[80] Efforts to "cure" queer people or to impose "corrective" surgery on them must be ended.[81] Evictions on the basis of sexuality are prohibited.[82] Sexual minorities are entitled freely to access the labor market.[83] Transgender persons must be given access to gender reassignment surgery[84] and to a process for legal gender recognition whether they choose such surgery or not.[85] There is a duty to combat "bullying . . . in schools, in particular against lesbian, gay, bisexual, and transgender students."[86] Public health infrastructure must include appropriate sexual and reproductive health services, with "staff . . . trained to recognize and respond to the specific needs of vulnerable or

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[80] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Swaziland, ¶ 19, UN Doc. CCPR/C/SWZ/CO/1 (Aug. 23, 2017) ("The state party should . . . [a]dopt legislation explicitly prohibiting hate crimes against lesbian, gay, bisexual, transgender and intersex persons.").

[81] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Ecuador, ¶ 12, UN Doc. CCPR/C/ECU/CO/6 (Aug. 11, 2016) ("The state party should . . . redouble its efforts to eliminate fully the practice of placing [LGBTI] persons in institutions for treatment to 'cure their sexual orientation or gender identity'; adopt the necessary measures to investigate, prosecute and ensure suitable punishment for persons responsible for such 'treatment'; and provide full reparation for victims, including rehabilitation and compensation."); U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Australia, ¶ 26, UN Doc. CCPR/C/AUS/CO/6 (Dec. 1, 2017) ("The state party should . . . move to end irreversible medical treatment, especially surgery, of intersex infants and children, who are not yet able to provide fully informed and free consent, unless such procedures constitute an absolute medical necessity.") [hereinafter "Australia 2017 Concluding Observations"].

[82] U.N. Comm. on Econ., Soc., and Cultural Rts., Concluding observations of the Human Rights Committee: Uganda, ¶ 30(c), UN Doc. E/C.12/UGA/CO/1 (July 8, 2015). ("[T]he Committee expresses concern about information on many incidents of eviction of tenants following the passage of the Anti-Homosexuality Act in 2014 . . . [T]he Committee urges the state party to . . . [i]nvestigate all reported cases of illegal evictions of lesbian, gay, bisexual, transgender and intersex persons and ensure they are compensated . . .").

[83] "The labour market must be open to everyone under the jurisdiction of states parties . . . [T]he Covenant prohibits any discrimination in access to and maintenance of employment on the grounds of . . . health status (including HIV/AIDS), sexual orientation . . . or other status, which has the intention or effect of impairing or nullifying exercise of the right to work on a basis of equality." U.N. Comm. on Econ., Soc. and Cultural Rts., Gen. Comment No. 18: The Right to Work, ¶ 12(b)(I), UN Doc. E/C.12/GC/18 (Feb. 6, 2006). In addition, the duty to provide equal remuneration for work of equal value "applies to all workers without distinction based on . . . sexual orientation, gender identity or any other ground." U.N. Comm. on Econ., Soc. and Cultural Rts., Gen. Comment No. 23: The Right to Just and Favourable Conditions of Work, ¶ 11, UN Doc. E/C.12/GC/23 (April 27, 2016).

[84] U.N. Comm. on Econ., Soc. and Cultural Rts., Concluding observations of the Human Rights Committee: Lithuania, ¶ 8, UN Doc. E/C.12/LTU/CO/2 (June 24, 2014). ("The Committee is concerned at the situation of individuals in the state party who face discrimination in their enjoyment of the rights guaranteed under the Covenant on the grounds of sexual orientation or gender identity, including access to health-care services such as gender reassignment surgery."). [hereinafter "Lithuania 2014 Concluding Observations"].

[85] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Ireland, ¶ 8, UN Doc. CCPR/C/IRL/CO/3 (July 30, 2008) ("The Committee . . . is furthermore concerned that the state party has not recognized a change of gender by transgender persons by permitting birth certificates to be issued for these persons.") [hereinafter "Ireland 2008 Concluding Observations"]; Lithuania 2014 Concluding Observations, *supra* note 84, ¶ 8 ("The Committee encourages the state party to take effective measures to ensure that lesbian, gay, bisexual and transgender persons can enjoy their economic, social and cultural rights without discrimination . . . and that legal recognition of their gender is not dependent on whether or not they have undergone gender reassignment surgery.").

[86] U.N. Comm. on Econ., Soc. And Cultural Rts., Concluding observations of the Human Rights Committee: Kazakhstan, ¶¶ 48–49, UN Doc. E/C.12/KAZ/CO/2 (March 29, 2019).

marginalized groups."[87] Asylum from "persecution owing to . . . sexual orientation or gender identity" is to be guaranteed.[88] Sexual minority migrants must be protected against the particular risks of exploitation and abuse.[89] Subject only to generally applicable limits,[90] queer people may publicly "express[] sexual identity and seek[] understanding for it,"[91] assemble to advocate their rights whether or not such activities "may be regarded as annoying or offensive by others,"[92] and openly participate in political and public life.[93] International human rights law is now understood even to impose a duty on states to undertake proactive efforts "to change societal perceptions of lesbian, gay, bisexual, transgender and intersex persons."[94]

There have, of course, also been some setbacks. Perhaps ironically, given the pace with which it has been embraced by many states,[95] the right of sexual minorities to marry and to form a family has foundered in global human rights jurisprudence[96]—though the analysis undergirding its rejection is patently

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[87] U.N. Comm. on Econ., Soc. And Cultural Rts., Gen. Comment No. 14, *supra* note 47, at ¶¶ 18, 37.

[88] U.N. Comm. against Torture, Concluding observations on the second periodic report of Namibia, ¶ 27, UN Doc. CAT/C/NAM/CO/2 (2017); *see generally* U.N. High Comm'r on Refugees, Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity, UN Doc. HCR/GIP/12/09 (Oct. 23, 2012).

[89] "The Committee recommends that the state party . . . [f]ocus on combating social stigmatization and sanction all forms of aggression and violence against migrants, with particular emphasis on protecting . . . lesbian, gay, bisexual, transgender and intersex persons . . . and develop campaigns against machismo and homophobia and promote social inclusion and respect for diversity." U.N. Comm. on the Prot. of the Rts. of All Migrant Workers & Members of Their Families, Concluding observations on the second periodic report of Guatemala, ¶ 27(d), UN Doc. CMW/C/GTM/CO/2 (May 2, 2019).

[90] ICCPR, *supra* note 20, at art. 19(3). Importantly, LGBTI protests may not be subject to "unnecessary or disproportionate limitations." Praded v. Belarus, Communication No. 2029/2011, UN Doc. CCPR/C/112/D/2029/2011, ¶ 7.8 (U.N. Human Rts. Comm. Nov. 25, 2014).

[91] Fedotova v. Russian Federation, Communication No. 1932/2010, UN Doc. CCPR/C/106/D/1932/2010, ¶ 10. 8 (U.N. Hum. Rts. Comm. Nov. 30, 2012).

[92] Alekseev v. Russian Federation, Communication No. 1873/2009, UN Doc. CCPR/C/109/D/1873/2009, ¶ 9.6 (U.N. Hum. Rts. Comm. Dec. 2, 2013).

[93] For example, it was determined that Colombia had a duty to "[e]nsure that . . . lesbian, bisexual and transgender women . . . are represented in the Presidential Council for Women's Equity." U.N. Comm. on the Elimination of Discrimination against Women, Concluding observations on the ninth periodic report of Colombia, ¶ 20(d), UN Doc. CEDAW/C/COL/CO/9 (March 19, 2019).

[94] U.N. Hum. Rts. Comm., Concluding observations on Eritrea in the absence of its initial report, ¶ 22, UN Doc. CCPR/C/ERI/CO/1 (May 3, 2019). *See also*, U.N. Hum. Rts. Comm., Concluding observations on the fourth periodic report of Bulgaria, ¶ 12, UN Doc. CCPR/C/BGR/CO/4 (Nov. 15, 2018) ("The state Party should . . . [i]ntensify efforts to combat negative stereotypes and prejudice against lesbian, gay, bisexual, transgender and intersex persons and to promote tolerance through training and awareness-raising campaigns for government officials and the general public, including through public schools.").

[95] The Human Rights Campaign notes that "[t]here are currently 31 countries where same-sex marriage is legal: Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, Denmark, Ecuador, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, Mexico, the Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, Switzerland, Taiwan, the United Kingdom, the United states of America and Uruguay." *Marriage Equality Around the World*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/marriage-equality-around-the-world (last visited Feb. 07, 2022).

[96] In the 2002 decision of Joslin v. New Zealand, Communication No. 902/1999, UN Doc. CCPR/C/75/D/902/1999, (U.N. Hum. Rts. Comm. July 30, 2002), it was determined that the right to

weak and unlikely to survive scrutiny.[97] And, of course, even when rights are recognized, there is often a huge gap between formal pronouncement and the enforcement of rights in practice.[98]

Yet it would be churlish to deny the momentous changes that non-discrimination law has produced at the United Nations over the last quarter century.[99] That marriage rights can be singled out as a failure actually speaks to the overall breadth of the rights that *have* been explicitly found to accrue to queer people.[100] Treaty bodies increasingly assert queer rights issues with vigor in their dialog of justification process with state parties.[101] While global international

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marry guaranteed by Art. 23 of the Civil and Political Covenant is limited to marriage between a man and a woman.

[97] As Gerber et al note, "[e]ntirely absent from Joslin . . . is a consideration of how a restrictive reading of the right to marry is compatible with the right to non-discrimination in ICCPR arts. 2 and 26." Paula Gerber, Kristine Tay & Adiva Sifris, *Marriage: A Human Right for All?*, 36 SYDNEY L. REV. 643, 651 (2014). While invocation of Art. 2 may not be apt given the Committee's finding that no right under Art. 23 or any other provision of the Covenant was engaged, the all-encompassing nature of the Art. 26 duty surely calls for reconsideration of the decision rendered in Joslin. As the Individual Opinion of Members Lallah and Scheinin in the case observed, "it is the established view of the Committee that the prohibition against discrimination on grounds of 'sex' in article 26 comprises also discrimination based on sexual orientation. And when the Committee has held that certain differences in the treatment of married couples and unmarried heterosexual couples were based on reasonable and objective criteria and hence not discriminatory, the rationale of this approach was in the ability of the couples in question to choose whether to marry or not to marry, with all the entailing consequences. No such possibility of choice exists for same-sex couples in countries where the law does not allow for same-sex marriage or other type of recognized same-sex partnership with consequences similar to or identical with those of marriage. Therefore, a denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under article 26, unless otherwise justified on reasonable and objective criteria." Joslin v. New Zealand, *supra* note 96.

[98] *See generally* Olga Avdeyeva, *When Do states Comply with International Treaties, Policies on Violence Against Women in Post-Communist Countries*, 51 INT'L STUD. Q. 877 (finding growing evidence that states' formal ratification of international human rights treaties does not routinely generate changes in states' domestic human rights practice) (2007). If a more modest process-based approach is taken, however, there is a good case that UN periodic reporting has real value. Carraro, *supra* note 30.

[99] The mainstreaming approach has arguably meant that advocates for queer rights have "gained access to and successes in UN bodies as unlikely as the Security Council." Gross, *supra* note 49, at 168. It is noteworthy, however, that a UN special procedure on sexual orientation discrimination was established only in 2016, and then on a very close 23–18–6 vote: Dominic McGoldrick, *The Developments and Status of Sexual Orientation Discrimination under International Human Rights Law*, 16 HUM. RTS. L. REV. 613, 625 (2016). Others, however, place less stock in the centrality of such a procedure, noting that "[t]he work of existing thematic mechanisms, being grounded in broad human rights principles rather than identity claims, carries authority in countries and cultures that don't recognize 'sexual orientation' or 'gender identity.'" SEXUAL RIGHTS INITIATIVE, *supra* note 47, at 14.

[100] It remains, though, that "marriage is a useful cypher for the whole citizenship debate, since it is seen as a cohesive element of social life, straddling the public and the private, containing a mix of rights and duties, and occupying a central position in political, legal and popular discourses." BELL & BINNIE, *supra* note 12, at 58.

[101] *See generally* Paula Gerber & Joel Gory, *The UN Human Rights Committee and LGBT Rights: What is it Doing? What Could it be Doing?*, 14 HUM. RTS. L. REV. 403, 411–15 (2014). Some caution is, however, warranted. McGoldrick reports that in the first Universal Periodic Reporting (UPR) cycle, states accepted expert recommendations related to sexual orientation and gender identity only 36% of the time, as contrasted with a 73% overall acceptance rate. In the second UPR cycle, that figure rose to only 37%. McGoldrick, *supra* note 99, at 624. As Baisley notes, "UN experts and expert bodies are

human rights law is not supranational law in the sense that it automatically trumps contrary domestic norms, it is nonetheless clear that United Nations standards for the protection of sexual minorities have often inspired national efforts to improve the lives of sexual minorities.[102]

At least as important, the scope of the overarching duty to guarantee all rights without discrimination has expanded exponentially since the *Toonen* decision. With claims no longer limited to those that can be shoe-horned into the category of "sex,"[103] the most broadly applicable guarantee of non-discrimination found in Art. 26 of the ICCPR[104] may now be invoked in myriad contexts, including to contest differentiation on the following grounds:

1999	engaging in "private homosexual relations between consenting adults"[105]
	"sexual orientation"[106]
2002	engaging in "private sexual relations between consenting adults"[107]

not ideal norm entrepreneurs because they have little control over how issues are framed." Elizabeth Baisley, *Reaching the Tipping Point? Emerging Human Rights Norms Pertaining to Sexual Orientation and Gender Identity*, 38 HUM. RTS. Q. 134, 143 (2016). More generally, lawmaking through treaty bodies suffers from "piecemeal approaches" under which "spaces may be open for some aspects of sexual rights because others are shut down." Roseman & Miller, *supra* note 48, at 373.

[102] In a recent report, the UN's Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity noted that international standards on sexual orientation and gender identity had recently been invoked in "countless decisions of domestic tribunals including the Supreme Courts of Botswana, India, and Nepal, national laws, such as of Argentina and Belgium, and public policy as is the case with Colombia and Sweden." Victor Madrigal-Borloz (Independent Expert), *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, ¶ 35, UN Doc. A/HRC/47/27 (June 23, 2021).

[103] In contrast to the Human Rights Committee's embrace of the notion of sexual orientation as a facet of sex, *see supra* note 71 and accompanying text, it is noteworthy that the supervisory body for the companion Economic Covenant led the way in adopting the view that sexual orientation is best understood as a protected form of "other status." U.N. Comm. on Econ., Soc. and Cultural Rts., Gen. Comment No. 20: Non-discrimination in economic, social and cultural rights, ¶ 32, UN Doc. E/C.12/GC/20 (July 2, 2009).

[104] "[A]rticle 26 . . . provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on states parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a state party, it must comply with the requirement of Article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in Article 26 is not limited to those rights which are provided for in the Covenant." U.N. Hum. Rts. Comm., Gen. Comment No. 18, *supra* note 83, at ¶ 12.: Non-Discrimination, ¶ 12, UN Doc. HRI/GEN/1/Rev.7 (May 12, 2004).

[105] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Ecuador, ¶ 8, UN Doc. CCPR/C/79/Add.92 (Aug. 18, 1998).

[106] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee:
Hong Kong Special Administrative Region, ¶ 14, UN Doc. CCPR/C/79/Add.117 (Nov. 15, 1999).

[107] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Egypt, ¶ 19, UN Doc. CCPR/CO/76/EGY (Nov. 28, 2002) [hereinafter "Egypt 2002 Concluding Observations"].

2004	"sexual minorities"[108]
2007	"consenting adults of the same sex"[109]
2008	those partaking in "same-sex sexual activities between consenting adults"[110]
	"transgender persons"[111]
	"unmarried cohabiting same-sex couples"[112]
	persons in "non-traditional forms of partnership"[113]
2009	"lesbian, gay, bisexual, and transgender (LGBT) persons"[114]
2011	"persons living with HIV/AIDS, including homosexuals"[115]
	"gender identity"[116]
2012	"homosexuality between adults of both sexes"[117]
	"bisexuality or transsexuality"[118]

[108] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Poland, ¶ 18, UN Doc. CCPR/CO/82/POL (Dec. 2, 2004).
[109] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Algeria, ¶ 26, UN Doc. CCPR/C/DZA/CO/3 (Dec. 12, 2007).
[110] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Botswana, ¶ 22, UN Doc. CCPR/C/BWA/CO/1 (Apr. 24, 2008).
[111] Ireland 2008 Concluding Observations, *supra* note 85, ¶ 8.
[112] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Japan, ¶ 29, UN Doc. CCPR/C/JPN/CO/5 (Dec. 18, 2008).
[113] Ireland 2008 Concluding Observations, *supra* note 85, ¶ 8.
[114] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Russian Federation, ¶ 27, UN Doc. CCPR/C/RUS/CO/6 (Nov. 24, 2009).
[115] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Jamaica, ¶ 9, UN Doc. CCPR/C/JAM/CO/3 (Nov. 17, 2011).
[116] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Islamic Republic of Iran, ¶ 10, UN Doc. CCPR/C/IRN/CO/3 (Nov. 29, 2011). It is noteworthy, however, that treaty supervisory bodies have yet to define "gender identity," leading one commentator to argue that "gender is an identity per se" such that there is no need to treat "gender and gender identity as distinct categories." Giovanna Gilleri, *Abandoning Gender 'Identity,'* 116 AM. J. INT'L L. UNBOUND 27, 27 (2022).
[117] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Malawi, ¶ 7, UN Doc. CCPR/C/MWI/CO/1 (June 18, 2012).
[118] U.N. Hum. Rts. Comm., Concluding observations adopted by the Human Rights Committee at

2014	"intersex conduct"[119]
	"same-sex couples"[120]
	"LGBT students"[121]
	"students considered to be homosexuals"[122]
2015	"trans-gender identity, bi-gender identity, asexuality, and cross-dressing"[123]
	persons who engage in "consensual same-sex sexual conduct"[124]
	"intersex individuals"[125]
	"diverse gender identities"[126]
2016	"actual or presumed gender identity"[127]
	persons "imitating members of the opposite sex"[128]
	"real or perceived sexual orientation or gender identity"[129]
	victims of "homophobic and transphobic violence"[130]

its 105th session, 9–27 July 2012: Armenia, ¶ 10, UN Doc. CCPR/C/ARM/CO/2 (Aug. 13, 2012).

[119] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Sri Lanka, ¶ 8, UN Doc. CCPR/C/LKA/CO/5 (Nov. 21, 2014).

[120] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Japan, ¶ 11, UN Doc. CCPR/C/JPN/CO/6 (Aug. 20, 2014).

[121] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Malta, ¶ 10, UN Doc. CCPR/C/MLT/CO/2 (Nov. 21, 2014).

[122] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Burundi, ¶ 8, UN Doc. CCPR/C/BDI/CO/2 (Nov. 21, 2014).

[123] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Russian Federation, ¶ 10, UN Doc. CCPR/C/RUS/CO/7 (Apr. 28, 2015).

[124] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: South Korea, ¶ 14, UN Doc. CCPR/C/KOR/CO/4 (Dec. 3, 2015).

[125] *Id.*

[126] *Id.* ¶ 15.

[127] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Morocco, ¶ 12, UN Doc. CCPR/C/MAR/CO/6 (Dec. 1, 2016).

[128] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Kuwait, ¶ 13, UN Doc. CCPR/C/KWT/CO/3 (Aug. 11, 2016) [hereinafter Kuwait 2016 Concluding Observations].

[129] *Id.*

[130] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Namibia, ¶ 10, UN Doc. CCPR/C/NAM/CO/2 (Apr. 22, 2016).

	persons who have "same-sex relationships"[131]
	"bodily diversity"[132]
	"transvestites [and] transsexuals"[133]
2017	"same-sex families"[134]
	"intersex infants and children"[135]
2020	"sexuality"[136]
	"including multiple discrimination"[137]
2021	"including multiple, direct and indirect discrimination… [in] both the public and the private sectors"[138]

In short, international human rights law now imposes a broad-ranging duty to guarantee virtually all traditional rights without discrimination on the basis of virtually all permutations of queer identity.

II. What's Missing?

Tempting as it may be to claim normative victory for queer rights in international human rights law, it would be premature.

The first worry is that all of the gains to-date are embedded in the non-discrimination approach to international queer rights. Queer people may not—by virtue of their queer identity—be discriminated against in accessing the traditional catalog of international human rights.[139] But if the matter of interest is

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[131] *Id.*
[132] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: South Africa, ¶ 21, UN Doc. CCPR/C/ZAF/CO/1 (Apr. 27, 2016).
[133] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Argentina, ¶ 3(c), UN Doc. CCPR/C/ARG/CO/5 (Aug. 10, 2016).
[134] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Italy, ¶11, UN Doc. CCPR/C/ITA/CO/6 (May 1, 2017).
[135] Australia 2017 Concluding Observations, *supra* note 81, ¶ 26.
[136] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Dominica, ¶ 15, UN Doc. CCPR/C/DMA/COAR/1 (Apr. 24, 2020).
[137] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Tunisia, ¶ 16, UN Doc. CCPR/C/TUN/CO/6 (Apr. 24, 2020).
[138] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Botswana, ¶ 12, UN Doc. CCPR/C/BWA/CO/2 (Nov. 24, 2021).
[139] "[A]t least from a liberal, positivist point of view, we have had some successes. We have made gains in being included in the heteronormative system." Wayne Morgan, *Queering International*

not guaranteed in the catalog, queer people have no greater access to it than does anyone else.

While this may sound equitable, in fact it is not.[140] That is because straight people benefit from an unquestioned, if tacit, right to engage in mainstream (marital, procreative[141]) sex.[142] In contrast, queer sex benefits from no such presumptive entitlement.[143] With no underlying right to sexual liberty to which the non-discrimination doctrine[144] can attach, queer people are in an especially vulnerable position.[145]

Human Rights Law, *in* SEXUALITY IN LEGAL ARENA 208, 211 (Carl Stychin & Didi Herman eds., 2000).

[140] "The claim of recognition does not occur within a liberal situation of equality or 'veil of ignorance,' but within pre-existing networks of cultural power and meaning." PHELAN, *supra* note 4, at 87.

[141] "[I]t appears that there is a general vision of sexuality that assumes that sex must be legitimised by higher goals (marriage, love, procreation)." Int'l Council on Hum. Rts. Pol'y, *supra* note 17, at 39.

[142] Simply put, there are "heteronormative assumptions that underpin international human rights law more generally." Gross, *supra* note 49, at 167. In Otto's succinct framing, "[h]eterosexual analytics saturate our everyday lives without most of us even noticing." Dianne Otto, *Resisting the Heteronormative Imaginary of the Nation-state: Rethinking Kinship and Border Protection*, *in* QUEERING INTERNATIONAL LAW: POSSIBILITIES, ALLIANCES, COMPLICITIES, RISKS 238, 240 (Dianne Otto ed., 2018).

[143] "[A] fallacy . . . is the idea that homosexuality and heterosexuality are merely two sides of a common coin called sexuality . . . In a society where institutions embody a presumption of heteronormativity and homosexual deviance, arguing that we are just like everyone else convinces no one." VAID, *supra* note 2, at 46.

[144] Non-discrimination is in any event an especially wobbly component of international human rights law. It is not the case that every form of differentiation in access to rights based on a protected category amounts to unlawful discrimination under international law. Instead, a given differentiation rather amounts to prohibited discrimination only insofar as the differentiation is not adjudged "objective and reasonable." U.N. Hum. Rts. Comm., Gen. Comment No. 18, *supra* note 83, at ¶ 13. As Thoreson rightly concludes, the "objective and reasonable" carve-out presents an ever-present risk of retrogression. Ryan Thoreson, *The Limits of Moral Limitations: Reconceptualizing Morals in Human Rights Law*, 59 HARV. INT'L L. J. 197, 211–18 (2018). Indeed, one commentator worries that the Human Rights Committee has adopted a "focus . . . on a general standard of reasonable and objective without correlation to the actual discriminatory impact on rights . . . By frontloading the justification inquiry and completely obliterating the consideration of the impact of discrimination on the equal enjoyment of rights, the Committee has foregone developing a richer understanding of discrimination, intersectional or otherwise." Shreya Atrey, *Fifty Years On: The Curious Case of Intersectional Discrimination on the ICCPR*, 35 NORDIC J. OF HUM. RTS. 220, 238 (2017). Greater reliance on the "objective and reasonable differentiation" loophole can moreover be especially concerning when international rights claims are adjudicated in domestic courts and tribunals, fora in which traditional understandings of "reasonableness" can have real salience.

[145] "The demand for civil rights puts one in the position of admitting one's vulnerability and dependence on the larger society . . . The group is . . . forced to account for itself as incomplete, dependent subjects . . . This paradox prevents the demand for citizenship from going beyond inclusion to a broader vision of social transformation and justice, and so maintains the structures of citizenship that produced the exclusion." PHELAN, *supra* note 4, at 57. Thus, it is arguable that in the international legal space "queer engagement with human rights has taken the radicality out of queer rather than resulting in the queering of international human rights law . . . [R]adicalism . . . [is] quickly quenched by the lure of normativity and glitter of respectability." Ratna Kapur, *The (Im)possibility of Queering International Human Rights Law*, QUEERING INTERNATIONAL LAW: POSSIBILITIES, ALLIANCES, COMPLICITIES, RISKS 131, 132 (2018).

The simple truth is that non-discrimination law cannot deliver what is most central to queer sexuality:[146] the right to have consensual sex outside the conventional confines of the marital, procreative model. Persons who deviate from sexual norms must now be protected from most *consequences* of that deviation, at least insofar as those consequences resonate within the traditional human rights catalog. But many of us still do not have the right to have sex in the ways that are most natural to, or fulfilling for, us.[147]

This might be thought of as a distinction without a difference. But imagine if political activists were told that while they had no right to hold a political opinion as such, the government would nonetheless step in to ensure that their activism did not strip them of their civil and other basic rights. Or that people were told they would be protected from harms arising from the religious identity imputed to them by their acts of observance—but that religious observance would not itself be a protected interest. Would that be considered a satisfactory state of affairs?

Surely it would not.[148] That is because, as critically important as consequentialist protection undoubtedly is, the central purpose of human rights law is explicitly to name and protect that which is understood to be fundamental to human dignity.[149] As Phelan writes,

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[146] The present approach to queer rights has "increasingly narrowed its scope to those issues of sexual orientation that have the least to do with sex . . . The movement in too many ways has chosen to become a politics of sexual identity, not sex." WARNER, *supra* note 3, at 25, 40.

[147] "[T]his project is itself bounded and limited by a liberal scaffolding which provides little space for radical alternatives or for the 'failed' queer who refuses normative compliance." Kapur, *supra* note 145, at 145. Cossman was an early advocate of a "shift from identity to self-determination by emphasizing [that] sexuality is something we do, not simply something we have." Brenda Cossman, *Gender Performance, Sexual Subjects and International Law*, 15 CAN. J. L. & JURIS. 281, 294 (2015).

[148] PHELAN, *supra* note 4, at 58 ("Without a vision of a desired future, such a politics amounts to a continual picking at the scab of suffering.").

[149] "[B]iological [non-discrimination] and privacy-based arguments for lesbian and gay rights fail to address the actual wrong . . . [T]hey fail to claim that same-sex desire is of the same moral status as opposite-sex sexual acts, and that relationships between people of the same sex have the same moral status as relationships between people of the opposite sex." Stein, *supra* note 72, at 504. To be clear, my invocation of human dignity is not an endorsement of the movement seeking to treat "dignity" as a free-standing norm rather than as a more general ethical construct from which legally binding human rights norms may be derived; perhaps regrettably "[n]o consensus exists about the contours of human dignity as a legal concept." Michèle Finck, *The Role of Human Dignity in Gay Rights Adjudication and Legislation: A Comparative Perspective*, 14 INT'L J. CONST. L. 26, 28 (2016). *But see*, UNDERSTANDING HUMAN DIGNITY (Christopher McCrudden ed., 2014). Indeed, as Moyn rightly insists, "the party most closely associated with claims about human dignity was neither liberal nor socialist but conservative and rigid in its commitment to hierarchy: the Catholic Church . . . Searching for divine certification of our standing may always be appealing, but the liberal interest in dignity seems to follow from less exalted and metaphysical concerns . . . [Moreover dignity is] far less helpful when some of us insist that our fellow humans care about one another's broader welfare or social emancipation." MOYN, *supra* note 29, at 26, 33. For a critique of the value of "dignity" in queer rights litigation, *see* Jeffery Redding, *Queer-Religious Potentials in US Same-Sex Marriage Debates*, *in* QUEER THEORY: LAW CULTURE, EMPIRE 122, 127 (Robert Leckey & Kim Brooks eds., 2010) (arguing in particular that such claims in the US have been inattentive to the complexity of non-straight communities).

> Full citizenship requires that one be recognized not in spite of one's unusual or minority characteristics, but with those characteristics understood as part of a valid possibility for the conduct of life. Emergence into publicity as an equal means that one appears on the terms by which one understands oneself.[150]

In contrast, protecting people on the basis of actual or ascribed identity arising from activity that is not itself protected is a bit like being invited into a house through the back door. Of course, it's better than being left outside in the cold. But it's neither gracious nor truly dignified, sending a message of tolerance rather than genuine acceptance,[151] and certainly not conveying recognition of value. In our embrace of the non-discrimination approach to international human rights law, queer people have—at least impliedly—accepted what Bell and Binnie rightly call "the burden of compromise:"

> [R]ights claims articulated through appeals to citizenship carry the burden of compromise in particular ways: this demands the circumscription of "acceptable" modes of being a sexual citizen . . . [I]t tends to demand a modality of sexual citizenship that is privatized, de-radicalized, de-eroticized, and *confined* in all senses of the word: kept in place, policed, limited.[152]

Urvashi Vaid has made clear that this approach has harmful consequences.[153] She insists that "a rights-based movement can co-exist with prejudice against lesbians and gay men," noting that traditional queer advocacy "focuses on the suppression of sexuality itself."[154] She further suggests that a rights-based movement "can even advance while leaving homophobia intact."[155] Arguing against acceptance of "the compromised minimum,"[156] Vaid pushes us to recognize the broader social importance of sexual liberty as such:

> [C]ivil rights do not change the social order in dramatic ways; they change only the privileges of those asserting those rights. Civil rights strategies do not challenge the moral and antisexual underpinnings of homophobia, because homophobia does not originate in our lack of full civil equality . . . The deeper threat

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[150] PHELAN, *supra* note 4, at 16.
[151] "The very notion of 'tolerance' implies subordination: you don't 'tolerate' something which is good (you celebrate it), you only 'tolerate' things you would rather didn't exist." Morgan, *supra* note 139, at 220. *See* WARNER, *supra* note 3, at 46–47 ("Sex and sexuality are disavowed as 'irrelevant' in an attempt to fight stigma. But the disavowal itself expresses the same stigma . . . Try imagining, by contrast, that heterosexuality might be irrelevant to the normative organization of the world.").
[152] BELL & BINNIE, *supra* note 12, at 3.
[153] VAID, *supra* note 2.
[154] *Id*., at 37. Thus, for example, "legal recognition appears to take the sex out of same-sex relationships, leaving intact only their sameness to heterosexuality." Joshi, *supra* note 34, at 440.
[155] *Id.*, at 179.
[156] *Id*., at 388.

> we present to heterosexual culture lies in the disruption that our sexuality and gender nonconformity make in a society invested in rigid gender roles and the myth that the heterosexual nuclear family should be the sole form of relationship . . . Heterosexual morality is predicated on the suppression of joy or, more accurately, on its control by religion: there are appropriate places to feel ecstasy (religious enlightenment and marriage), and all other arenas are wrong. But in gay life, pleasure serves a very different role. We do not fear it; we embrace it, ritualize it, and are transformed by its power.[157]

In short, we have accepted a cultural loss[158] that parallels the kind of exclusion lamented by Bhabha as a "deeply negating experience, oppressive and exclusionary."[159] Our embrace of non-discrimination to secure access for those who engage in queer sex to the traditional (heterosexual and marriage-oriented[160]) catalog of rights means that we have thus far opted not to contribute to the creation of a "vernacular cosmopolitanism [which] measures global progress from the minoritarian perspective [and in which] claims to freedom, and equality are marked by a 'right to difference in equality.'"[161]

III. Privacy to the Rescue?

Even if it is acknowledged that non-discrimination law cannot deliver a right to sexual liberty, it might still be suggested that such a right can be established (or is at least confidently claimed) under the right to privacy. If so, it might be argued that there is no need to pursue codification of a right to sexual liberty. Schabas contends that this is the case, arguing that "[s]exual autonomy represents a particularly important case of the right to communication in the area of privacy. Regulation of sexual behaviour therefore constitutes interference with

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[157] *Id.*, at 183, 191, 383.

[158] Joshi notes that it is more accurate to speak of the pursuit of normalcy than of assimilation since that term better captures the phenomenon of "lesbians and gays constitut[ing] themselves as being worthy of recognition." Joshi, *supra* note 34, at 421.

[159] HOMI BHABHA, THE LOCATION OF CULTURE, xi (1994). He continues that such neglect "spurs you to resist the polarities of power and prejudice, to reach beyond and behind the invidious narratives of center and periphery." *Id.*

[160] Marriage sanctifies some couples at the expense of others. It is selective legitimacy . . . Marriage, in short, discriminates." WARNER, *supra* note 3, at 82. More specifically, "[e]ven though people think that marriage gives them validation, legitimacy, and recognition, they somehow think it does so without invalidating, delegitimizing, or stigmatizing other relations, needs, and desires." *Id.* at 133. Indeed, "[t]he deeper issue is that queers outside the gilded cage of marriage may actually be more susceptible to discrimination." Joshi, *supra* note 34, at 445.

[161] BHABHA, *supra* note 159, at xvi–xvii. Drawing on this notion of "difference in equality" one could in principle imagine "[a] queer conception of equality [that] would . . . reject the notion of measuring equality by a hegemonic standard that purports to be universal, and it should recognize 'equal difference' that is based not only on similarity but also on what is different." Aeyal Gross, *The Politics of LGBT Rights in Israel and Beyond: Nationality, Normativity, and Queer Politics*, 46 COLUM. HUM. RTS. L. REV. 81, 132 (2015).

privacy."[162] Subject only to limitations which are "absolutely necessary" to protect vulnerable persons or involving "sexual conduct in public," Schabas takes the view that the right to privacy articulated in Article 17 of the ICCPR already requires state parties to abstain from any regulation of sexual acts.[163]

This optimistic view contrasts with the more circumspect position taken by Joseph and Castan that "[r]egulation of sexual behaviour that takes place in private *may be* an interference with privacy" (emphasis added).[164] The strongest support they locate for even this cautious assertion is a minority opinion in the Human Rights Committee decision of *Hertzberg* which *left open* the question of whether Article 17 protects "the right to be different and live accordingly."[165] Indeed, the majority opinion in the case vindicated the state party's right to censor speech on the grounds that "that radio and TV are not the appropriate forums to discuss issues related to homosexuality."[166]

On balance, the jurisprudence of the Human Rights Committee does not suggest a commitment to leverage a broadly conceived right to sexual liberty from Article 17's right to privacy. To its credit, the Committee regularly invokes the right to privacy to insist on the need to decriminalize same-sex activity,[167] at least insofar as such activity is "carried out in private."[168] But Article 17 has thus far been drawn upon to question only a few other practices at odds with sexual liberty—in particular, to condemn criminal prosecutions for public indecency,[169] "imitating members of the opposite sex,"[170] and propositioning a person of the

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[162] WILLIAM SCHABAS, U.N. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: NOWAK'S CCPR COMMENTARY 474 (3rd ed. 2019).
[163] *Id*.
[164] SARAH JOSEPH & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 554 (3rd ed. 2013).
[165] Hertzberg v. Finland, Communication No. 61/79, UN Doc. CCPR/C/OP/1, ¶ 18.68 (U.N. Hum. Rts. Comm. 1985).
[166] *Id.* at ¶ 10.4.
[167] *See supra* text accompanying notes 73–76.
[168] This limitation was common in relevant concluding observations made through 2008. *See e.g.*, U.S. 1995 Concluding Observations, *supra* note 73, ¶ 22 ("Concerned at the serious infringement of private life in some states which classify as a criminal offence sexual relations between adult consenting partners of the same sex carried out in private."); Egypt 2002 Concluding observations, *supra* note 107, ¶ 19 ("should refrain from penalizing private sexual relations between consenting adults."); U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Saint Vincent and the Grenadines, ¶ 8, UN Doc. CCPR/C/VCT/CO/2 (2008) ("concerned that consensual homosexual acts between adults in private are still criminalized"). But beginning in 2009 the Human Rights Committee has consistently invoked Art. 17 to call for the decriminalization of homosexuality without limiting its application to the private sphere. *See e.g.*, U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Grenada, ¶ 21, UN Doc. CCPR/C/GRD/CO/1 (Aug. 14, 2009) ("notes with concern that the Criminal Code penalizes same-sex sexual activities between consenting adults."); U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committees: Uzbekistan, ¶ 7, UN Doc. CCPR/C/UZB/CO/4 (Aug. 15, 2015) ("concerned that consensual sexual activities between adult males continue to be criminalized"); U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Kenya, ¶ 13, UN Doc. CCPR/C/KEN/CO/4 (May 11, 2021) ("should . . . [a]mend all relevant laws . . . to decriminalize consensual sexual relations between adults of the same sex").
[169] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Democratic Republic of the Congo, ¶¶ 13–14, UN Doc. CCPR/C/COD/CO/4 (Nov. 30, 2017).
[170] Kuwait 2016 Concluding Observations, *supra* note 128, ¶ 13.

same sex.[171] On no occasion has the Committee's review of state reports led it to insist on full respect for an affirmative right to sexual liberty as an inherent aspect of the right to privacy.

There is, in any event, something decidedly odd about invoking "privacy" in order to secure sexual "liberty."[172] After all, if liberty means anything, it must mean the right to be and to act in ways natural to oneself whether in a private space *or not*.[173] For many queers, the goal is decidedly not just to be able to do what one wishes in the privacy of one's own proverbial bedroom.[174] To the contrary, they wish to be able to express themselves as freely as heterosexuals do in *public* spaces[175] — whether that is by holding hands, enjoying an embrace or a kiss, or even by finding a nook in a park for something more sexually robust. It is simply true that many persons (queer or not) take particular pleasure in sexual intimacy outdoors or in other places not clearly within the private sphere.[176] Reliance on privacy to vindicate sexual liberty moreover presupposes access to a private space for sex—an assumption that is simply not realistic for many persons whose economic or social circumstances require them to share housing with others.[177] Nor does the privacy doctrine easily lend itself to the protection of sex—even in the bedroom—when more than just two persons are involved.[178]

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[171] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Cameroon, ¶¶ 13–14, UN Doc. CCPR/C/CMR/CO/5 (Nov. 30, 2017).

[172] BELL & BINNIE, *supra* note 12, at 4 ("The outcome of rights claims . . . is to secure private space to be a sexual citizen.").

[173] "I would argue that any politics based on . . . a sentimental rhetoric of privacy is not only a false idealization of love and coupling; it is an increasingly powerful way of distancing citizens from the real, conflicted, and unequal conditions governing their lives, and that it serves to reinforce the privilege of those who already find it easiest to imagine their lives as private." WARNER, *supra* note 3, at 100.

[174] VAID, *supra* note 2, at 388 ("We seek to be gay or lesbian not merely in the shelter of the ghetto or in the 'privacy' of the bedroom or in the confines of a more spacious closet.").

[175] "[S]truggles over real and symbolic space may be useful in progressing the discussion between a simple dichotomy of redistribution versus recognition . . . [W]e need to see social exclusion as manifest in space." BELL & BINNIE, *supra* note 12, at 82. In particular, because "the city is the prime site both for the materialization of sexual identity, community and politics," *id.* at 83, "[r]esidents [of a city] should not dictate the uses of the urban space around them to the exclusion of other users of the city. To do so is to fail to recognize what a city is." WARNER, *supra* note 3, at 190.

[176] "The thrill lies, at least in part, in being off stage, in being provocative, in being in the words of the law lewd and lascivious." Cossman, *supra* note 147, at 292. In particular, "many men who participate in public sex do not see it as an expression of political identity . . . Even those who consider themselves gay may be seeking in such venues a world less defined by identity and community than by the negation of identity through anonymous contact; they may be seeking something very different from 'community' in a venue where men from different worlds meet, often silently, for sex." WARNER, *supra* note 3, at 165–66; *see also*, BELL & BINNIE, *supra* note 12, at 61.

[177] Sonia Katyal, *Sexuality and Sovereignty: The Global Limits and Possibilities of Lawrence*, 14 WM. & MARY BILL OF RTS. J. 1429, 1469 (2006). "Full lesbian/gay equality requires Third World liberation in a broader social sense: liberation from poverty and dependency. LGBT people need housing to give them physical room for their relationships." Peter Drucker, *Reinventing Liberation: Strategic Questions for Lesbian/Gay Movements*, *in* DIFFERENT RAINBOWS 207, 211 (Peter Drucker ed., 2000).

[178] Even in its landmark ruling finding sodomy laws to be unconstitutional, the Constitutional Court of South Africa nonetheless insisted that "there is no reason why the concept of privacy should be extended to give blanket libertarian permission for people to do anything they like provided that what

Indeed, as a matter of principle, so long as the rights of others are not genuinely infringed, why ought "privacy"—protecting sex behind closed doors with only two persons involved—be reified as somehow uniquely appropriate to vindicate sexual rights? Is this not, as Morgan argues, acquiescing in an approach that "silences sexual difference"[179] by keeping it hidden? More generally, why should the assumed mainstream preference for a limited range of safeguarded sexuality[180] dictate the sphere of what protected sexual liberty involves? Just as we recognize that both speech[181] and religion[182] are broad-ranging protected interests that transcend majoritarian preferences,[183] so too should sexual liberty be liberated from the constraints of the privacy doctrine.[184]

IV. Addressing Disfranchisement

The analysis in Parts II and III has shown why the present reliance on an amalgam of non-discrimination and privacy law to vindicate international queer rights must be called into question. Fundamentally, the doctrinal problems identified give rise to an overarching problem of disfranchisement: some people who have queer sex do not fall into even the expansive categories of identity now

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they do is sexual and done in private . . . Respect for personal privacy does not require disrespect for social standards." *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1999 (1) SA 6 (CC) at 118–19 (S. Afr.).

[179] Morgan, *supra* note 139, at 220.

[180] "Perhaps we should call it moralism, rather than morality, when some sexual tastes or practices (or rather an idealized version of them) are mandated for everyone." WARNER, *supra* note 3, at 4.

[181] The right to freedom of expression under Art. 19 of the Civil and Political Covenant extends to "even expression that may be regarded as deeply offensive." U.N. Hum. Rts. Comm., Gen. Comment No. 34: Article 19, Freedoms of Opinion and Expression, ¶ 11, UN Doc. CCPR/C/GC/34 (2011).

[182] The right to freedom of religion protects "theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms 'belief' and 'religion' are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community." U.N. Hum. Rts. Comm., Gen. Comment No. 22, *supra* note 20, at ¶ 2. Moreover, "[t]he fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers." *Id.* ¶ 9.

[183] "The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition." U.N. Hum. Rts. Comm., Gen. Comment No. 22, *supra* note 20, at ¶ 8. *See also*, U.N. Hum. Rts. Comm., Gen. Comment No. 34, *supra* note 181, at ¶ 32.

[184] "[T]he rhetoric of privacy has historically functioned to perpetuate the oppressive politics of the 'closet': privacy is the ideological substrate of the very secrecy that has forced gay men and lesbians to remain hidden and underground, and thus rendered them vulnerable to private homophobic violence. There is no reason to think that we can rid privacy of its sedimented history." Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1510 (1992).

protected from discrimination and some people embrace queer sex lives not protected under privacy law.

The first problem—that significant numbers of people having queer sex simply do not identify as belonging to any of the various categories that are now entitled to protection against discrimination[185]—follows from the fact that each of those categories is predicated upon identity.[186] This is to be expected, since non-discrimination law in pith and substance is about ensuring that individuals are not treated on the basis of group stereotypes, but rather on the basis of their own particularized attributes and abilities.[187] Non-discrimination is thus a powerful protection for many queer people who feel that they are stigmatized on the basis of actual or ascribed group identity.

But for those persons who simply seek to engage in forms of sex that transgress social norms, the idea that protection must be sought through the assertion of some type of group identity may be quite foreign. Whether because they choose to be "on the down low"[188] or otherwise have no desire to disrupt their traditional family, matrimonial, or other structures, a significant number of persons wish to have queer sex without belonging to any queer community. The challenge is thus to ensure protection where the risk arises not "for who they are but for what they do; conduct is the issue."[189]

The second problem is that the narrow ambit of international privacy law[190] means that it can be invoked to legitimize harsh measures against those not clearly "on the side of 'good,' 'normal,' or 'natural'"[191] versions of non-traditional sexuality. For example, "more LGBTI people are jailed, abused, and tortured daily under laws targeting sex work than are arrested worldwide under sodomy laws. These include not just LGBTI sex workers but other people arrested for loitering, 'cruising,' or walking while trans."[192] The narrow scope of concern under privacy law has permeated the work of even many who see themselves as advocates for queer inclusion. This is seen, for example, in both the failure to explicitly condemn the anti-sex goals of Russia's laws on propagandizing of non-

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[185] *See supra* text accompanying notes 105–138. A focus on protection by identity "will lose the context and the connections between the lived realities of LGBTI persons and of those who do not identify as such." SEXUAL RIGHTS INITIATIVE, *supra* note 47, at 9.

[186] "[T]he universalisation of the homosexual as a transhistorical, trans-spatial subject as he/she is articulated in human rights discourse reproduces . . . ethical violence. By attempting to transform participants in certain intimacies into homosexual persons, do we not do a greater disservice to the vast majority of participants in same-sex acts in other places?" Neville Hoad, *Arrested Development or the Queerness of Savages: Resisting Evolutionary Narratives of Difference*, 3 POSTCOLONIAL STUD. 133, 153 (2000).

[187] *See* SANDRA FREDMAN, DISCRIMINATION LAW 109 (2nd ed. 2011).

[188] *See generally* Jessie Heath & Kathy Goggin, *Attitudes Towards Male Homosexuality, Bisexuality, and the Down Low Lifestyle: Demographic Differences and HIV Implications*, 9 J. BISEXUALITY 17 (2009).

[189] Waites, *supra* note 49, at 152.

[190] *See supra* Part III.

[191] Cai Wilkinson, *Putting "Traditional Values" Into Practice: The Rise and Contestation of Anti-Homopropaganda Laws in Russia*, 13 J. HUM. RTS. 363, 373 (2014).

[192] SEXUAL RIGHTS INITIATIVE, *supra* note 47, at 12.

heterosexuality[193] and in the endorsement of gay marriage[194] as an "anchor . . . in the chaos of sex and relationships"[195] or critical "civilizing" influence on gay men.[196] As Otto succinctly summarizes the concern, "[w]hile . . . some former deviants have been welcomed into the charmed circle of good sexuality, the demonisation of those who remain on the outer limits has intensified."[197]

The imperative is to do right by all queers—not just those who conform to heteronormative expectations of the kind most readily protected by non-discrimination and privacy law. The pursuit of a comprehensive right to sexual liberty also holds promise for other sexually subordinated subjects, logically including[198] many (if not most) women.[199] So too will it be of value to "straight"

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[193] "Rather than advocating for intimate and sexual liberation, mainstream LGBT activism has instead become complicit in the moral regulation of intimate practices . . . This complicity in moral regulation . . . creates an opening for challenges such as the current Russian one . . . [in which one sees] the dependence of rights-based claims on the presence of an undesirable and morally inferior 'other,' in this case the nonhomonormative queer . . . making the concept of LGBT rights look decidedly relativistic and contingent on being the 'right sort' of gay or transgender person." Wilkinson, *supra* note 191, at 373.

[194] "[M]arriage . . . privileges state-regulated, long-term pairing over other forms of intimacy and connectedness. Many in the gay movement—like their counterparts in the women's movement—have been critical of marriage not only for its gender inequity and history of violence but also for the ways in which it contributes to a *devaluing* of other ways of being sexual, loving, and nurturing." Suzanna Walters, *Take My Domestic Partner, Please: Gays and Marriage in the Era of the Visible*, *in* QUEER FAMILIES, QUEER POLITICS: CHALLENGING CULTURE AND THE STATE 338, 348 (Mary Bernstein & Renate Reimann eds., 2001).

[195] Andrew Sullivan, *Here Comes the Groom*, THE NEW REPUBLIC (Aug. 28, 1989), https://newrepublic.com/article/79054/here-comes-the-groom.

[196] WILLIAM ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996).

[197] Otto, *supra* note 142, at 256.

[198] Sadly, the Convention on the Elimination of All Discrimination Against Women (CEDAW) cannot be relied upon to leverage broader liberatory goals since it "enshrines the male/female binary . . . when CEDAW's goals would be better served by the elimination of the categories themselves." Darren Rosenbaum, *Unisex CEDAW, or What's Wrong with Women's Rights*, 20 COLUM. J. GENDER & L. 98, 101 (2011); *see also*, Dianne Otto, *Queering Gender [Identity] in International Law*, 33 NORDIC J. HUM. RTS. 299, 306 (2015). As Gallagher observes, "[u]nlike the [Universal Declaration of Human Rights], CEDAW takes an asymmetric approach by prohibiting all discrimination against 'women,' rather than symmetrically or categorically prohibiting discrimination based on 'sex' or 'gender.'" Robina Gallagher, *Redefining 'CEDAW' to Include LGBT Rights: Incorporating Prohibitions Against the Discrimination of Sexual Orientation and Gender Identity*, 29 S. CAL. INTERDISC. L. J. 637, 638 (2020). The supervisory committee moreover "refused to take a clear stance on the question of whether the discrimination ground 'sex' in the Convention includes all identities captured under the LGBTI initialism." Rikki Holtmmat & Paul Post, *Enhancing LGBTI Rights by Changing the Interpretation of the Convention of the Elimination of All Forms of Discrimination against Women?*, 33 NORDIC J. OF HUM. RTS. 319, 330 (2015). In contrast, for example, in the Convention on the Elimination of Racial Discrimination (CERD) "race is a category, not an identity. If CERD were about identity in the way that CEDAW is, it would specify a particular race, such as 'black' or 'African descent.' It does not; any race, defined in a broad or narrow fashion, can benefit from CERD's protections." Rosenbaum, *supra* note 198, at 145. *See also* Elise Meyer, *Designing Women: The Definition of "Woman" in the Convention on the Elimination of all Forms of Discrimination Against Women*, 16 CHI. J. INT'L L. 553 (2016) (discussing the range of ways in which "women" could in theory be interpreted to include queer people). Interestingly, Meyer notes that "[s]tate[] parties themselves include [queer] individuals in their country reports to CEDAW." *Id.* at 582.

[199] This is not to say that all feminists would agree; to the contrary, as Rubin observes, one strain of feminism "has called for sexual liberation that would work for women and well as for men" while

people whose preferred sex lives are not protected by the relegation of sexual liberty to the status of only a subset of the right to privacy.[200] Indeed, as people increasingly embrace more inclusive and fluid understandings of sexuality,[201] the appeal of a broadly framed right to sexual liberty is likely to increase.[202]

Establishment of a right to sexual liberty would also attenuate the political divide that has bedeviled the identity-based, discrimination-oriented approach to vindicating international queer rights.[203] Nearly a quarter century ago, Altman noted that there is a problem with "Western lesbian/gay theorists and activists . . . claiming a universality for an identity which developed out of certain historical specificities."[204] The emergence of queer identity was largely a product of increased economic independence in wealthier countries,[205] which enabled

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another "has considered sexual liberalization to be inherently a mere extension of male privilege." Rubin, *supra* note 13, at 165. She insists, however, that we need to "challenge that feminism is or should be the privileged site of a theory of sexuality. Feminism is the theory of gender oppression. To assume automatically that this makes it the theory of sexual oppression is to fail to distinguish between gender, on the one hand, and erotic desire, on the other." *Id.* at 169. Approached from the optic of validating erotic desire, "[t]he civil rights model can be turned inside-out by shifting the analysis away from the denial of subjecthood to women in patriarchal culture and towards the value of the objectified . . . The redemption of the value of the loss of the coherent self in sex . . . becomes a profoundly antiphallocentric manoeuvre . . . which may in turn undermine existing definitions of maleness." STYCHIN, *supra* note 5, at 69–70. Cossman makes a comparable point, arguing that if gender is understood to be performative rather than simply a descriptor of the social differences following from biological sex, "gender outlaws [could be seen] not only as political allies of feminism, but as struggling against the very same restrictions on the performance of gender within a heterosexual matrix that requires stable sexed bodies." Cossman, *supra* note 147, at 290.

[200] "What if our work were defined not as getting for gay people that which other minority groups have won, but as dealing with the violence that threatens all of us? . . . Transforming straight culture poses a massive challenge that has room in it for everyone." VAID, *supra* note 2, at 208–09. "Individuals . . . have a stake in a culture that enables sexual variance and circulates knowledge about it, because they have no other way of knowing what they might or might not want, or what they might become, or with whom they might find a common lot." WARNER, *supra* note 3, at 7.

[201] STYCHIN, *supra* note 5, at 31 ("Not only does an articulated gay identity undermine the universality of the sexual subject, it also potentially challenges the naturalness of gendered identity as it has been culturally constructed.").

[202] PHELAN, *supra* note 4, at 127 ("[D]isarticulating identity, sexual act, and desire forces us to find a political ground for alliances, a vision for the future rather than the simple claim of identity.").

[203] "[A] large number of people around the world . . . do not feel comfortable with international law [which they] regard . . . as an expression of, and a tool of, Western dominance over the world . . . Human rights [are] a product of modern Europe . . . [which] sometimes sounds like another beautiful slogan by which Western powers rationalize their interventionist policies." ONUMA, *supra* note 66, at 106, 373. Onuma's call, however, is emphatically not for a rejection of human rights as a global public good, but rather for its recalibration to be more culturally inclusive. *Id.* at 376–89. In the end, "[t]o accept the system of sovereign states, a product of modernity, and to reject that of human rights, a counter-product, is an arbitrary selection of modernity. This should not be allowed." *Id.* at 390.

[204] Dennis Altman, *The Emergence of Gay Identities in Southeast Asia*, *in* DIFFERENT RAINBOWS 137–38 (Peter Drucker ed., 2000); *see generally*, Peter Drucker, *Introduction: Remapping Sexualities*, *in* DIFFERENT RAINBOWS 9, 12–25 (Peter Drucker ed., 2000).

[205] "In Western Europe and the United States, industrialization and urbanization reshaped the traditional rural and peasant populations into a new urban industrial and service workforce. It generated new forms of state apparatus, reorganized family relations, altered gender roles, made possible new forms of identity, produced new varieties of social inequality, and created new formats for political and ideological conflict." Rubin, *supra* note 13, at 155; *see also*, Joshi, *supra* note 34, at 431.

people seeking queer sex lives to live on their own and to form communities of choice.[206] In earlier times, in contrast, "a person's sexual self was not defined in terms of the sex of his/her partners. The rise of les-bi-gay people transformed 'doing' into 'being,' and homosexual activity became a basis for the identities."[207] Those new-found identities in turn enabled and informed the non-discrimination tack to international human rights advocacy.[208] But for many people living outside of Western countries, queer identity—in any of its forms—simply does not ring true.[209] Chou, for example, points out that "[m]any Chinese *tongzhi* stress that sexuality is only one integral part of life and does not mark them as categorically different people."[210] This does not mean, of course, that people are not having queer sex in non-Western societies.[211] To the contrary, there are often rich traditions of non-mainstream sexual attraction that have withstood the tests of both time and tyranny.[212] But the notion of a queer *identity*[213] of the kind that non-discrimination principles require is often literally foreign.[214] It too often runs

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[206] World War II "plucked millions of young men and women, whose sexual identity was just forming, out of their homes, out of towns and small cities, out of the heterosexual environment of the family and dropped them into sex-segregated situations." John D'Emilio, *Capitalism and Gay Identity*, *in* THE GAY & LESBIAN STUDIES READER 467, 472 (Henry Abelove et al eds., 1983).

[207] Sherry Joseph & Pawan Dhall, "*No Silence Please, We're Indians!"—Les-bi-gay Voices from India*, *in* DIFFERENT RAINBOWS 157, 173 (Peter Drucker ed., 2000).

[208] "[T]he Gay International . . . [seeks] to liberate Arab and Muslim 'gays and lesbians' from the oppression under which they allegedly live by transforming them from practitioners of same-sex conduct into subjects who identify as homosexual and gay." Joseph Massad, *Re-Orienting Desire: The Gay International and the Arab World*, 14 PUB. CULTURE 361, 362 (2002).

[209] Katyal, *supra* note 59, at 102 (noting the clash between the Western "substitutive model" that assumes the equivalence of public sexual identity and private sexual conduct and the "transformative" and "additive" models predominant in other parts of the world).

[210] Wah-Shan Chou, *Individual Strategies for Tongzhi Empowerment in China*, *in* DIFFERENT RAINBOWS 193, 194 (Peter Drucker ed., 2000).

[211] To the extent that a label is chosen at all, it may be predicated on engaging in same sex activity rather than on identity, such as the "men having sex with men—MSM—but not gay" label that some queer Indians prefer. Joseph & Dhall, *supra* note 207, at 161. As Bell and Binnie note, "'men who have sex with men' might be the only true dissidents of our time (since they resist identarian restriction altogether)." BELL & BINNIE, *supra* note 12, at 52 (citing Alan Sinfield, *Diaspora and Hybridity: Queer Identities and the Ethnicity Model*, 10 TEXTUAL PRACTICE 271 (1996)).

[212] *See* Drucker, *supra* note 204, at 11–12. Examples include the Zapotec tradition of mampo, *see* Max Mejia, *Mexican Pink*, *in* DIFFERENT RAINBOWS 43, 44 (Peter Drucker ed., 2000); South African mine workers and sangoma, *see* Mark Gevisser, *Mandela's Stepchildren: Homosexual Identity in Postapartheid South Africa*, *in* DIFFERENT RAINBOWS 111, 122 (Peter Drucker ed., 2000); Indian same-sex relationships existing parallel to traditional marriage, *see* Joseph & Dhall, *supra* note 207, at 159; and the Sub-Saharan African tradition of jin bandaa, *see* Mburu, *supra* note 9, at 182.

[213] "Mugabe, Museveni, Nujoma et al are right about one thing: while homosexual practise predates the colonization of the continent, the advent of a 'gay' subculture—of people taking on identities as 'gay' or 'lesbian' and demanding rights as such is without doubt a new—and Western—import, insofar as it is a consequence of urbanization and modernization as a global society." Gevisser, *supra* note 212, at 116. It must be acknowledged, however, that social antipathy to queer people is often stoked by governments in order to "distract[] domestic and international publics alike from other vexing issues such as political repression, corruption and bad governance." Rahul Rao, *Global Homocapitalism*, 194 RADICAL PHIL. 38, 45 (2015).

[214] VAID, *supra* note 2, at 286 ("A false assumption underlies all gay and lesbian organizing: that there is something at once singular and universal that can be called gay or lesbian or bisexual or even transgendered identity.").

roughshod over indigenous understandings of self-actualization and sexuality[215] predicated on the coexistence of traditional marriage and family[216] with other expressions of sexuality.[217]

Even for those who might prefer queer community and identity,[218] the conditions that allowed queer communities and identity to blossom in richer countries[219] have yet to arrive in many parts of the world:

> In the absence of welfare states, family is important in the Third World for simple survival. Marriage and children are the only forms of old-age or health insurance in many poor countries.[220]

In many poorer communities, "there is simply no space to be gay."[221] To insist—as non-discrimination law does—that queer identity is the lynchpin to protection

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[215] "By privileging Western definitions of same-sex sexual practices, non-Western practices are marginalized and cast as 'premodern' or 'unliberated'. . . [T]he closet is not a monolithic space, and . . . 'coming out' or becoming publicly visible is not a uniform process that can be generalized across national cultures." Martin Manalansan, *In the Shadows of Stonewall: Examining Gay Transnational Politics and the Diasporic Dilemma*, *in* THE POLITICS OF CULTURE IN THE SHADOW OF CAPITAL 485, 486, 501 (Lisa Lowe & David Lloyd eds., 1999). Tragically, identity-based initiatives "can serve to erase indigenous identities around sexuality and gender in favor of 'gay' or 'transgender' identities more readily recognizable to Western activists and law . . . [I]t may make rights claimants more vulnerable; may make them look more 'foreign' and less rooted in their own cultures, and in the process more othered and exposed." SEXUAL RIGHTS INITIATIVE, *supra* note 47, at 15.

[216] Chang, *supra* note 63, at 352 ("Historically, ethnic aversion to homosexual behavior was not so much a judgement on sexuality as it was on those who do not value procreation.").

[217] "The tension is between two very different ways of dealing with homosexuality—the traditional approach, which finds ways of accommodating it and not talking about it . . . and the Western way, which claims for homosexuals a 'gay' identity . . . With the latter comes personal freedom—and extreme cultural conflict." Gevisser, *supra* note 212, at 117. "Gay Africans, like straight Africans, do not leave their home cultures unless they are forced to; they find, rather, ways of reconciling their differences with the values of their home-communities." *Id.* at 135. Indeed, "[t]he need of Western lesbigays to engage in identity politics as a means of enhancing self-esteem may not be felt in other societies." *Id.* at 153. "Not all the people that the movement reaches are willing to redefine the concepts of family and marriage . . . In other words, many les-bi-gay people fear that visibility may mean too heavy a price to pay." Joseph & Dhall, *supra* note 207, at 174. In China, queer people increasingly "use a strategy of resistance in which same-sex relationships are legitimated not by rejecting the mainstream but by 'queering' it." Chou, *supra* note 210, at 205. It is reported that some Filipino men are revolted by what they see as vulgar public displays by those who "come out." Manalansan, *supra* note 215, at 437.

[218] "In the age of digital technology and social media, previously isolated people suddenly found themselves part of a global queer community, able to connect with others first in chat rooms and then on hookup sites or social media platforms; to download ideas about personal freedom and rights that encouraged them to become visible; and to claim space in society." GEVISSER, *supra* note 8, at 15.

[219] In pre-Stonewall times, "it is no accident that gay people viewed gay identity under a very thin description. Survival dictated as much." Ortiz, *supra* note 27, at 1850.

[220] Drucker, *supra* note 177, at 216; Dennis Altman, *Rupture or Continuity? The Internationalization of Gay Identities*, 48 SOC. TEXT 77, 88 (1996) ("Affluence, education, and awareness of other possibilities are all prerequisites for the adoption of new forms of identity, and the spread of these conditions will increase the extent to which gay identities develop beyond their base in liberal Western societies.").

[221] Gevisser, *supra* note 212, at 127; *see also*, Mburu, *supra* note 9, at 189; Katyal, *supra* note 177, at 1469–70.

is thus to ignore the deep socioeconomic divisions in the world that too often make it nearly impossible to be part of a community that exists outside of traditional heterosexual and marital family structures.[222] As Kapur pointedly reminds us,

> [t]he gaining of queer selfhood through visibility may involve great losses, ranging from familial and social rejection and ostracism, to being deprived of home, livelihood and services, to discrimination and humiliation, to violent assault and sometimes even death at the hands of the bigoted and/or the ignorant.[223]

The bottom line is that there may simply be few alternatives to traditional family support structures in many poorer countries.[224] If we insist that human rights claims may only be made by assertion of queer *identity* we risk ostracizing (or threatening the survival of) some of the most vulnerable people who engage in queer sex.[225]

It is true, of course, that non-discrimination law does not literally require the assertion of a queer identity in order to vindicate rights—imputed or ascribed group identity suffices.[226] But something remains conceptually askew when people who either choose not to adopt such an identity, or whose lives are too difficult or circumscribed to allow for such a choice, are nonetheless required to work within an identity-based paradigm of rights. As Gross rightly insists, "the idea of sexual orientation may sometimes be restricting rather than liberating."[227]

In addition to its validation of non-identarian queer lives and recognition of the socioeconomic constraints that constrain options for many queer people, a third type of inclusivity furthered by a focus on sexual liberty is the possible reduction of resistance from the political bloc thus far most staunchly opposed to

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[222] Katyal, *supra* note 59, at 158 ("In many situations, material conditions force individuals to prioritize family over social identification, a factor that is complemented by the strong boundaries that exist between public identity and private conduct.").

[223] Kapur, *supra* note 145, at 141.

[224] Drucker, *supra* note 177, at 216 ("In the absence of welfare states, family is more important in the Third World for simple survival. Marriage and children are the only form of old-age or health insurance in many poor countries.").

[225] "It is not the Gay International or its upper-class supporters in the Arab diaspora who will be persecuted, but rather the poor and nonurban men who practice same-sex conduct and who do not *necessarily* identify as homosexual or gay." JOSEPH MASSAD, DESIRING ARABS 189 (2007). As Onuma has eloquently argued, international law needs to "respond to desires, wishes, expectations and aspirations of a far larger number of non-Western people who were generally ignored when people saw, narrated, and administered the world in the twentieth century." ONUMA, *supra* note 66, at 33.

[226] The UN Human Rights Committee has made clear that "the term 'discrimination'. . . should be understood to imply any distinction, exclusion, restriction or preference which is *based on* any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has *the purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms." U.N. Hum. Rts. Comm., Gen. Comment No. 18, *supra* note 83, at ¶ 7.

[227] Gross, *supra* note 66, at 132.

queer rights—namely, the Organization of Islamic Cooperation.[228] While this may seem counterintuitive, Puar has pointed out that this group's unwavering resistance to protecting queer people against discrimination is not simply doctrinally based,[229] but is also a reaction to the politicization by Western countries of the duty not to discriminate against queer people via "homonationalism."[230] With instances of discrimination against queer people treated as indicia of backwardness,[231] Islamic (and other) countries that have not embraced the duty of non-discrimination are relegated to a subaltern status.[232] Rahman equates this stance to a new variant of colonialism under which Western discourse

> frames modernization as the necessary precursor to sexual diversity, and thus resistance to queer rights is seen as indicative of a less economically developed, less democratic, and less secular social formation. . . . Homocolonialism provokes Muslim homophobia which becomes part of the process of triangulation, reinforcing Islamophobia because the resistance to sexual diversity is taken as fundamentally indicative of

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[228] The 1981 and 1990 Organization of the Islamic Conference declarations "prioritize[] Sharia law over the perceived Judeo-Christian and secular provenance of [the Universal Declaration of Human Rights] . . . and thus do[] not provide scope for including sexual orientation." Momin Rahman, *Queer Rights and the Triangulation of Western Exceptionalism*, 13 J. HUM. RTS. 274, 276 (2014). Rahman notes too that half of the countries that criminalize homosexuality are majority Muslim states. *Id*. *See generally*, Robert Blitt, *The Organization of Islamic Cooperation's (OIC) Response to Sexual Orientation and Gender Identity Rights: A Challenge to Equality and Nondiscrimination Under International Law*, 28 TRANSNAT'L L. & CONTEMP. PROBS. 89, 183 (2018) (noting in particular that the Organized Islamic Cooperation (OIC) has sought to "mainstream its views as consistent with and embracing human rights universality").

[229] Hamzic identifies two streams of Islamic interpretation—a scripturalist approach that "equates Islamic legal tradition with shari'a, a set of divine and immutable principles" and a new historian approach under which "shari'a cannot be artificially disentangled from public policy," and argues that "we shall find . . . no reference to the categories of sexual orientation and gender identity" under either approach. Vanja Hamzic, *The Case of 'Queer Muslims': Sexual Orientation and Gender Identity in International Human Rights Law and Muslim Legal and Social Ethos*, 11 HUM. RTS. L. REV. 237, 253–54 (2011). She blames a "post-colonial condition" for the fact that presently "[f]or the first time in the history of Muslim communities, *people*, the fellow Muslims, instead of certain illicit *acts*, have received blanket condemnation. states, jurists and scholars have now joined hands in defence of *naturalised* normative *heterosexuality* and neo-Victorian sexual puritanism." *Id.* at 261.

[230] This term derives from JASBIR PAURA, TERRORIST ASSEMBLAGES (2007); *see also*, Puar, *supra* note 58, at 336. Massad, for example, argues that "it is not same-sex practices that [were] being repressed by Egyptian police [in the 2001 raid on the Queen Boat] but rather the sociopolitical identification of these practices with the Western identity of gayness and the publicness that these gay identified men seek." Massad, *supra* note 208, at 382; *see also*, Gross, *supra* note 66, at 130 ("what is being repressed is not same-sex sexual practices but, rather, the sociopolitical identification of these practices with the Western idea of gayness"). Rao notes moreover that a homonationalist agenda has been adopted by international financial institutions, giving rise to what he calls "homocapitalism." Rao, *supra* note 213, at 38.

[231] Non-discrimination based on sexual orientation or gender identity has become "a barometer by which the right and capacity for national sovereignty is evaluated." Puar, *supra* note 58, at 336.

[232] "Because of . . . [their] humiliating past, [non-Western countries] tend to be excessively sensitive to criticism from the developed countries," with criticisms "perceived as arrogant interventions or pressures from the outside world." ONUMA, *supra* note 66, at 56.

> Muslim "otherness" to modernity. . . . Not only does this potentially prevent the development of queer Muslim religious discourses within queer and Muslim politics, but it lowers the likelihood of debate and change within Muslim communities on issues of sexuality and gender.[233]

The identarian focus of anti-discrimination law serves the homonationalist agenda well,[234] emphasizing the extent to which (Western-embraced) forms of collective identity are safeguarded in a particular state.[235] A focus on sexual liberty, in contrast, is less readily deployed as a tool of stigmatization—especially if forms of extramarital and non-heterosexual sex, long practiced in Muslim and other non-Western societies, are taken into account. This shift in focus might therefore defuse at least some of the present antagonism directed at traditional approaches to queer rights.

This point should not be overstated. Islam, like most organized religions,[236] has rarely been an ally of sexual liberation.[237] But it remains that a right to sexual liberty, at least if carefully framed in a culturally inclusive way, has the potential to lower the homonationalist temperature engendered by the Western, identity-based variant of queer rights[238] that has predominated in international human rights law to-date.

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[233] Rahman, *supra* note 228, at 277, 280, 282. "Once LGBT rights are incorporated into global governance, they can be appropriated to reinforce or strengthen the political and/or economic power of Northern states over states in the global South." Gross, *supra* note 49, at 154.

[234] "My point . . . is an argument against a Western nativism . . . that considers assimilating the world into its own norms as ipso facto 'liberation' and 'progress' and a step toward universalizing a superior notion of the human. There is nothing liberatory about Western human subjectivity including gays and lesbians when it does so by forcibly including those non-Europeans who are not gays or lesbians while excluding them as unfit to defend themselves." MASSAD, *supra* note 225, at 42.

[235] Much queer rights advocacy has been "aligned with a set of (white) secular norms which reinforce the racist representation of Islam and Muslims as homophobic and culturally backward, where practices such as gay marriage serve as a marker for the distinction between a radicalised, primitive, Muslim population and upright, proper, homosexual citizens." Kapur, *supra* note 145, at 136.

[236] "In every nation where the idea of human rights has taken root, there has been a conflict between human rights ideals and the dominant religion and culture." ONUMA, *supra* note 66, at 458.

[237] David Leeming, *Religion and Sexuality: The Perversion of a Natural Marriage*, 42 J. RELIGION & HEALTH 101 (2003) (arguing that the split between sexuality and religion is especially evident in the repression of women and the criminalization of sexuality characteristic of religions of the Abrahamic tradition). *But see*, QUEER AND RELIGIOUS ALLIANCES IN FAMILY LAW POLITICS AND BEYOND (Nausica Palazzo & Jeffrey A. Redding eds., 2022) (an exploration of the possible common ground between religion and queer rights).

[238] Indeed, it might well better align with contemporary queer rights activism in wealthier countries to take a more fluid view of the relationship between sexuality and identity. As Massad has noted, "[t]he categories gay and lesbian are not universal at all and can only be universalized by the epistemic, ethical, and political violence unleashed on the rest of the world by the very international human rights advocates whose aim is to defend the very people their intervention is creating . . . [W]hat the incitement and intervention of international human rights activism achieves is the replication of the very Euro-American human subjectivity its advocates challenge at home." MASSAD, *supra* note 225, at 41.

Conclusions

The short point, then, is that both the privacy and non-discrimination routes taken to vindicate queer rights have left some who partake in queer sex behind—people whose needs and aspirations call for adoption of a right to sexual liberty. I have argued the case for an approach to international queer rights that goes beyond the integrative agenda to embrace also non-integrative, liberatory goals. To be clear, I am not calling for "unfettered freedom."[239] The right to sexual liberty I advocate is rather a more modest claim, intended to guarantee freedom from oppressive constraints[240] and firmly anchored in the usual balancing processes of international human rights law.[241] Establishment of a right to sexual liberty in international human rights law would nonetheless be transformative: it would impose a duty of justification on whoever challenges the presumption that we are all entitled freely to choose to have consensual sex in whatever ways we find satisfying. Absent the ability to satisfy that high bar, any constraint on consensual sex would be unlawful.[242]

The non-discrimination framework deployed to-date, in contrast, fails to do substantive justice to the intrinsic importance of recognizing sexual liberty as a core component of what it means to be truly human. And perhaps most important of all, an identity-based remedy is at odds with the way that many people who have queer sex see themselves, especially those living outside the Western world. A right to sexual liberty shifts the discussion away from the culturally cribbed assumption that the choice of sexual partners or activities necessarily implicates one's identity, allowing sex to be understood instead as something worthy of protection because it has value in and of itself.[243]

Establishing a right to sexual liberty also avoids the pitfalls of continued reliance on privacy rights. While the privacy doctrine has been effectively invoked to mandate the decriminalization of (private) same-sex activity, it has not

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[239] This is the goal embraced in RATNA KAPUR, GENDER, ALTERITY AND HUMAN RIGHTS: FREEDOM IN A FISHBOWL 70, 76 (2018).

[240] *See generally* JOHN STEWART MILL, *Introduction*, *in* ON LIBERTY (1869). Some would nonetheless argue that the liberatory character of such a move is undermined by its reinforcement of the state's regulatory authority. *See e.g.,* Kapur, *supra* note 145, at 140. Yet this critique seems more embedded in an aspirational preference for supranational law over (extant) international law, a foundational premise that logically counsels against any and all engagement with (extant) international law rather than speaking to prospects for queer rights advocacy in particular.

[241] *See supra* text accompanying notes 25–26, 144.

[242] Care would of course need to be taken to ensure that the bases upon which legitimate constraints could be imposed are not overly broad. As Thoreson rightly observes, a "morals" limitation clause could be especially problematic even as it might well both incentivize participation and play a constructive role in the supervisory dialogue. Thoreson, *supra* note 144, at 206. His insistence that any morals constraint be understood to legitimate only consideration of intertextual morality (looking "both at the treaties to which the state has acceded and the state's own constitutional jurisprudence as evidence of its foundational values." *Id.* at 234–35) is wise.

[243] "A sexual autonomy model . . . equalizes one's sexual and identity preferences by focusing on the act of choosing, rather than the gender or identity chosen . . . Expressive liberty, then, goes one step further than expressive identity: it permits the choice of with whom to have sexual relations, how to identify oneself, and whether or not the relationships one chooses should be publicly recognized." Katyal, *supra* note 176, at 1475, 1482.

been interpreted to require states to protect all forms of consensual sex. To the contrary, privacy law can be counted on only to protect sexual activity between not more than two persons in a strictly private space—meaning that it is most friendly to forms of queer sex that come relatively close to the heterosexual analogue.[244] It is also most readily invoked by those whose social and economic circumstances provide them with ready access to space that is traditionally acknowledged to be genuinely *private*.

These points are not tantamount to saying that the proponents of earlier approaches were short-sighted, much less misguided.[245] I believe that we owe these pioneers an enormous debt of gratitude for having capitalized on the ability of extant liberal-inspired international human rights law to deliver certain social goods critical to queer rights[246]—and to do so at quite a remarkable pace. I see no value in contesting the importance of the victories secured, in particular under the non-discrimination framework.[247] For many queer people, social inclusion on traditional terms is valued—and that is a choice that we should have.[248]

My argument is rather that the liberal framework of international human rights law can be harnessed to do much more. As Nussbaum makes clear, liberal principles themselves require more than non-discrimination and respect for privacy; true equal respect instead requires "the capacity for imaginative and emotional participation in the lives of others."[249] The conceptual weaknesses of the non-discrimination paradigm and the narrow range of people having queer sex whose lives fit its parameters should therefore give us pause.[250] Nor is there any good reason to limit sexual autonomy by reference to heteronormative and marriage-based privacy rights. While there is no need to revisit, much less to

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[244] Classic understandings of a sexual citizen involve "a heterosexual citizen . . . whose sexuality is contained within the private realm of family and conjugality." Brenda Cossman, *Sexing Citizenship, Privatising Sex*, 6 CITIZENSHIP STUD. 483, 485 (2002).

[245] It has been argued, for example, that "if we are to concede that citizenship discourse can accommodate only certain articulations of sexual rights, would we not be better served by refusing that agenda altogether, and finding more imaginative ways to mobilize sexual politics?" BELL & BINNIE, *supra* note 12, at 142. My own view is that the rights secured are neither unimportant to many queer people nor at odds with now seeking to engage law in a more expansive quest for sexual liberty. That said, Bell and Binnie are clearly right to insist that "we should always keep a critical eye on the moves we make to secure status as citizens, and look around at the potential harm any rights claims might have on others." *Id.* at 146.

[246] "Organizing around the notion that there is a fixed, definable gay and lesbian identity is far more convenient than organizing around the notion that homosexual desire is present in every person. It is also far less threatening . . ." VAID, *supra* note 2, at 209.

[247] Others disagree, of course. Working under both paradigms has been described as "Scyla and Charybdis—steering for recognition endangers one's ability to be different, forcing one to forswear differences that interfere with the assimilating body, while claims to autonomy founder on the problems of delineating a space that is both distinct from the mainstream and deserving of its protection." PHELAN, *supra* note 4, at 112.

[248] "Obviously, no thoughtful gay activist should or would take a position that argues for continual exclusion of lesbians and gays from any institution or practice they choose to join—be it marriage or the military." Walters, *supra* note 194, at 345.

[249] NUSSBAUM, *supra* note 18, at xix.

[250] "Equality and non-discrimination should . . . be included, but not as the sole or primary focus." Walker, *supra* note 52, at 72.

reject, the true successes secured to-date,[251] a right to sexual liberty moves us to the next level.[252] It decenters mainstream preferences and makes room for queers and all others autonomously to decide how best to live an authentic sexual life.

[251] VAID, *supra* note 2, at 24–25 ("Our focus has reflected the historical necessity of eliminating draconian laws and harmful social policies. The time has come for us to shift that focus somewhat in order to win the larger battle of full equality.").

[252] Ortiz, *supra* note 27, at 1856 ("For the purpose of combating a single monolithic external description, a thin master description may serve best. For purposes of later empowering the group, new and positive thick master descriptions may serve even better.").

Sadomasochism in Strasburg: A Pleasurable Danger?

Giovanna Gilleri*

ABSTRACT

This paper presents an analysis of sadomasochistic practices from a gender perspective against which it compares and criticizes the European Court of Human Rights' (ECtHR) case law on sadomasochism. In sadomasochistic practices, domination and subordination are closely interdependent. The interplay of domination-subordination and pleasure-danger entails that these postures may be variously attached to either/both masculine and/or feminine roles and identities without pre-fixed meaning. What is the stance of human rights law on this type of practice? The ECtHR's case law is the only example of a supranational human rights court dealing with sadomasochism. To date, no cases related to sadomasochism have been brought forth in other regional courts' case law and in the jurisprudence of UN human rights treaty bodies. The study investigates, therefore, how the ECtHR has interpreted sadomasochism under Article 8 of the European Convention of Human Rights, considering the notions of private life, sexual acts, and violence in order to evaluate the legitimacy of the State's interference. This paper looks at the way in which the ECtHR interprets the conducts and roles within sadomasochism. The peculiarities of this sexual performance are hardly understood faithfully to their nature and purposes in the ECtHR's case law. Apart from rare shy exceptions, the mantra of domination=violence, dominator=perpetrator, and dominated=victim monopolizes the ECtHR's narrative on sadomasochism. From the sadomasochistic perspective, the subject described as a "victim" in the Court's decisions can well be an individual who has freely consented to receive pain as a source of their pleasure under certain conditions negotiated beforehand with the dominator. Where such conditions are respected, the latter's position should be considered much closer to a sexual contracting party rather than a perpetrator. The conclusion stresses that the ECtHR's reasoning does not grasp the sexual realities of gendered subjectivities, being based on oppositional and unnuanced conceptions of violence versus sex, domination versus subordination, and masculinity versus femininity.

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. . . Pleasure often comes from pain, power from prohibition, and domination often is impossibly mixed up in subordination.[1]

INTRODUCTION

Sadomasochism resides in the blurred land of domination-subordination producing a sense of pleasure-danger. It encompasses various types of sexual activities which share their consensual nature and their source of pleasure, ranging from control over or subjection to others to giving and receiving pain. In sadomasochistic practices, domination and subordination are closely linked. At the heart of subordination is the danger-pleasure of domination, unlike the oppositional conceptions of male domination *versus* female subordination underlying prevailing interpretations of international human rights law. But what happens when sadomasochism arrives before the European Court of Human Rights in Strasbourg? This paper analyses sadomasochistic practices from a gender perspective against which it compares how the European Court of Human Rights (ECtHR) interprets the conducts and roles within sadomasochism under Article 8 of the European Convention of Human Rights (ECHR), considering the notions of private life, sexual acts, and violence in order to evaluate the legitimacy of the State's interference. The ECtHR's case law is the only example of a supranational human rights court dealing with sadomasochism. To date, no cases related to sadomasochism have been brought forth in other regional courts' case law and in the jurisprudence of UN human rights treaty bodies.

Sadomasochism disrupts the traditional gendered dualism and asymmetry of the man-perpetrator dominating the woman-victim. The amalgam of domination and subordination unveils that the legal framework of 'victim' and 'perpetrator' is unsuitable for the erotic unraveling of sadomasochistic acts. The interplay of domination-subordination and pleasure-danger entails that these postures may be variously attached to either/both masculine and/or feminine roles and identities without pre-fixed meanings. Domination may be feminine, subordination may be masculine—just like any power position may be attached to any variously gendered subject. When this intimate sexual revolution put into effect on the sadomasochistic stage encounters the gendered human rights discourse, many questions arise. How does the ECtHR consider this intersection of pleasure and danger characterizing sadomasochistic practices? What role does the violence enshrined in certain sadomasochistic acts play in the eyes of the Court? How does the ECtHR apply the dualistic model of victim and perpetrator to sadomasochism? What is the Court's attitude towards the alteration of traditional models of woman-subordinated and man-dominator, replaced by various positionalities of both femininities and masculinities? Femininities,

[1] Martha McCluskey, *How Queer Theory Makes Neoliberalism Sexy*, in FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS 115, 125 (Martha Fineman, Jack E. Jackson, & Adam P. Romero eds., 2009).

masculinities, domination, aggression, lust, and subordination intermingle in sadomasochistic practices. The following examination will dismantle the Court's gendered assumptions about sexual encounters, focusing particularly on the objectivity of pain and the conventional power relations of domination/subordination. By conceiving sadomasochism as a net of sexual interactions, this paper challenges the Court's reasoning which mirrors traditional gender normativity. This paper is a journey into the changing dynamics of gendered subordination and domination in relation to danger *and* pleasure, and danger *as* pleasure. This journey starts by defining the field of the concept and practices of sadomasochism, with specific attention to the reversibility of the dominative and subordinate roles (Section I). The sadomasochistic interaction as an unbalanced power relationship plays with the subjective boundaries between subjects and between danger and pleasure. As such, sadomasochism is a personal sexual choice expressed through the consent of the participants (Section II). This paper subsequently addresses how the ECtHR treats sadomasochistic acts by examining its case law (Section III). The analysis of the Court's case law between 1997 and 2020 focuses on how judges have applied Article 8(2) ECHR to cases concerning consensual acts of sadomasochism. The discussion addresses three aspects of the Court's reasoning in particular: the interpretation of violence in the context of sadomasochism (Section III.2), also in comparison with judgments on homosexual acts (Section III.1); the Court's tendency to victimize individuals actively engaged in the sadomasochistic act because of their subordinate position, as well as its ambiguous attitude toward considering sadomasochism as a sexual activity (Section III.3). Against this enigmatic connotation of sadomasochism as a less valuable sexual activity, the paper shows how the ECtHR constructs a hierarchy of sex value where 'non-traditional' sexual acts are relegated to lower positions (Section IV). Given this ECtHR's suspicion, there is reason to doubt the existence of a right to engage in sadomasochistic activities under the ECHR. Further, the paper finds that an approach to violence which is based on the degree of pain, such as the Court's approach, is conceptually and operationally limited in the light of the subjective and the cultural roots of the perception of pain (Section V). The conclusion suggests that a closer examination of the specifics of the sadomasochistic performance, including the roles, positions, and situational meanings of the subjects may provide the Court with a better understanding of the human rights implications of sadomasochistic practices.

I. SADOMASOCHISTIC PRACTICES

1.1. THE KERNEL: DOMINATION, PLEASURE, RECOGNITION

'Sadomasochism' refers to consensual sexual activity based on the pleasure of controlling or being subjected to others, as well as inflicting pain on and receiving pain from others. Sadomasochism is a portmanteau term merging 'sadism,' which is the enjoyment of sexual pleasure in inflicting pain, and 'masochism,' which is the taking of erotic pleasure in receiving pain. Sadomasochism is frequently referred to as 'SM,' 'S/M,' 'S&M,' as well as in

combination with bondage ('B') and discipline ('D') in the acronym 'BDSM.'[2] Sadomasochism is often distinguished from dominance and submission ('D/S'), which, instead, is frequently a key part of the former. Throughout this paper, 'BDSM' will be used only where this term is deployed in the ECtHR's decision at stake. Otherwise, the paper will avoid any acronym and simply refer to sadomasochism as defined above, which may or may not include bondage meaning the consensual practice of binding, tying, or otherwise restraining a partner's movements.[3] Another definitional note concerns the identitarian connotations of sexual practices. Sadomasochistic acts can occur between individuals of the same or different gender: acts may be described as 'heterosexual' or 'homosexual' sadomasochistic. By 'homosexual sexual acts' with no further connotation, this paper will refer to non-sadomasochistic homosexual acts, especially throughout the comparison between the ECtHR's case law on decriminalization of homosexual acts on the one hand, and sadomasochistic practices on the other hand.[4]

Such a broad definition of sadomasochism comprises an array of practices characterized by a power imbalance that produces lust both in the presence or absence of pain.[5] Where pain is present, it (1) derives from various forms of domination; (2) produces pleasure; and (3) is a form of recognition that is a way for the subject to be recognized. This is the scope of sadomasochism for the purposes of this study. Accordingly, sadomasochism is one of those sexual activities that transcends and is not interested in the dynamics of the homosexual/heterosexual binary. Sadomasochism can still have a homosexual or heterosexual characterization. However, central to this specific form of sexuality is the alternation of domination and subjugation that occurs between the subjects performing it and the pain-pleasure stemming from it.[6]

Physical pain is only one aspect of sadomasochism. Dominance and submission—also referred to as 'D/S' and often distinguished from sadomasochism—may take place in various manners that are not necessarily

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[2] On BDSM community assertions of sadomasochism as an identity, *see* Michel Foucault, *Sex, Power, and the Politics of Identity*, in ETHICS: ESSENTIAL WORKS OF MICHEL FOUCAULT 1954-1984 163-173, 167-170 (Paul Rabinow ed., 2000).

[3] Bondage, in turn, does not necessarily imply sadomasochism, since it can be used as an end in itself: *cf.* Theodore Bennett, *Human Rights (Sexual Conduct) Act 1994*, 35 SYDNEY L. REV. 541, 541 (2013).

[4] *See* infra, § 3.1.

[5] *See* STEVEN ALLEN, CINEMA, PAIN AND PLEASURE CONSENT AND THE CONTROLLED BODY 28 (2013).

[6] An exhaustive description of the practices of sadomasochism, their genealogy and developments furnishes scope for a separate paper; for a rich psychoanalytical study of the unconscious fantasies of masochism built on, among others, psychological pain and self-destructive violence, *see* ESSENTIAL PAPERS ON MASOCHISM, (Margaret Ann Fitzpatrick Hanly ed., 1995); for an example of ethnographic and sociological explorations on contemporary sadomasochistic culture, *see* STACI NEWMAHR, PLAYING ON THE EDGE: SADOMASOCHISM, RISK, AND INTIMACY (2011); DANIELLE J. LINDEMANN, DOMINATRIX: GENDER, EROTICISM, AND CONTROL IN THE DUNGEON (2012); on alternative narratives of consensual BDSM, *see* Bela Bonita Chatterjee, *Pay v. UK, the probation service and consensual BDSM sexual citizenship,* 15 SEXUALITIES 739, 741-743 (2012); on the relationship between subject and object in sadomasochism, *see* JEAN-PAUL SARTRE, L'ÊTRE ET LE NÉANT: ESSAI D'ONTOLOGIE PHÉNOMÉNOLOGIQUE 446, 475-76 (2017); RENÉ GIRARD, JEAN-MICHEL OUGHOURLIAN & GUY FORT, DES CHOSES CACHÉES DEPUIS LA FONDATION DU MONDE: RECHERCHES AVEC JEAN-MICHEL OUGHOURLIAN ET GUY FORT 3 (1978).

physically painful. Dominance-submission presumes that one or more individual(s) ('the dominator') assume(s) control over the other(s) ('the dominated') who relinquish(es) their power. Control is key to triggering lust in both the dominating and the subordinated individual. Control is often exercised through various forms of humiliation of the controlled subject. There are countless erotic fantasies about how control can be exercised. To name some of them: the 'golden shower' consists of urinating on the dominated; in 'foot worship' the dominated follows the dominator's orders, such as kissing or massaging their feet.[7] A conceptual, and somehow operational, clarification: the complementary agent of a masochist player is not a sadist person. The sadist person is one who enjoys harming the other. If the masochist finds pleasure in being harmed, there is no reason for the sadist to choose a masochist victim. Indeed, there is the inappropriate tendency to believe, as stressed by Gilles Deleuze, that it is possible to achieve unity in the complementarity of antonyms and therefore 'to obtain Masoch starting from Sade.'[8] As will be explained below, roles in the sadomasochistic play are not stable, but shift from dominative to subordinate positions, and *vice versa*.

Sadism and masochism have long been considered disorders of sexual development. The Diagnostic and Statistical Manual (DSM-5) of the American Psychiatric Association includes the so-called 'sexual masochism disorder' and 'sexual sadism disorder' which occur when the person suffers from significant distress caused by the psychosocial difficulties deriving from sadomasochistic sexual interests. Therefore, sadomasochism *per se* is not classified as a mental disorder under the DSM-5, but only when the individual experiences obsessive thoughts and/or distress, such as guilt, anxiety, and shame. Notwithstanding this evolution and the slight depathologization of sadomasochistic inclinations, criticism of the former as well as of the present DSM-5 approach to sadomasochism and other 'sexual disorders' are harsh.[9]

A central element of sadomasochism is consent. The sadomasochistic drive presupposes that, and is only possible if, the participants have given their prior consent to what otherwise would most likely amount to wrongful acts violating, to mention a few, the individual's dignity, the right to physical integrity and the right to be free from cruel, inhuman and degrading treatments. In order to reach consent, individuals discuss the type of acts they wish to be engaged in. The

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[7] Danielle Lindemann, *BDSM as Therapy?*, 14 SEXUALITIES 151, 152–53 (2011).
[8] GILLES DELEUZE, MASOCHISMO E SADISMO 11 (1971).
[9] DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5, (American Psychiatric Association & American Psychiatric Association eds., 5th ed. 2013); for an overview of the ways in which the different editions of the DSM have dealt with sadomasochism and the criticism regarding the pathologizing inclusion of sadomasochism among mental disorders, see Richard B. Krueger, *The DSM Diagnostic Criteria for Sexual Masochism*, 39 ARCHIVES OF SEXUAL BEHAV. 346, 348 (2010); for a piercing criticism of the DSM-5, particularly the pathologization of normality and the stigmatization of healthy persons as mentally ill behaviors it operates, *see* ALLEN FRANCES, SAVING NORMAL: AN INSIDER'S REVOLT AGAINST OUT-OF-CONTROL PSYCHIATRIC DIAGNOSIS, DSM-5, BIG PHARMA, AND THE MEDICALIZATION OF ORDINARY LIFE (2014); on other arguments against pathologization, *cf.* Roy Baumaister & Jennifer Butler, *Sexual Masochism: Deviance without Pathology*, *in* SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT 225–39 (William O'Donohue & Richard Laws eds., 1997).

agreement they reach is the result of negotiations focused on the activities they want or do not want to participate in. Precautionary measures are also included in the 'sadomasochistic contract' to signal an immediate halt to the practice.[10] Subjects—most likely the one receiving pain—can withdraw their consent explicitly by using a safe-word or a safe-symbol, i.e., a non-verbal action, especially where speech is restricted, that was previously agreed upon, such as a gesture or a noise.[11] There are some rules for the erotic game[12] of pain-pleasure to take place smoothly. However, if the (dominating) subject does not honor the safe-word or the safe-symbol, consensual pain-pleasure turns into non-consensual pain-abuse. If the rules of the game are not respected, the rules of the law apply to the misconduct. The regime of eroticism gives way to the legal regime. For some, consensual sadomasochism "appears to be on the cusp of a new understanding"[13] in the legal domain. For instance, the time for consensual sadomasochism "to be heard has come."[14] Before turning to the core question—what sadomasochism is for the ECtHR—the next section presents the configuration of sexual roles in sadomasochism as changeable, malleable, and prone to creative reinventions.

I.2 REVERSIBLE ROLES

Domination and subordination are not necessarily connected to one or other gender. The scheme of masculine domination, opposing a superordinate man dominator to a subordinate woman victim [m>f],[15] can actually be a *good* model, but only in two cases:

(1) If [m>f] is extrapolated from the societal context in which, for instance, human rights analysis, such as the one developed throughout this paper, applies it.

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[10] STACI NEWMAHR, PLAYING ON THE EDGE: SADOMASOCHISM, RISK, AND INTIMACY 75–78 (2011); MARGOT DANIELLE WEISS, TECHNIQUES OF PLEASURE: BDSM AND THE CIRCUITS OF SEXUALITY 78–85 (2011).

[11] *See* JAY WISEMAN, SM 101: A REALISTIC INTRODUCTION (1998).

[12] The conceptualisation of sadomasochistic activities as game playing dates back to Michel Foucault, *Sexual choice, sexual act: Foucault and homosexuality (interview)*, *in* POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 1977-1984 286, 299 (Lawrence Kritzman ed., 1988); however, the idea was further developed by Nils-Hennes Stear, *Sadomasochism as Make-Believe*, 24 HYPATIA 21 (2009).

[13] Chatterjee, *supra* note 6 at 740.

[14] Darren Langdridge & Trevor Butt, *A Hermeneutic Phenomenological Investigation of the Construction of Sadomasochistic Identities*, 7 SEXUALITIES 31, 35 (2004).

[15] [m>f] was first introduced by Janet Halley as one of the essential claim underlying a certain form of American feminism: JANET E. HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 17–18 (2006); Dianne Otto further elaborated the concept and applied it to her criticism of sex and gender as interpreted under international human rights law. Dianne Otto, *International Human Rights Law: Towards Rethinking Sex/Gender Dualism and Asymmetry*, *in* THE ASHGATE RESEARCH COMPANION TO FEMINIST LEGAL THEORY 197–214 (Margaret Davies & Vanessa E. Munro eds., 2013); the author has deepened and broadened the applications of this theoretical strand in human rights law, with specific reference to the case of surgeries upon intersex children: Giovanna Gilleri, *Gendered Human Rights and Medical Sexing Interventions upon Intersex Children: A Preliminary Enquiry*, 3 ASIAN Y.B. HUM. RTS & HUMANITARIAN L. 79 (2019).

(2) If [m>f] is applied to sadomasochism, along with other dominative forms [>], including but not limited to [m>f], [f>m], [f>f], and [m>m].

The first case assumes an acontextual type of examination that clearly does not mirror the orientation of this paper. The second case, instead, is the direction that the last paragraphs of this inquiry will follow.

I.2.1 UNPREDICTABLE MASTERS AND SLAVES

The application of [m>f] to sadomasochism requires some conceptual premises on gendered subordination occurring *regardless of* the sadomasochistic stage. A structural legal element constitutes the primary force of gender-based male dominative institutions and practices in the so-called western world.[16] This finding has at least two implications. First, male domination is twofold in nature. It is 'individual' [m_i], that is, it depends on the single individual's will and (unconscious) desire. It is also and simultaneously 'social' [m_s]: it has social and cultural roots in rules and processes. [m_s] and [m_i] are separate yet interdependent. The individual exerts [m_i], which is partially grounded in the structural [m_s] and partially rooted in the individual will. By the same token, [m_s] exists and resists at the level of social, legal, cultural, and familiar infrastructures. However, it expresses itself also through the action of single individuals in the form of [m_i], which is never detachable from the system [m_s] where it operates. The 'm' of [m>f] should be read, therefore, as [(m_s + m_i)>f]. The acknowledgment of the structural component of gender domination has a crucial consequence for the positionality of femininity in the gender formula [(m_s + m_i)>f]. Indeed—and this is the second implication—there is no correspondence between [m_s + m_i] and a hypothetical [f_s + f_i]. Femininity does not express itself as a dominative structure socially and culturally ingrained. [f_s] simply does not find any reason to exist, at least in the western model of society and its representation in the letters and interpretations of human rights law. Hence, [f_s + f_i] is an incorrect understanding of what femininity actually is, for both individuals and social institutions. A final consequence is that the "f" and "m" of [m>f] are not, to quote Jessica Benjamin, "sovereign equals," since 'm' is the result of a combination of factors, unlike "f." As femininity, unlike masculinity, is not endowed with any historically structural dominative dimension, the reversed [f>m] will never be the reciprocal of [m>f]. This is because of the incommensurability of the constitutive terms of femininity and masculinity.

These premises are useful to understand what makes sadomasochistic interactions peculiar in gendered terms. While sadomasochism is not completely secluded from the above-described dynamics, the scheme [m>f] applied to sadomasochism ignores any consideration of the systematic domination of [m], making [m] the sum of [m_s + m_i]. The sadomasochistic act, regardless of the number of people performing it, is individual in nature: [m_i], [f_i], and [any_i]. Therefore, sadomasochism is a performance between, for instance, [m_i] and [f_i].

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[16] JESSICA BENJAMIN, THE BONDS OF LOVE: PSYCHOANALYSIS, FEMINISM, AND THE PROBLEM OF DOMINATION 216 (1st ed. 1988).

The subject's single action can transcend the structural character of male-driven domination underlying any socio-legal examination of gender-related violations. This conception of sadomasochistic practices as make-belief and/or simulation of individual acts has many implications. To mention some of these:

- $[f_i]$ may actually enjoy the fact of being subject to $[m_i]$;
- $[f_i]$ is the subordinate subject, while $[m_i]$ is the dominator;
- $[f_i]$ and $[m_i]$ have agreed that their relationship will take the shape of $[m_i>f_i]$;
- $[f_i]$ can in any moment stop the erotic game for any reason according to the rules the subjects have previously agreed upon;
- $[m_i]$'s conduct and existence are fully dependent upon $[f_i]$ in practice.[17]

Clearly, the major implication is the transformation of $[m_i>f_i]$ into any dominative combination such as $[x>z]$. To continue with the letters and identities of the above example, the relationship can well take the reversed direction of $[f_i>m_i]$, without any major consideration concerning women's structural subordination in the world—this is the world *outside of* the sadomasochistic play, the world sadomasochism may simulate *inside of* its play.[18] The creative impulse of sadomasochism entails inherent asymmetry in relation to any feminine, masculine, or other gendered posture. The dominative matrix can occur in heterosexual, homosexual, and any other sexual relationships.[19] What is central to sadomasochism is its capability to invert social roles (the vulnerable man/the cruel woman), displace them from the social level to the mental and corporeal level, and eventually use them to generate new pleasures.[20]

The relation is reversible,[21] with the master turning into the slave, but it will never become equal or reciprocal—remember: the balance between self-

[17] According to a certain psychoanalytic interpretation of masochism, the masochist is indeed the one who actually commands the experience: *cf.* ROBERT JESSE STOLLER, SEXUAL EXCITEMENT: DYNAMICS OF EROTIC LIFE (1986); for an account of a personal experience confirming the psychoanalytical finding, *see* Susan Farr, *The Art of Discipline: Creating Erotic Dramas of Play and Power*, *in* COMING TO POWER: WRITINGS AND GRAPHICS ON LESBIAN S/M (Samois ed., Alyson Publications ed. 1981); *see generally* BENJAMIN, *supra* note 16 at 262.

[18] Saying that sadomasochism is a play does not mean that it is not real; rather, sadomasochism takes place and subverts our very human caves.

[19] This investigation scrutinizes how sadomasochist practices overturn the traditional asymmetries and axioms of human rights law; therefore, this section does not address the question as to how sadism and masochism have become associated with masculinity and femininity respectively: *see* BENJAMIN, *supra* note 16 at 74.

[20] *See* GIORGIO AGAMBEN, THE OMNIBUS: HOMO SACER 1124 (2017).

[21] On the fluidity of the sadomasochistic relationship, Michel Foucault stressed: 'S&M is the eroticization of power, the eroticization of strategic relations. What strikes me with regard to S&M is how it differs from social power. What characterizes power is the fact that it is a strategic relationship which has been stabilized through institutions . . . At this point, the S&M game is very interesting because it is a strategic relation, but it is always fluid. Of course, there are roles, but everyone knows very well that those roles can be reversed. Sometimes the scene begins with the master and slave, and at the end the slave has become the master. Or, even when the roles are stabilized, you know very well that it is always a game. Either the rules are transgressed, or there is an agreement, either explicit or tacit, that makes them aware of certain boundaries': MICHEL FOUCAULT, ETHICS, SUBJECTIVITY AND TRUTH (THE ESSENTIAL WORKS OF MICHEL FOUCAULT, 1954–1984, VOL I) 169 (Paul Rabinow ed., 1997).

assertion and mutual recognition is broken. Absence of reciprocity, however, is not synonymous with lack of recognition. Submission becomes a form of recognition for the slave ("this is me for you, take me and make the use of me as you wish"), while the master asserts power through domination ("this is me over you, I exert on you all the power that you granted me").[22] These are the core traits characterizing sadomasochistic performances where pleasure may come from pain and domination is "impossibly mixed up in subordination."[23]

I.2.2. BEYOND REPLICATION OF MASCULINE DOMINANCE

Femininities and masculinities may play various roles, not necessarily prefixed, on the sadomasochistic stage. The feminist debate on sadomasochism is fierce. The two extremes are sex-negative feminism and sex-positive feminism. The former condemns the objectification of women's bodies, the eroticization of violence, and the normalization of aggression and humiliation. All this happens, according to this line of thought, in the context of systemic sexual subordination [m>f]. It is believed that these kinds of sadomasochistic practices, with the woman being the subordinated subject, cannot but amplify and legitimize masculine dominance. This approach perpetuates the narrative of the woman suffering harm and therefore being the victim of the man, even if victimization happens within a consensual practice. The woman is not actively performing sadomasochism, because she lacks the sexual agency to enjoy beyond pain, because of pain.[24] For sex-negative feminists, sadomasochistic activities replay and propagate the unequal assumptions and harmful implications of structural sexism. As such, sadomasochism reiterates masculine prevarication and control over women and other (racially, gender-ly, ethnically) subjugated groups.[25] From this perspective, the subjugated subject's consent is not deemed sufficient to replace subordination with lust, pain with pleasure, and domination with exciting restraint. This is because violence is considered inherent to sadomasochism, even when desire and consent are at the basis of the sadomasochistic encounter. If sadomasochism is always violent, the radical feminist line of thought concludes, there is no clear difference between a sex offender and the dominant individual in the sadomasochistic relationship.[26] Accordingly, this sex-negative conceptualization of sadomasochism as replication of structural gendered inequalities constructs women's subjectivities through the process of victimization. This is only a sketch of the two major different feminist positions; the discussion is more intricate than that.[27] Nevertheless, at least two questions arise: Do women always occupy the

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[22] See BENJAMIN, *supra* note 16 at 62.
[23] McClusky, *supra* note 1 at 125.
[24] Brenda Cossman, *Sexuality, Queer Theory, and "Feminism After"—Reading and Rereading the Sexual Subject*, 49 MCGILL L. J. 848, 861–862 (2003).
[25] *Id.* at 861–862.
[26] *See, e.g.,* Diana Russell, *Sadomasochism: A contra-feminist activity*, *in* AGAINST SADOMASOCHISM: A RADICAL FEMINIST ANALYSIS (Robin Ruth Linden et al. eds., 1982).
[27] Against sadomasochism, *see* AGAINST SADOMASOCHISM: A RADICAL FEMINIST ANALYSIS, (Robin Ruth Linden ed., 1982); for arguments in favor of sadomasochism, *see, e.g.,* Farr, *supra* note 17; THE SECOND COMING: A LEATHERDYKE READER, (Patrick Califia & Robin Sweeney eds., 1st ed. 1996);

subordinate position in the erotic game of sadomasochism? And if so, do women always suffer from the pain they receive from their sadomasochistic partner?

In contrast to sex-negative accounts of sadomasochism, sex-positive feminism does not equate sexuality with subordination. Enslavement may trigger pleasure. The realities lived by sadomasochist individuals tell a story which is different from sadomasochism as *replication* of structural masculine privilege over women [m>f].[28] To the sex-negative model of replication, Theodore Bennett opposes sadomasochism as *simulation*. Sadomasochistic acts do not literally replicate everyday oppression, but they reproduce power differentials by recontextualizing and redeploying them in alternative manners.[29] Power inequalities in sadomasochism draw on consent and mutual pleasure. In a nutshell, the sadomasochistic war on subject formation between sex-positive and sex-negative approaches takes the shape of a threefold opposition: consent-mutuality-pleasure *versus* victimization-harmfulness-abuse.[30] Hence, it might well be that the masochist posture liberates women in that it frees them from the condemnation of being victims.[31] Sadomasochism may be a form of subversion for the woman-victim depending on the representation of power differentials it engenders. Instances of sadomasochism may or may not draw on pre-existing social systems of domination. The meaning of sadomasochistic activities is situational rather than inherently linked to socially entrenched inequalities.[32] This contextuality arises from intricate interactions between multiple factors including cultural history, the subjects' sociocultural positioning, and the audience's reaction.[33] In short, there is no such thing as 'sadomasochism.' The contingency and the malleability of any sadomasochistic performance depends on several situational specifics that make the meaning attached to it unfixed and unpredictable once and for all.[34] For instance, women can be dominatrices over men slaves: they may indeed play the role of the powerful subject, controlling themselves and the other. A revolution, rather than a subversion, one might think, for a woman who has been continuously portrayed, in the law and in society, as the passive victim who takes and suffers, instead of giving and aggressing. Yet this is only an example reproducing a rather heterosexual matrix. Roles between men and women in sadomasochism are not necessarily reversed in the sense that the outside-world sexual subordination scheme unfolds with the man becoming the dominated, and the woman becoming the dominator. The type of relationship may not mirror the heteronormative matrix, with two gendered individuals performing specific roles. Subject

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Monica Pa, *Beyond the Pleasure Principle: The Criminalization of Consensual Sadomasochistic Sex*, 11 TEX. J. WOMEN & L. 51–92.

[28] Patrick Califia, *Feminism and Sadomasochism*, 2 HERESIES 30, 30–34 (1981); Carol Truscott, *S/M: Some questions and a few answers*, *in* LEATHERFOLK: RADICAL SEX, PEOPLE, POLITICS, AND PRACTICE 15–36 (Mark Thomson ed., 2004).

[29] Gayle Rubin, *The Leather Menace: Comments on Politics and S/M*, *in* COMING TO POWER: WRITINGS AND GRAPHICS ON LESBIAN S/M 194, 224 (Samois ed., 3rd ed. 1981).

[30] Theodore Bennett, *Persecution or Play? Law and the Ethical Significance of Sadomasochism*, 24 SOC. & LEGAL STUD. 89, 99 (2015).

[31] *See* Darren Rosenblum, *Rethinking International Women's Rights through Eve Sedgwick*, 33 HARV. J. L. & GENDER 349, 356 (2010).

[32] WEISS, *supra* note 10 at 19.

[33] *See* Bennett, *supra* note 30 at 102.

[34] *Id.* at 103.

positions, just like desire, are hardly coherent and highly ambiguous.[35] Therefore, roles may shift throughout time and during the same sexual encounter: from subject to object, from other-controlled to self-directed. A queer legal analysis of the below ECtHR decisions will identify that the Court is not yet capable of recognizing such instabilities and ambiguities in current sadomasochistic practices. Indeed, the Court struggles to repudiate a victim-based narrative.

Overall, sex-positive feminism celebrates the infinite spectrum of sexual possibilities: sadomasochism is only one among the legitimate practices of sexual pluralism.[36] This is a "reductionist" approach to sadomasochism, like the one assumed in this section. Sadomasochism is not "the" sexual practice alternative to stereotyped sexual intercourse, but "a" number of sexual practices among many other sexualities producing multiplicities of pleasures and dangers.[37] The cases that will be discussed below constitute different examples of how the ECtHR deals with individuals expressing their subjectivities through a specific form of sexual practice such as sadomasochism. These cases enshrine diverse gendered dynamics of domination and subordination, which form an integral part of the process of subject formation.[38] Before turning to the analysis of the ECtHR's case law, the next section will examine the interaction of domination-subordination from the perspective of consent and intersubjective boundaries. A psychoanalytically-inspired analysis will identify that these components of sadomasochism constitute modes of subject formation for those individuals participating in it.

II. A PATH OF SUBJECT FORMATION

Domination-subordination tells us something about who we are and what we wish to know about ourselves, and what counts for us as pleasure and/or pain. The following subsections demonstrate the diverse role that gender differentials may play in these sadomasochistic dynamics. After a psychoanalytically-inspired exploration of the meaning and interactions of subordinate/dominative postures (Section II.1), the paper explains why consent is necessary but not sufficient in understanding sadomasochism (Section II.2).

II.1. A QUEST FOR BOUNDARIES

Intersubjective relationships rely on the delicate tension between self-assertion and mutual recognition. This means that the subject recognizes their individuality as distinct from the other (self-assertion). At the same time, the other recognizes the subject and is recognized by the subject (mutual recognition).[39] Self-assertion and mutual recognition are in a delicate balance. What is the place for sadomasochistic practices in this scenario? Sadomasochistic fantasy

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[35] *See* Cossman, *supra* note 24 at 864–65.
[36] *See id.* at 850.
[37] *See* PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY, (Carole S. Vance ed. 1984).
[38] *See infra*, § 2.
[39] *See* BENJAMIN, *supra* note 16 at 12, 62.

materializes in the 'violation,' i.e. transgression against the other's body. The tension between self-assertion and mutual recognition is broken because self-assertion through domination disturbs the balance. Domination of physical boundaries replaces the tension between the self and the other.[40] Subjects are still in a relationship of dependency. However, reciprocity changes its shape—the boundaries of the violated are broken because the violated allowed the violator to break them. One desires to receive suffering (the violated), while the other (the violator) desires to inflict pain.[41] This complementary movement, although directed to the destruction of boundaries, is a quest for boundaries. To destroy the boundary, one needs to find them first. In this sense, Brenda Cossman recalls the psychology behind the solo practice of certain self-mutilators, who express themselves and trace their bodily frontiers by self-inflicting pain:

> Self-mutilators are sometimes said to be marking the borders between self and other, between inside and out by violating them; they are marking and asserting the border of the self through pain; it is an assertion of self-control.[42]

In the context of sadomasochism, seeking boundaries allows the violated and the violator to preserve their vitality. The search for boundaries is a search for survival and recognition. This is what distinguishes sadomasochism as an erotic encounter from abusive conduct, and sadomasochism as a fantasy of domination from real domination.[43] Eros as a pure experience free from dominative practices is an illusion as it is kneaded with assertion, mastery, and aggression. It is exactly this mix of love with death, and *eros* with *thanatos* which makes sexuality both a danger and a pleasure.[44] Destruction is around the corner, yet the survival of the subject makes sexuality so attractive in the eyes of those who play with boundaries.

II.2. CHOICES AND CONSENT

Sadomasochism is a pleasurable danger. The idea of victimization in the sadomasochistic context can hardly be understood through the scheme and vocabulary of non-sadomasochistic practices. This is because sadomasochistic victimization is a source of pleasure in that it expresses a desire for recognition. Pain is not an obstacle to, but a precondition for, pleasure.[45] What many feminisms have often framed as negative postures of and for the weak woman victimized by a male-dominated system[46] may be, instead, various modes of erotic satisfaction

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[40] *Id.* at 55.
[41] *Id.* at 64.
[42] Cossman, *supra* note 24 at 871.
[43] *Cf.* BENJAMIN, *supra* note 16 at 74.
[44] *Id.* at 73.
[45] GEORG WALTHER GRODDECK, IL LIBRO DELL' ES: LETTERE DI PSICOANALISI A UN'AMICA 85 (1992).
[46] As Jessica Benjamin recalls, many feminists criticized the famous Pauline Réage's Story of O considering the novel the story of a victimized woman rather than an allegory of the desire for

and mutual recognition. Oppression, humiliation, and, more generally, submission may all be tempting if lived in complicity with one's desire. As seen, the issue at stake here is *prima facie* consent-related. For instance, there are acts of submission to violence and humiliation which are voluntary—that the individual decides to be subject to because these acts bring pleasure regardless of their painful effects. The following section will show that the ECtHR attributes an unstable role to consent. In the Court's decisions, consent seems central to the circumstances of the cases: applicants are described as 'consenting males,' 'consenting adults,' and the like. Yet, when a considerable degree of injury or harm is present, the voices of those consenting people are silenced throughout the Court's judgements. As will be explained shortly, for the Court, the degree of (potential) harm is determinative of whether the subject's desire expressed through consent has a weight and can be heard. A critical reading of these decisions will bring to light one of the limitations of the Court's approach to sadomasochism. That is, the State can outlaw the infliction of considerable harm to which a person decided voluntarily to be subjected to achieve lust. At that point, the subject's consent is not granted a central place anymore. Consent to pain-based and pleasure-oriented acts is relegated to the margins in the name of higher—at least from the community's perspective—interests to be protected such as public health, morals, public safety, prevention of crime or disorder, and the other grounds listed under Article 8(2) ECHR.

While the ECtHR decisions will be examined closely in the next section, one critical remark should be anticipated here. The Court's reasoning is as follows: the absence of consent between parties triggers the shift from legal eroticism to illegal conduct, thereby justifying a legal intervention and allowing for the re-establishment of the language of victims and perpetrators. In contrast, where the sexual encounter is consensual, that is based on prior agreement between the parties; the fact that the dominated subject did not enjoy the acts of subordination is not sufficient to make it actionable. What the Court fails to recognize is that sadomasochism is just another sexual choice.[47]

Against this backdrop, the intentional infliction of pain or emotional distress can be consensual and based on the previous agreement, or non-consensual and without prior agreement. A third mode is the negligent infliction of pain or distress[48] where, having received consent from the other(s) for specified acts, the sadomasochistic partner goes beyond the agreed sexual terms. The

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recognition: *see*, *e.g.,* SUSAN GRIFFIN, PORNOGRAPHY AND SILENCE: CULTURE'S REVENGE AGAINST NATURE (First Harper Colophon ed. 1982); Andrea Dworkin, *Woman as Victim: "Story of O"*, 2 FEMINIST STUD. 107 (1974); CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 266, fn 42 (1994); PAULINE REAGE, HISTOIRE D'O (1954); BENJAMIN, *supra* note 16 at 55.

[47] *Cf.* Cossman, *supra* note 24 at 863 (noting that the dominant feminist narrative, sex radical feminism, and queer theory feminism have opposing interpretations of a sadomasochistic sexual act that a party consented to but did not enjoy).

[48] *Cf. id*. at 857-858 (describing the case of Twyman v. Twyman, where a woman unsuccessfully sued her husband for negligent infliction of emotional distress for encouraging her to continue a sadomasochistic dynamic after she stated the activities triggered her trauma from a previous sexual assault and engaged in sex that, while involving no bondage activities, was so rough it left her bleeding).

scenario of negligent infliction is a light 'manslaughter' that can be outlined as follows: *I wanted to suffer because that gives me pleasure; I gave my consent for that, but then my partner did not realize that they went beyond. The partner's intention, however, was far from making me suffer*. However, this narrative may not be compelling or may appear rather simplistic from a certain human rights perspective.

This is the crux of the challenge of the relation between human rights and sadomasochism: how far can consent negate liability for injuries inflicted during sadomasochistic encounters? Upholding the omnipotent nature of consent—a force that destroys any legal 'obstacle' to defend the individual(istic) will to enjoy lust—could pose particular difficulties for the domestic criminal justice systems in prosecuting abusers. However, this intricate matter requires a deeper reflection that cannot be exhausted within this investigation. What is certain is that reducing the discussion on the relation between sadomasochism and law to sheer consent is conceptually inaccurate. This is because the lens of consent is biased by the gendered echoes of domination and submission affecting the way in which one observes the sadomasochistic act. Gender-related premises and assumptions precede and surround the ECtHR's conception of consent, as the following analysis of the Court's case law demonstrates.

III. JUDGING SADOMASOCHISM, SADOMASOCHISM JUDGED

The ECtHR, set up in Strasbourg in 1958, examines alleged violations and ensures compliance by the States with their obligations under the ECHR.[49] The ECtHR is the only enforcement mechanism at the regional or international levels that has developed case law on sadomasochistic practices, specifically under Article 8 ECHR. Partially overlapping with Article 17 ICCPR,[50] Article 8 ECHR protects the right to respect for private and family life, home, and correspondence. It reads:

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime,

[49] On the ECtHR's functions and structure, and the procedure before the Court, see Convention for the Protection of Human Rights and Fundamental Freedoms, art. 19-51, Nov. 4, 1950, ETS 005 (entered into force Sept. 3, 1953).

[50] "(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks." International Covenant on Civil and Political Rights, art. 17, Dec. 16, 1966, 999 UNTS 171 (entered into force Mar. 23, 1976).

> for the protection of health or morals, or for the protection of the rights and freedoms of others.

Under Article 8 ECHR, States shall guarantee the individual's privacy-related positive and negative freedoms. Precisely, States have a negative obligation not to interfere with private life and a positive obligation to take active steps to ensure the individual's effective enjoyment of the right to privacy.[51] This is the backdrop against which the ECtHR has judged a number of cases involving sadomasochistic activities.

The ECtHR has dealt with sadomasochism in *Laskey, Jaggard*, and *Brown v. UK*,[52] *K.A. and A.D. v. Belgium*,[53] *Pay v. UK*,[54] and *Mosley v. UK*.[55] Some commentators have applied a descriptive model of the ECtHR's decisions on sadomasochism, dividing them into two clusters on the basis of the nature of the obligations at stake.[56] The first group contains negative-obligations claims according to which States should have refrained from criminalizing sadomasochistic activities: *Laskey,* and *K.A.*. The second group comprises positive-obligation claims against States which, rather than intervening, have failed to enact laws to protect the privacy of individuals practicing sadomasochism: *Pay* and *Mosley*.[57]

While this taxonomy based on positive/negative obligations brings some descriptive clarity, the objective of this examination is different. Investigating gendered interplays in human rights law requires addressing sadomasochism from another perspective. For this purpose, this paper will scrutinize the Court's case law from different but connected perspectives. The key question is: what is sadomasochism for the ECtHR? This question can be split into the following sub questions:

1. Who are the subjects involved in the activity? What roles do these individuals play? Have they provided their consent to such practices? Can the consent be withdrawn at any time during the act?
2. Is sadomasochism a sexual practice under the ECHR?
   - **2a.** Does it belong to the private sphere and therefore fall under Article 8 ECHR?
   - **2b.** Does any sadomasochistic act constitute violence which should not be protected but rather condemned? If so, under what conditions is sadomasochism a form of violence?
3. Are national public authorities entitled to interfere with the practice of sadomasochistic activities as provided under Article 8(2)? If so, under which conditions and on which grounds?

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[51] Mosley v. U.K., 48009/08 [May 2011] ECHR 774 ¶ 29 https://hudoc.echr.coe.int/fre?i=002-533.
[52] Laskey, Jaggard and Brown v. U.K., App. No. 21627/93; 21628/93; 21974/93 (February 19, 1997) https://hudoc.echr.coe.int/eng?i=001-58021.
[53] K.A. et A.D. c. Belgique, App. No. 42758/98; 45558/99 (June 7, 2005) https://hudoc.echr.coe.int/eng?i=001-68354.
[54] Pay v. United Kingdom, 32792/05 [2008] ECHR 1007 (2008).
[55] Mosley, *supra* note 51.
[56] Bennett, *supra* note 3 at 547.
[57] *Id.*

Question (1) addresses the elements of sadomasochism. It investigates the factual and subjective elements of the conduct by looking at the parties involved in the sadomasochistic act and their interrelations, roles, and consent. As such, question (1) applies transversally to both questions (2) and (3). Question (2) concerns the scope and the nature of the conduct. Sadomasochism under (2a) is a form of sexual interaction, falling under the protection guaranteed by Article 8 ECHR; or it can be (2b) a form of (sexual, but not necessarily) violence, against which other rights apply, for example, the right to be free from torture or cruel, inhuman, degrading treatment ensured by Article 3 ECHR. Accordingly, there are reasons to wonder whether States can adopt measures to limit or prohibit sadomasochistic activities. Question (3) addresses the legitimacy of such interferences, in the light of the purported necessity of the intervention in a democratic society, as Article 8(2) provides. These questions are the lenses through which this paper analyzes the cases the ECtHR has dealt with so far. Answering these questions requires both a hermeneutical endeavor—how the Court interprets that specific element of sadomasochism—and a critical examination—why the Court embraces a certain interpretation of sadomasochism.

This section will unveil how the ECtHR's case law treats sadomasochism, first by problematizing the dichotomies of dominator=perpetrator and dominated=victim, and, secondarily, by analyzing whether and how these positions interlink with feminine and masculine postures. The next sections compare *Laskey*, *K.A.*, *Pay*, and *Mosley* in line with these purposes. Before examining these decisions, the next section shows how the ECtHR's case law on sadomasochism does not exist in a legal vacuum, but is connected to the Court's previous decisions on the criminalization of homosexual acts between consenting adults.

III.1. CRIMES AND PLEASURES: HOMOSEXUAL ACTS AND SADOMASOCHISM

Before entering the discussion of the ECtHR's case law on sadomasochism, a digression is necessary. It would be historically and legally inaccurate to believe that decisions on sadomasochism came out of the blue in the ECtHR's jurisprudence. The interrelationship between sexuality and human rights was already debated in Strasbourg starting from at least the 1980s. In a series of decisions on the legitimacy of laws criminalizing homosexual sex acts, the Court scrutinized sexual intercourse between homosexual individuals. The comparison between sadomasochism and homosexual practices conducted here concerns, therefore, the type of conduct, rather than the identitarian characterization of the subjects performing it (gay, lesbian, heterosexual, trans, etc.).

The criminalization of homosexual acts was at the center of the ECtHR's decision in *Dudgeon v. UK*[58] (1981). This is a landmark case overturning the criminalization of consensual homosexual sexual acts. The Court held that the laws prohibiting homosexual acts between consenting adult men constitute a

[58] Dudgeon v. United Kingdom, App. No. 7525/76 (October 22, 1981), https://hudoc.echr.coe.int/eng?i=001-57473.

continuing unjustified interference with the applicant's right to respect for his private life.[59] The Court found a breach of Article 8 ECHR.[60] Two elements of the decision are crucial for the analysis of sadomasochism-related case law. First, the Court found no "pressing social need" to prohibit these sexual acts by considering them criminal offenses, "there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public."[61] Secondly, the Court considered sexual acts as belonging to the "most intimate aspect of private life."[62] In such cases, the Court specified, the reasons for interference on part of public authorities must be "particularly serious" to be considered legitimate under Article 8(2) ECHR.[63] The legitimacy test is stricter for acts related to the sexual sphere and has a higher threshold than other activities of private life covered by Article 8. The decision had positive reverberations on legislation of those Member States of the Council of Europe which still prohibited certain forms of sexual intercourse between adult men.[64] For instance, as a consequence of the decision, Northern Ireland decriminalized homosexual sex. *Dudgeon* became the key precedent for subsequent cases[65] where the criminalization of sexual acts between homosexual persons was successfully challenged, namely *Norris v. Ireland*[66] (1988) and *Modinos v. Cyprus*[67] (1993).

A more recent case on the criminalization of homosexual acts between consenting men is *A.D.T. v. UK*[68] (2000). This decision will be explored in-depth below in relation to the way in which the Court constructs the victim in cases concerning sadomasochistic and non-sadomasochistic activities.[69] This section anticipates the circumstances and the judgment of *A.D.T.*, which will later be compared as a case on non-sadomasochism to another case on sadomasochism.[70]

A.D.T. dealt with the violation of the right to private life following the seizure by police officers of a number of videotapes recorded at the applicant's

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[59] *Id.* ¶ 41.
[60] *Id.* ¶¶ 41, 63.
[61] *Id.* ¶ 60.
[62] *Id.* ¶ 52.
[63] *Id.*
[64] *See* ROBERT WINTEMUTE, SEXUAL ORIENTATION AND HUMAN RIGHTS: THE UNITED STATES CONSTITUTION, THE EUROPEAN CONVENTION, AND THE CANADIAN CHARTER 132–33 (1997); PAUL JOHNSON, HOMOSEXUALITY AND THE EUROPEAN COURT OF HUMAN RIGHTS 15, 97 (2014); *cf.* DAMIAN A GONZALEZ-SALZBERG, SEXUALITY AND TRANSSEXUALITY UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A QUEER READING OF HUMAN RIGHTS LAW 59–92 (2019).
[65] *See* N.Ç. v. Turkey, App. No. 40591/11 (2021) (concerning the existence of laws in the Turkish Republic of Northern Cyprus criminalizing certain acts between consenting adult men; however, the applicant withdrew the application since the concerned provisions of the criminal code had been amended; the Court decided to strike the application out of the list of cases, taking into consideration that no special circumstances concerning the protection of human rights required the examination of the case).
[66] Norris v. Ireland, App. No. 10581/83 (October 26, 1988), https://hudoc.echr.coe.int/eng?i=001-57547.
[67] Modinos v. Cyprus, App. No. 15070/89 (April 22, 1993), https://hudoc.echr.coe.int/eng?i=001-57834.
[68] A.D.T. v. United Kingdom, App. No. 35765/97 (July 31, 2000), https://hudoc.echr.coe.int/eng?i=001-58922.
[69] *See infra*, § 3.3.1.
[70] *Id.*

house. The videotapes contained the recordings of sexual acts between the applicant and four other adult men. The applicant, convicted of the offense of gross indecency by the domestic court,[71] alleged the violation of his right to private life under Article 8 and the right to be free from discrimination on sexual orientation grounds under Article 14 in conjunction with Article 8. The ECtHR considered that the applicant had been a victim of interference with his right to respect for his private life with regard to the legislation criminalizing sex between consenting men and the conviction for gross indecency.[72] The Court held that the applicant had been prosecuted for the sexual activities themselves rather than for the recording or the potential public dissemination of it. These activities involved intimate aspects of private life, therefore the margin of appreciation was narrow as in other precedent decisions.[73] The Court found that the legislation prohibiting homosexual acts between men in private and the consequent prosecution and conviction were not justified given the absence of any public health consideration.[74] The ECtHR concluded that the State had breached Article 8, without further examination of the case under Article 14,[75] relying on the precedent *Laskey*.[76]

The following analysis of ECtHR's cases on sadomasochism builds on the above overview of the (de)criminalization of homosexual acts. As will be seen, the ECtHR's attitude towards sadomasochism has changed throughout the years. Sadomasochistic acts have rarely been considered protected from public interference under Article 8(2) ECHR. What matters at this stage of the inquiry is that the criminalization of homosexual acts and sadomasochistic acts, and the respective decisions from the ECtHR are, for some aspects, closely related, while, for other aspects, very far from one another.

The test of the legitimacy of the State's interference with private life relies precisely on what standard of sexual pleasure the Court applies. In this sense, the Court interprets and therefore gives a specific meaning to sexual relations by producing one or another juridical outcome. In order to assess whether sadomasochistic interactions constitute a form of violence or a form of (violent) sex, the ECtHR may embrace a conception of sex ranging from sheer sweet love made of tender so-called 'romantic' gestures to enjoyably painful actions variously performed. The choice of one conception over another influences the outcome of the judgment, of course. As will be explained below, intimacy can assume affection and exclude violence. For example, sadomasochistic acts may not be considered legally sexual acts. Against this backdrop, homosexual acts as such, with no further sadomasochistic connotation, (i) are sexual activities, which therefore (ii) fall under the "most intimate aspect of private life." This is not always the case with sadomasochistic acts. Where these acts are interpreted as violence, there are two consequences: (a) their sexual nature

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[71] A.D.T. v. U.K., ¶ 10.
[72] *Id.* ¶ 26.
[73] *Id.* ¶ 37; on the narrow margin of appreciation in cases concerning the most intimate aspects of private life, *see, e.g.*, Dudgeon v. U.K., ¶ 52.
[74] A.D.T. v. U.K., ¶ 38.
[75] *Id.* ¶ 41.
[76] Laskey, Jaggard and Brown v. U.K., App. No. 21627/93; 21628/93; 21974/93 (February 19, 1997), ¶ 70.

is denied; and (b) they are not granted the higher threshold in the legitimacy test for 'intimate acts.' This is because, in any case, framing sadomasochism as violence makes public authorities' interference legitimate under different possible grounds (health, morals. . .). Overall, sadomasochism and homosexual sex reconverge as to the treatment they receive when they are both prohibited under the heteronormative paradigm. Prohibition wipes out lust by erasing *any* act of pleasure which does not conform with the conventional *heteromantic* (hetero + romantic) sexual norm enforced by the Court. However, as will be seen shortly, sadomasochism receives a less favorable treatment in the hierarchy of sexual activities interpreted and judged by the Court.[77]

Starting with analogies, both sadomasochistic and homosexual acts may belong to the "most intimate aspect of private life," to quote Dudgeon again. Clearly, this applies to the former only when these are considered sexual acts. Indeed, where sadomasochistic practices are understood as violence rather than sexual acts, the conceptual distance between the two clusters of cases increases. The discriminatory factor between sadomasochism and (homo)sexual intercourse is, from the perspective of the respect of the right to be free from any interference to one's private life, the presence of a significant degree of injury.[78] How does the ECtHR interpret the infliction of and subjection to injury for the purposes of gaining pleasure? The investigation finally turns to the ECtHR's understanding of sadomasochism. To orient the reader, the following table contains the list of decisions including some basic information on the date, content, and outcome of the judgment. All of these decisions are discussed under different thematic subsections. The list includes three decisions on merits and one decision on admissibility. The inquiry relies on these and other decisions to conduct a comparative examination of judgments on sadomasochistic homosexual and non-sadomasochistic homosexual sex.

Table 1. ECtHR's decisions on sadomasochism (1997–2020)

Decision	**Year**	**Type of decision**	**Sexual orientation**	**Type of sex** number of people	**Violation**
Laskey, Jaggard and Brown v. UK	1997	merits	homosexual	group (44)	no: art 8(2)
K.A. and A.D. v. Belgium	2005	merits	heterosexual	couple and group (club)	no: arts 6, 7, 8
Pay v. UK	2008	admissibility	homosexual	group (club)	inadmissible: arts 6, 8, 10, 14
Mosley v. UK	2011	merits	not specified	group (6)	no: art 8

[77] *See infra*, § 4.
[78] *See infra* § 3.2.2; *cf.* Laskey, Jaggard and Brown v. U.K.¶ 45.

III.2. SEX, VIOLENCE OR VIOLENT SEX?

The ECtHR has been criticized for upholding a "moralising and paternalistic disciplinary gaze"[79] in cases concerning criminalization of group sex and sadomasochistic practices among consenting adults, both homosexual and heterosexual. The chronologically first and most well-known case is *Laskey*.[80] The case was brought before the ECtHR by three of the defendants of *R v. Brown*, a controversial decision of the House of Lords (United Kingdom), outlawing participation in painful activities regardless of whether or not they were consensual or aimed at bringing sexual pleasure.[81] *R* conceptualized sadomasochism as violence rather than sex.[82] In *Laskey* and the subsequent cases the ECtHR elaborated on the notions of sexual activities in relation to the right to respect private life. This is done to assess whether sadomasochistic acts constitute sexual or violent acts, and whether, consequently, the public authorities' interference (commonly, criminalization of sadomasochism) is to be considered legitimate.

III.2.1. THE CASE IN A NUTSHELL

Laskey concerned a group of forty-four people practicing acts provoking a certain level of pain for many of them. Having come in possession of a number of videos in the course of routine investigations for other matters, the British national authorities charged the applicants (and other participants) with offenses including wounding and assault for having performed sadomasochistic acts and filming them over a ten-year period. None of the injuries inflicted were permanent, had provoked any infection, or required any medical attention.[83] Activities were consensual and carried out in private for sexual pleasure, following specific rules agreed beforehand among participants, including the provision of a safe-word to be pronounced by the dominated subject to stop the act.[84] The applicants alleged that the public authorities' intervention constituted a violation of their right to private life, since it was an unjustifiable, unlawful, and

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[79] *See, e.g.*, Francesca Romana Ammaturo, *The Council of Europe and the creation of LGBT identities through language and discourse: a critical analysis of case law and institutional practices*, 23 INT'L J. HUM. RTS 575, 582 (2019).

[80] Laskey, Jaggard and Brown v. U.K.

[81] R v. Brown [1994] 1 AC 212 (HL) p. 1 (appeal taken from Regina v. Brown, Regina v. Lucas, Regina v. Jaggard, Regina v. Laskey, Regina v. Carter, Court of Appeal, Criminal Division).

[82] Certain dissenting opinions considered sadomasochism a form of sexuality: *see, e.g.*, Lord Mustill's invite to 'leav[e] aside the repugnance and moral objection, both of which are entirely natural but neither of which are in my opinion grounds upon which the court could properly create a new crime,' as well as Lord Slynn's reflection on the prosecution's rhetorical question as to whether the court should 'adopt a paternalistic attitude as to what is bad or good for subjects, in particular as to deliberate injury.' *Id* ¶ 59.

[83] Particularly, "the acts consisted in the main of maltreatment of the genitalia (with, for example, hot wax, sandpaper, fish hooks and needles) and ritualistic beatings either with the assailant's bare hands or a variety of implements, including stinging nettles, spiked belts and a cat-o'-nine tails. There were instances of branding and infliction of injuries which resulted in the flow of blood and which left scarring" Laskey, Jaggard and Brown v. U.K. ¶¶ 8, 38.

[84] *Id.* ¶¶ 8–9.

unnecessary interference under Article 8(2) ECHR. The Court evaluated whether such an interference was "necessary in a democratic society" as provided under Article 8(2). The ECtHR deemed the interference necessary and found no breach of Article 8(2). Sadomasochistic sexual activities, the ECtHR maintained, performed in private and provoking a significant degree of injury and wounding, may be subject to restriction under Article 8(2) on the ground of general protection of health.[85]

III.2.2. THE COURT'S REASONING

The ECtHR specifies that Article 8 does not necessarily cover every type of sexual activity performed behind closed doors. Even though certain situations are clear, others pose complex questions regarding the scope of the right to privacy protected under Article 8.[86] While, as stressed in *Dudgeon*, sexual activities and sexual orientation belong to the intimate sphere of private life,[87] some private life is considered less private than others in different contexts. This is the case of *Laskey*. The Court brought to question the private character of the sexual activities, considering many factors including the large number of people, the recruitment of new participants, the existence of many equipped rooms, and the shooting of several videotapes (although distributed only among members of the group).[88] The Court dwelt upon the determination of the level of harm as the condition to assess whether the consent of the so-called 'victim'—the person who has voluntarily joined the sadomasochistic activity—is to be considered still valid, and therefore prevails over public interference. This determination lies with the State since it entails the protection of public health on the one hand, and individual personal autonomy on the other hand.[89]

In this respect, the Court distinguishes this case from previous decisions on consensual sexual acts between (homosexual) adults carried out in private spaces, including the above-mentioned *Dudgeon*, *Norris*, and *Modinos*.[90] In the pilot case *Dudgeon*, the ECtHR considered criminalization of homosexual acts an unnecessary interference because of the absence of pressing social needs. The low risk of harm to vulnerable societal groups and/or effects on the public requiring special protection did not provide sufficient justification for the State interference and classification of homosexual acts as criminal offences.[91] Like *Laskey*, the "non-sadomasochistic" *Dudgeon*, *Norris*, and *Modinos* did not involve a significant degree of injury for the people participating in the sexual activity. A reasonable deduction is that the shield of privacy should yield to public interference when the injury or wounding is considerable. What if the degree of injury is minor? It is hard to hypothesize abstractly and without context what the

[85] *Id.* ¶¶ 45, 50.
[86] *Id.* ¶ 36.
[87] Dudgeon v. U.K. ¶ 56.
[88] Laskey, Jaggard and Brown v. U.K. ¶ 36.
[89] *Id.* ¶ 44.
[90] *See supra* § 3.1.
[91] Dudgeon v. U.K. ¶ 60.

Court would say in situations featuring a lower degree of injury. It is foreseeable, on the basis of the threshold of sexually-driven injury established in *Laskey*, that the Court may accept "soft" acts of sadomasochism. This, as will be explained shortly, would also be consistent with the Court's recognition that certain acts producing pain are sexual acts.[92] The Court concluded that certain acts of violence can be transient or trifling in nature, whereas the State is entitled to punish serious acts of violence amounting to torture, irrespective of the consent of the victim. In particular, the Court specifies that

> some of these acts could well be compared to 'genital torture' and a Contracting State could not be said to have an obligation to tolerate acts of torture because they are committed in the context of a consenting sexual relationship.[93]

The Court draws a line between what type of sexual activity the law should tolerate and what type of sexual activity the law should criminalize. This line does not seem, however, particularly neat since the criterion for banning sadomasochism is not injury as such, but a certain level of injury. The Court's choice of relying on *Dudgeon*, *Norris* and *Modinos* as comparators for *Laskey* is not convincing. Indeed, the Court does not compare the present case with another where some degree of injury is present, but cases where injury is completely absent. To recall again, these cases concerned non-sadomasochistic sexual performances.

In *Laskey,* the Court seems to adopt an effect-focused approach, as opposed to an act-based approach. Looking at the consequences of the conduct, it holds that the State's intervention is legitimate where there is a significant degree not of injury, rather than violence. One may be tempted to conclude that erotic games consisting in physically violent or psychologically humiliating acts cannot justify *prima facie* public intervention since they might not provoke directly a considerable degree of injury. Yet the Court specifies that while deciding for or against the prosecution, State authorities are entitled to consider both the actual seriousness of the harm and the potential harm the act could produce.[94] In light of the serious degree of potential harm, the Court finds that the measures adopted are sufficient and relevant for the protection of health in a democratic society within the meaning of Article 8(2).[95] Measures are necessary and proportionate considering the sophisticated organization behind the offenses, including wounding and assault, as well as the numerous charges of assaults that occurred over more than ten years.[96] Nevertheless, as the following Subsections explain, a number of aspects of the Court's reasoning are not clear, including the sexual nature of sadomasochism and the role attributed to the individuals involved in it.

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[92] Laskey, Jaggard, and Brown v. U.K. ¶ 36.
[93] *Id.* ¶ 40.
[94] *Id.* ¶ 46.
[95] *Id.* ¶¶ 48, 50.
[96] *Id.* ¶ 49.

III.2.3. IS SADOMASOCHISM SEXUAL?

Laskey offers evidence of the Court's inclination for prevailing behavioral sexual standards and its reluctance to conceive sadomasochism as a legitimate sexual activity.[97] The applicants' views upheld in the case are clear on this point. They submitted that

> their case should be viewed as one involving matters of sexual expression, rather than violence. With due regard to this consideration, the line beyond which consent is no defence to physical injury should only be drawn at the level of intentional or reckless causing of serious disabling injury.[98]

For persons seeking pain as a source of lust, sadomasochism is a form of sexual expression that they decide voluntarily to perform according to the rules agreed upon beforehand. For the Court, consent means acceptance of suffering but does not cover acts intentionally or inconsiderately aimed at provoking severe injury. Yet, for the ECtHR, the discriminatory factor between what is prohibited and what is allowed is the level of injury, rather than consent. Because of the complex role of consent under criminal law, the Court claims, States enjoy a wide margin of appreciation as to the preferred policy options, including criminalization.[99] The State determines the level of legally tolerated harm in cases with consent, since the circumstances entail consideration of: (a) public health; (b) the deterrent function of criminal law; and (c) the individual's personal autonomy.[100] Given the "extreme character," as well as "significant nature and degree" of the conduct in question, State authorities have acted within their margin of appreciation.[101]

Hence, for the Court, public authorities have intervened to protect citizens from a "real risk of serious physical harm or injury."[102] The degree of the injury is central to evaluating the legitimacy of the measure under Article 8(2). The criminalization of sadomasochistic acts is determined by whether the intervention is necessary in a democratic society. The notion of necessity requires that the public interference responds to a pressing social need and, as such, is to be considered proportionate to the legitimate aim it pursues.[103] The proportionality-test is logically and chronologically tied to the test on the significance of the injury. The latter is the precondition to determine the necessity of the measure, although both tests remain in conversation. The following flow chart demonstrates the steps the Court followed in the present judgment to assess

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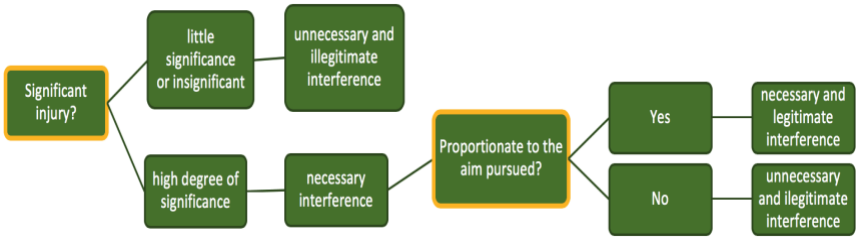
[97] *See* Michele Grigolo, *Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject*, 14 EUR. J. OF INT'L L. 1023, 1033 (2003).
[98] Laskey, Jaggard, and Brown v. U.K. ¶ 39.
[99] *Id.* ¶ 40.
[100] *Id.* ¶ 44.
[101] *Id.* ¶ 41.
[102] *Id.*
[103] *Id.* ¶ 42.

the legitimacy of the public authorities' intervention in the sadomasochistic activities performed by the applicants and other participants.

Figure 1. ECtHR's evaluation of public intervention in sadomasochistic practices



The above flow diagram is limited in its scope because (a) the basis for its construction is one single case, *Laskey*; and (b) the diagram serves only as a schematized description of the Court's reasoning. A descriptive analysis of the tests of necessity and proportionality starts from the severity of the harm or injury the act has provoked or could have potentially provoked. Notwithstanding the informative value of this description, further considerations are needed to understand the meaning that the ECtHR attributes to the significance of the injury. The Court adopts a standardized criterion to gauge the significance of the injury. The evaluation of painfulness relies on the objective perception that a specific act constitutes injury for *any* human being. The Court assigns to this objectivized perception a specific meaning. If there is a significant injury, sadomasochism can be criminalized as being a danger for health. Not all sadomasochism, however, is about physical pain. The relation of dominance-submission materializes in one partner (dominator) assuming control and the other (dominated) relinquishing their power. This can happen in a violent or non-violent manner. Control may take different forms, besides or beyond physical constraints. Psychological humiliation, as a source of erotic pleasure, may or may not reach the threshold of psychological harm.[104]

The Court's attitude towards sadomasochism as an expression of sexuality is ambiguous. The Court measures the erotic play performed against behaviors and meanings traditionally attached to sexual intercourses. That is, the Court's approach to sadomasochistic practices mirrors a specific cultural view of love and pleasure.[105] At first glance, it seems that the Court embraces a romantic view of sex according to which sex is an act of tenderness. If love cannot be but gentle, how can pain be enjoyable? If sexual interactions cannot be but affectionate, how can painful activities be conceived as sexual in nature? Yet the Court recognizes that pain may also be a vehicle to sexual gratification. The applicants do not find protection from the State's interference under Article 8(2).

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[104] For some examples of specific forms of physically non-violent practices, *see supra* ¶ 3.2.3; *see* Lindemann, *supra* note 7 at 152–53.

[105] *See* GEOFFREY MAINS, URBAN ABORIGINALS: A CELEBRATION OF LEATHER SEXUALITY 68 (3rd ed. 2002).

However, the Court refers to sadomasochistic acts such as whipping, flogging, branding and the application of hot wax as "sexual activities" meeting the "purposes of sexual gratification."[106] Hence, the consequence of the Court's reasoning, according to this investigation, is that interference is legitimate and sadomasochism is outlawed even though sadomasochistic activities are not considered to be violence, but rather as a vehicle of sexual pleasure. Put differently, the categorization of the sadomasochistic act as sexual is not a guarantee of legality. Sadomasochism consists of consensual sexual acts between adults, not violence. Yet it constitutes, for the Court, a danger for public health that makes the State's interference proportionate and necessary.[107]

III.2.4. UPSIDE DOWN VICTIMIZATION

Another relevant aspect of the case is the process of victimization, in addition to the relation between sexual acts and violence. The process is reversed or even blurred in *Laskey*. The dichotomic architecture of victims-*versus*-perpetrators collapses where sadomasochism enters the human rights vocabulary which relies on supposedly neat oppositions between doer and done-to. In Laskey, individuals involved in sadomasochistic activities do not identify themselves as victims of any purported violence.[108] The claimants' misrecognition of the criminal nature of their acts[109] coupled with their refusal to speak about themselves as victims of sadomasochistic activities disrupts the traditional narrative of victimization staged in Strasbourg. Applicants turn to the ECtHR alleging the breach of their right to respect for private life, materializing in a supposedly illegitimate public interference. In situations where the Court identifies the illegitimacy of public interference on moral or health grounds, complainants may be seen as victims. Here, such a narrative does not apply coherently. Applicants are implicitly perpetrators because they have committed harmful acts (sadomasochistic activities) upon other people. The State's prosecution, the ECtHR argues, is legitimate for reasons of health.[110] The State can retain the criminalization of sadomasochism, and applicants practicing sadomasochism become perpetrators. The Court and the applicants do not share the same, or at least similar, signified for the signifier "victim." "Victims," for the Court, are those participants in sadomasochistic group activities receiving pain from others (perpetrators).[111] The applicants suffered the violation of their right to private, particularly sexual, life by the State's interference: they see themselves as the "victims." Identifications are highly subjectified depending on the perspective adopted. The dichotomy of the victim-perpetrator is confusing at best,

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[106] Laskey, Jaggard and Brown v. U.K. ¶ 36; *see* Bennett, *supra* note 3 at 549.
[107] Laskey, Jaggard and Brown v. U.K. ¶ 49.
[108] Ammaturo, *supra* note 79 at 582.
[109] Laskey, Jaggard and Brown v. U.K. ¶ 49.
[110] *Id.* ¶ 50.
[111] *See id.* ¶¶ 8, 10, 40, 44.

inappropriate at worst. The encounter of human rights and sadomasochism at the ECtHR creates a linguistic, conceptual and legal short circuit.

Overall, the interpretation of sexually-driven pain does not seem to follow a consistent path at the ECtHR. As the most recent jurisprudence shows, there is space for a shift from the conception of sadomasochism in terms of victimization to a form of sexual expression. Before addressing a number of sadomasochist-positive decisions, the next Section reflects upon the notion of victimization by comparing two cases, concerning respectively sadomasochist sex (*Laskey*) and non-sadomasochist sex (*A.D.T.*).

III.3. FROM VICTIMIZATION TO SEXUAL EXPRESSION

III.3.1. MORE THAN ONE VICTIMIZATION

Three years after *Laskey*, the ECtHR decided another case which does not directly concern sadomasochism, but raises some interesting points in relation to sadomasochistic practices. The Section above has already introduced a case on the criminalization of homosexual acts.[112] *A.D.T. v. UK*[113] (2000) is a case that may be considered the parallel case on non-violent consensual sex to the violent consensual sex of *Laskey*. The circumstances of *A.D.T.* are not identical to *Laskey*. First and foremost, in *A.D.T.*, the ECtHR clearly stated that: "[t]here was no element of sado-masochism or physical harm involved in the activities depicted on the videotape."[114] Nevertheless, although the two cases do not completely overlap, they share similar elements: group sex, between consenting homosexual individuals, recorded by one of the participants. In particular, to recall the facts of *A.D.T.*, already outlined above,[115] police officers seized certain video tapes containing the recordings of non-sadomasochistic sexual acts between the applicant and other four adult men at the applicant's house. The applicant complained about the violation of his right to private life under Article 8 and the right to be free from discrimination on sexual orientation grounds under Article 14 in conjunction with Article 8. The ECtHR held that the applicant's privacy rights had been violated with regard to (a) the existence of legislation criminalizing sex between consenting men, and (b) the conviction for gross indecency.[116] According to the Court, the applicant had been prosecuted not for the recording or the potential dissemination of, but rather for the sexual activities. Regarding these sexual activities, which are the most intimate aspects of private life, the margin of appreciation was narrow as similar to other precedent decisions.[117] The issue of the margin of appreciation will be examined shortly. For the Court, in the absence of any public health consideration, the legislation

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[112] *See supra* § 3.2.2.
[113] A.D.T. v. U.K., App. No. 35765/97, (Oct. 31, 2000), https://hudoc.echr.coe.int/eng?i=001-58922.
[114] *Id.* ¶ 10.
[115] *See supra* § 3.2.2.
[116] A.D.T. v. U.K. ¶ 26.
[117] *Id.* at 37.; on the narrow margin of appreciation in cases concerning the most intimate aspects of private life, *see, e.g.,* Dudgeon v. United Kingdom, *supra* note 58 ¶ 52.

prohibiting and prosecuting homosexual acts in private was not justified.[118] Relying on the precedent in *Laskey*,[119] the Court held that there had been a violation of Article 8, without further examination of the case under Article 14.[120]

The remainder of this Section will not elaborate on the Court's reasoning, but instead concentrate on the construction of the "victim" before the ECtHR in these two cases. Unlike *Laskey*, in *A.D.T.* the applicant is successful in conveying to the Court the perception that he has been a victim of the State's interference. The non-sadomasochistic activities were considered "genuinely private."[121] Therefore, given the private character of the sexual interactions, the State was afforded a narrow margin of appreciation. In any case, the narrative of who is a victim of a State's interference takes root more easily in non-sadomasochistic circumstances. This narrative takes root because victimization occurs, according to this inquiry, at different levels in sadomasochistic and non-sadomasochistic cases, the so-called "narrative victimization" and "judicial victimization." "Narrative victimization" refers to the connotation of individuals as victims in the factual and legal parts of the decision, before the merits. In "judicial victimization," the sexual subject becomes a victim only after the Court decides the case. The latter, therefore, occurs where the Court finds a breach of a right and identifies a victim of that breach. This paper identifies that the question about the level of consideration that applies to non-sadomasochistic sexual intercourse presumes a neutral connotation regarding the subjective roles people assume when taking part in sexual acts. Participants have sex with others, in this case four people, and they all (seem to) enjoy it. They are sex-peers because they are sexual actors on the same level. Equally, various acts are supposed to produce sexual gratification on an equal footing. Power dynamics are not evident (albeit present) in this configuration of sex as an exchange of pleasures. Under this power conception, there are no victims in this purportedly harmonious erotic scheme. "Narrative victimization" does not operate. The sexual subject becomes a victim only after the Court decides the case "judicial victimization." In *A.D.T.*, the State had violated the applicant's right to private life because of its unnecessary interference. The applicant has been a "victim" under Article 8(2) in the human rights jargon because he has suffered a violation. But before the judgment, the applicant was *just* an applicant, with, of course, all those features attached to the sexual role he played according to the facts described in the decision.

In this sense, sexual performances are impervious to the judicial verdict of "narrative victimization" given their conventional non-violent nature. Consenting and non-violent intercourse does not make the subject a victim of either the other subject participating in the sexual act or the State's inability to protect them from abuses committed by non-State actors. The perspective adopted at this stage of the investigation is the one of the judgments. This formalistic approach deems the victim a legal creature. The victim is a person who has suffered a violation of their rights according to the Court's decision. It is the Court

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[118] A.D.T. v. U.K. ¶ 38.
[119] Laskey, *supra* note 76.
[120] *Id.* ¶ 41.
[121] A.D.T. v. U.K. ¶ 64.

that finds whether or not there has been a breach of a right, and, therefore, whether the applicant is a victim of a human rights violation. While this is the analytical perspective embraced here, it is clear that a person having suffered from a form of violence considers themself to be a "victim" of that act regardless of what the Court holds in its decision. I can define myself as a victim of sexual abuse, even where the Court does not consider me a victim because it determined that the State was not in breach of my rights or its obligations.

From a formalistic perspective, instead, the victim is a juridical product that cannot exist outside of a certain outcome of a judicial proceeding. In contrast with the personal sense of victimhood and injustice, there is no victim before a judicial decision is issued from the perspective of the judiciary because the narration of the facts and the Court's reasoning do not label any individual as a "victim" *a priori*. It is only when and if the Court holds the State accountable for a human rights violation that the applicant becomes a victim. This victimization is uncertain at the outset of the trial as it is only one of the possible results of the proceedings.[122] "Victimization of individuals" and "juridification of sexuality" are two distinct yet related concepts, which do not always coincide.[123] The combination of the two concepts shows the different modes through which the judiciary interprets individuals' sexual behavior and ascribes to those individuals specific roles of either victim or perpetrator. More precisely, "juridification of sexuality" is the process through which behaviors are evaluated according to the type of sexual activities performed. As the sexual subject enters the legal proceeding when they knock at Strasbourg's door—sexuality constitutes only one of the manifold elements that fall under the Court's scrutiny. A European Court of *Human* Rights cannot but consider, consciously or unconsciously, sexuality as one of the human markers of the applicant and the other subjects involved in the case. Juridification may lead, as a possible outcome, to victimization. "Victimization of individuals" concerns chronologically different moments, and it may or may not happen at different stages of the trial. Depending on the circumstances of the case and the Court's reasoning, the result of the first victimization ("narrative victimization") may not correspond to the result of the second victimization ("judicial victimization"). Despite its name, "narrative" victimization is also judicial in its origins, as it stems from the judges' voices. The narrative presented by the ECtHR is imbued with diverse conceptions judges have about sexual practices, having subjectified the cultural and socio-political

[122] Those practicing non-sadomasochistic homosexual acts are not necessarily victimized in the socio-legal hierarchy of sexual activities: on the pyramid of erotic desire describing the acceptability of various sexual conducts, *see infra* § 4.

[123] The concept of "victimization of individuals' concerns the interaction between the judge and the subjects described in the facts of the case, including, but not limited to, the applicant who claims to be the victim of a violation; the concept refers to the process through which the judiciary attributes the label of "victim" to one or more individuals before (assumption), during or after the judgment (decision). As such, the theoretical frame of 'victimization of individuals' overlaps but does not correspond to more generic theories on victimizsation which are not necessarily concerned with the judge's positionality; on theories of victimology, the structural underpinnings of victimization, including its twofold configurations as primary and secondary victimization, *see* LORRAINE WOLHUTER, NEIL OLLEY & DAVID DENHAM, VICTIMOLOGY: VICTIMISATION AND VICTIMS' RIGHTS 13–50 (2008); Paul Rock, *Theoretical Perspectives on Victimisation*, *in* HANDBOOK OF VICTIMS AND VICTIMOLOGY (Sandra Walklate ed., 2018).

influences inside and outside the Court's environment. "Subjectivation" is, for instance, the subject's elaboration of alterity. Each individual gives a personal meaning to the reality making and surrounding them through the process of subjectivation.[124] The different perspectives judges have in regards to sexual practices and sexual roles constitute the subjective conceptions that consciously or unconsciously orient them before and while developing the legal reasoning leading to a final decision. The victims of the two processes (narrative and judicial victimization) may or may not correspond. For instance, non-sadomasochistic sexuality, as explained above, consists of sex among peers. There are no victims during the sexual act, because the juridification of non-sadomasochistic sexuality does not distinguish between victims and perpetrators of a sexual act which is believed to bring equal pleasure to all its participants. The judgment is constitutive of victimization, which is, indeed, a so-called "judicial victimization." Victimization comes with the Court's decision stating that the applicant has been victim of illegitimate State interference. In this case, "judicial victimization" and "victim" belong to the linguistic code used within the human rights regime.

In contrast, sadomasochist sexual acts involve overlapping processes of victimization and juridification. Sexuality in its sadomasochistic form implies dominators and dominated subjects, as opposed to the peer roles within non-sadomasochistic sex. Power dynamics are plain to see in sadomasochistic sexual acts. The presence of subordination, materializing in humiliating yet exciting acts for the persons enjoying them, makes the Court interpret the sexual interaction as a risky, unbalanced game among non-peers. Those who dominate are perpetrators, and those who are subject to domination are victims. Victimization takes place before the Court's decision. This is the "narrative victimization" that underlies the description of the circumstances and influences the Court's reasoning. Unlike non-sadomasochistic activities, where the Court looks at sexual individuals as equal peers, in judgments on sadomasochism the Court describes individuals occupying a subordinate position as victims (narrative victimization) before or even without judging them to be a victim of a human rights breach. *Laskey* is a clear example of how narrative victimization is untied from judicial victimization. In that case, narrative victimization is not followed by judicial victimization. As seen above under Section III.2.3, the subjects described as victims of sexual activities in the facts and the reasoning, do not continue to be victims in the outcome of the judgment. Those receiving pain are the victims, while those inflicting pain are the perpetrators in the factual and legal discussion. However, the Court does not consider the applicant—narratively the perpetrator of sexual violence—to be a victim of the public authorities' interference being the

[124] Subjectivation is a key concept in Jacques Lacan's psychoanalytical theory; subjectivation unfolds through two overlapping but ontologically different moments. It is both (1) the process through which the subject is construed; and (2) the process through which the subject constitutes their singularity; in the first sense, subjectivation relates to the impact of alterity (otherness) on the subject's body, therefore the subject is subject to otherness; in the second sense, the subject uses otherness to create their own uniqueness; actually, Lacan addresses subjectivation in three different moments of his reflection, concentrating on the dialectic of desire, the constitutive effect of desire and the break-in of enjoyment (*jouissance*): *see* MASSIMO RECALCATI, JACQUES LACAN: DESIDERIO, GODIMENTO E SOGGETTIVAZIONE (2012).

intervention was "necessary in a democratic society" under Article 8(2).

This version of victims *versus* perpetrators in the context of sadomasochism constructs a binary opposition which is not always neat, as has been repeatedly stressed in this Article. Equally, the narrative of victimization about sexually subordinated subjects neglects two purposes/effects that sadomasochism produces for and are sought by those engaged in it. The first is lust, the sexual pleasure that can take manifold shapes, colors and vibes. The second, usually untold in mainstream accounts, is therapy. Sadomasochism may produce therapeutic benefits. From a psychological perspective, sadomasochistic practices involve intimate relations that individuals can use as a "gateway to self-awareness."[125] This is because sadomasochistic intercourse can help psychological healing by constituting a psychodramatic sexual scenario.[126] Field research on professional dominatrices has shown that these dominatrices characterize themselves as "therapists" and consider their work to be psychological treatment for their clients.[127] From this perspective, sadomasochism is a form of self-help with the potential to "transform an individual by providing a window into his or her identity."[128] In addition to the ECtHR's assumptions underlying victimization(s), the Court has not taken a clear stance (yet) on the overall question of prohibiting or protecting sadomasochism. The remainder of this Paper addresses different answers to this question.

III.3.2. AN ENIGMATIC POSTURE

A potential turning point for the ECtHR jurisprudence on sadomasochism is *K.A. and A.D. v. Belgium*[129] (2005), where the Court held that non-consensual sadomasochism can be criminalized.[130] The case involved a small group of individuals practicing sadomasochism. The two applicants (a judge and doctor) were convicted at domestic level. Charges included serious assault provoking bodily harm on a third person, that is the first applicant's wife, in a sadomasochistic session held in a locale rented for that purpose.[131]

The first applicant's wife suffered extensive injuries.[132] Various practices provoked wounds, burns and notches on her body as a result of, among others, the application of needles, burning wax and red iron marking. She experienced electrical shocks, anal insertion of a hollow bar used as a beer funnel for defecation; the insertion in the vagina and the anus of vibrators, clamps, weights, as well as the others' hands and fists. Further, the other participants sewed her

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[125] Lindemann, *supra* note 7, at 154.
[126] *See* Meg Barker, Camelia Gupta & Alessandra Iantaffi, *The power of play: The potentials and pitfalls in healing narratives of BDSM*, *in* SAFE, SANE, AND CONSENSUAL: CONTEMPORARY PERSPECTIVES ON SADOMASOCHISM 197–216 (Meg Barker & Darren Langdridge eds., 2007).
[127] Lindemann, *supra* note 7, at 156–162; *see* LINDEMANN, *supra* note 6.
[128] Lindemann, *supra* note 7, at 154; Andrea Beckmann, *Deconstructing Myths: The Social Construction of Sadomasochism Versus Subjugated Knowledges of Practitioners of Consensual SM*, 8 J. CRIM. JUST. & POPULAR CULTURE 66, 80 (2001).
[129] K.A. et A.D. c. Belgique, App. No. 42758/98 and 45558/99, ¶¶ 39–61 (Feb. 17, 2005), https://hudoc.echr.coe.int/eng?i=001-68354.
[130] *Id.* ¶ 85.
[131] *Id.* ¶¶ 11–14.
[132] *Id.* ¶¶ 15, 50.

vulvar labia and hoisted her up through a rope between her legs.[133] These acts were, according to the Court of Appeal, of particular gravity. Indeed, they were likely to provoke serious injuries because of the pain, distress, and humiliation even if the only long-lasting consequences were only a number of scars.[134] Because of these supposed interventions, the applicants claimed the violation of, inter alia,[135] their right to respect of private life under Article 8. The ECtHR found no violation of Article 8(2) for the reasons summarized as follows. The Court held that the State's interference was foreseen by the law[136] and pursued legitimate aims in compliance with Article 8(2): the protection of general public health; the prevention of crime and disorder; the protection of the 'victim's (according to the above mentioned 'narrative victimization') rights and freedoms.[137] The ECtHR found that the interference was necessary in a democratic society because of the conditions in the session.[138] For instance, the applicants did not respect the woman's wish to stop the erotic interaction, who pronounced the pre-agreed safe words ('*pitié*' and '*stop*').[139] By using the safe words, the third person withdrew their consent to the continuation of the practice. However, the applicants did not stop the acts when the third participant no longer consented.[140] Further, applicants had lost their sense of control due to their high alcohol levels.[141] The intensity of violence had soared to the point that applicants had acknowledged that they were unable to predict where the session would have ended.[142] In light of these conditions, the Court deemed the measures adopted proportionate, recalling the decision *Christine Goodwin v. UK.*[143] The ECtHR stressed that Article 8 protects the right to personal development, including the right to establish and maintain relations with other humans in the sexual domain. The right to freely engage in sexual practices derives from the right to decide about one's own body. [144] As such, the right also implies a duty to respect the others' freedom of choice to express their sexuality. Where such conditions are not met, the interference is necessary and proportionate.[145] The third person's wish to stop the painful conduct constituted a limit to the applicants' right to engage in sexual practices. The disrespect of the third person's right justified the State's intervention.

Unlike in *Laskey,* in *K.A. and A.D.* the Court stresses that States can prohibit any—consensual or non-consensual—act of sadomasochism in presence

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[133] *Id.* ¶ 14.
[134] *Id.* ¶ 16.
[135] Applicants also alleged a violation of Article 6 (failure to communicate the reporting judge's report prior to the public hearing at the Court of Cassation) and Article 7 (*nullum crimen sine lege*). *K.A. et A.D.*, App. No. 42758/98 and 45558/99, ¶¶ 39–61.
[136] *Id.* ¶ 80.
[137] *Id.* ¶ 81.
[138] *Id.* ¶ 82.
[139] *Id.* ¶ 57.
[140] *Id.* ¶ 15.
[141] *Id.* ¶ 17.
[142] *Id.* ¶ 85.
[143] Christine Goodwin v. U.K., App. No. 28957/95, ¶ 90 (July 11, 2002), https://hudoc.echr.coe.int/eng?i=001-60596.
[144] K.A. et A.D. c. Belgique ¶ 83.
[145] *Id.* ¶ 85.

of a significant degree of injury. *K.A. and A.D.* might be a promising interpretive development, but this remains only potential because of two limitations: (1) the opaqueness of the finding; and (2) the narrative character of victimization. First, the Court does not uphold the legitimacy of consensual sadomasochism, but only the legitimacy of criminalizing non-consensual sadomasochism. It is unclear whether consensual sadomasochism is protected under human rights law and, consequently, whether States have the negative obligation not to prohibit consensual sadomasochism. The Court remains vague and hypothetical on this point, even where it explicitly refers to Belgian domestic courts. The ECtHR argues that it can be "deduced" from the Court of Appeal's decision that the law does not prohibit all sadomasochistic practices; however, these activities can be justified from the domestic perspective only where authorized by the law.[146] This reading is of no interpretive help. The generic guidance sounds like the following: sadomasochism can be practiced only within the limitations of the law. Another example of the Courts' ambiguity towards sadomasochism is explained when defining the scope of the right to engage in sexual practices. The Court identifies one person's freedom of choice (to express their sexuality) as a limit to the exercise of another participant's right to engage in sexual practices.[147] In support of its argument on the necessity of public interference with the sexual activities performed in *K.A. and A.D.*, the ECtHR discloses its veiled opinion on sadomasochism by quoting *Pretty v. UK* (2002). In this decision, the Court stated that

> the ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned.[148]

This quote in the context of a judgement on sadomasochistic sex does not manifest any blatant disapprobation of sadomasochism itself, or, at least, of that form of sadomasochism consisting of extremely violent practices. Yet the Court's position is obscure, almost contradictory, if read in its context, i.e., the proportionality test of the State's interference. On the one hand, the Court recognizes that one has the right to make the choices they want on their body and mind, even if these are dangerous or harmful. Therefore: "perform sex however you want!" On the other hand, morality is one of the evaluating criteria on which an external observer relies

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[146] "Si l'on peut déduire des décisions rendues en l'espèce par la cour d'appel et la Cour de cassation que la loi ne sanctionne pas toute pratique sadomasochiste, de telles pratiques ne pouvaient toutefois être justifiées en droit interne que dans les limites de l'autorisation de la loi, c'est-à-dire dans le respect des règles applicables dans ce domaine." *Id.* ¶ 56.

[147] *Id.* ¶ 83.

[148] Pretty v. United Kingdom, App. No. 2346/02, ¶ 62 (April 29, 2002), https://hudoc.echr.coe.int/eng?i=001-60448. The French version of the judgment, quoted by the ECtHR in K.A. et A.D. c. Belgique (not available in English) states: "la faculté pour chacun de mener sa vie comme il l'entend peut également inclure la possibilité de s'adonner à des activités perçues comme étant d'une nature physiquement ou moralement dommageables ou dangereuses pour sa personne." K.A. et A.D., App. No. 42758/98 and 45558/99, ¶ 83.

in order to build their 'perception'—or 'judgement'—of the connotations these activities acquire in their eyes. Therefore, "perform only proper sex!"

Secondly, closely related to this latter point is the Court's vocabulary through which it addresses the third participant. She is, for the Court, a 'victim' of sadomasochist acts. The vocabulary mirrors the Court's sometimes blurred, sometimes moralistic position towards sadomasochistic actors. Here, the word 'victim' appears frequently, denoting a protective sympathy for the subject who has (voluntarily) received pain and a further an implied disapproval of sadomasochistic practices.[149] Against this backdrop, one may reasonably ask who the victim is and what her legally relevant specificities are. The first and second applicant are clearly identified for their professions, a magistrate and a doctor respectively, which form also the basis for aggravating their negligent conducts and ignorance of the law.[150] However, very little is said about the 'victim': she is the first applicant's wife (*épouse*), although she is referred to more often as 'victim' than 'wife.'[151] The wife-is-a-victim reiterates perfectly the scheme of woman's subordination to man's power [m>f]. The existence of a non-sexual interaction between the husband and the wife does not emerge. Their roles are separated: on one side is the 'victim,' on the other the 'first applicant,' the perpetrator. Notably, the victim is portrayed as a passive subject, subject to the others' actions, rather than a person participating in and consenting, until a certain point, to sadomasochistic sex. The two other participants, or 'perpetrators,' are two men with specific social roles that allow them to own the agency of the game while being the active players of the sexual encounter. Their bodies do not attract any specific narration, while their actions are minutely described: for instance, the doctor sews the victim's vulvar labia,[152] and the two male applicants beat the victim brutally.[153] Their body becomes attractive only from the perspective of what they do upon the victim.

In contrast, the decision shapes the victim according to the passive role of receiving the others' acts. Admittedly, the detailed description of the acts serves as a factual basis for the Court's legal reasoning resulting in the decision on the necessity of public intervention. Ultimately, the victim *is* her body. She is a female, rather than a woman, because she is less a socialized 'wife' than an almost gender-less but sex-full 'victim.' One learns the contours of the victim's body through the specific reference to what are typically considered feminine traits: for example, 'vulvar labia' (*lèvres vulvaires*), 'breast' (*seins*), 'vagina' (*vagin*)[154] and 'nipple' (*mamelon*).[155] Her voice remains silenced and her positionality unknown—as perceived by her—within this series of sessions of sadomasochistic group sex. She is given voice through the applicants, who highlight her sexual complicity: "the applicants . . . underscore that the concerned person [the 'victim',

[149] *See*, e.g., K.A. et A.D. ¶¶ 55–57, 76, 81, 85.
[150] *Id.* ¶¶ 21–22, 55–56.
[151] *See, e.g., Id.* ¶¶ 12, 25, 50.
[152] *Id.* ¶ 22.
[153] *Id.* ¶ 13.
[154] *Id.* ¶ 13.
[155] *Id.* ¶ 15.

the 'wife'] was consenting, that she never lodged a complaint and she never joined the prosecution as civil plaintiff."[156] While here is not the place to find the judicial truth, and neither any other truth, this point substantiates even further the argument that sadomasochism remains for the ECtHR an enigmatic question.

One thing is clear. Subordination does not equate to victimhood, just like domination does not equate to perpetration from a sadomasochistic perspective. Instead, lust stems from subordination and domination. This makes sadomasochism a practice protected under the right to decide on one's own body by deriving pleasure with specific sexual activities. Nevertheless, another crucial matter is unclear. Is there a moment and, if any, what is the moment when the first applicant's wife becomes a victim for both the human rights system and the sadomasochistic ethos? Does it correspond to the infringement by the two applicants of the safe-word rule? Ultimately, some extreme sadomasochistic conducts appear easily identifiable as violations. Other sadomasochistic acts merge and mingle with human rights abuses but the line between the two remains so far unknowable through the reading of the EctHR's case law. Against this specific interpretive issue, some partially different conclusions may be drawn from the Court's most recent global approach to sadomasochism.

III.3.3. SADOMASOCHISTIC PERFORMANCE AS SEXUAL EXPRESSION

Recently, the EctHR has been able to capture certain traits of sadomasochism which are fundamental to understand its sexual nature. In *Pay v. UK*[157] (2008), a decision declaring the inadmissibility of the application, the Court recognizes that public performance of sadomasochistic gestures is part of sexual expression.[158] The case concerned the suspension from the job of a probation officer working in the Lancashire Probation Service where he offered treatment to sex offenders. The employer directed an inquiry to all employees as to whether or not they were freemasons. The applicant responded negatively but disclosed to be a member of a number of sadomasochistic organizations. Among these was Roissy Workshops Ltd ('Roissy') of which the applicant was the director. A few months after the questionnaire, the Lancashire Police received an anonymous fax describing Roissy's advertisements of its main activities on the internet: (1) supplier and builder of products for bondage, domination and sadomasochism ('BDSM'); and (2) organizer of BDSM performances and events. The fax included also a picture of the applicant wearing a mask, with two semi-naked women.[159] The Lancashire Probation Service suspended the applicant from his job, having discovered the character of Roissy's activities, the applicant's leading role in Roissy and the registration of the organization at the applicant's home address. Further, the employer uncovered that Roissy's website included links to

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[156] Author's translation: 'les requérants . . . soulignent que l'intéressée était consentante, qu'elle n'a jamais déposé plainte et ne s'est jamais constituée partie civile,' *Id.* ¶ 76.
[157] Pay v. United Kingdom, App. No. 32792/05 (Sep. 16, 2008), https://hudoc.echr.coe.int/eng?i=001-88690.
[158] *Id.* ¶ 12.
[159] *Id.* ¶ 2.

other BDSM-related websites containing a number of photographs of the applicant involved in BDSM performances.[160]

The applicant complained that his dismissal amounted to a disproportionate interference with his right to respect for his private life under Article 8, to freedom of expression under Article 10 and to be free from discrimination for his sexual orientation under Article 14.[161] Finally, the applicant alleged a violation of Article 6(1), complaining about the length of the proceedings.[162] The Court rejected this last complaint as it did not consider the length of the proceedings excessive.[163] This section scrutinizes the Court's reasoning concerning Articles 8, 10 and 14. The core of the case concerns the nature of the activities (whether they fall within the scope of private sphere) and the content of the right to sexual expression (whether it encapsulates the performance of BDSM acts). These two questions intersect, as the following discussion shows.

The applicant considered the activities he performed with Roissy in the BDSM club a vital part of his sexual orientation and expression. Therefore, these acts fell within the scope of private life. He also believed that the performative side involved in his act in the club constituted a fundamental, rather than accessory part of his sexual expression. The context where the performances took place was, the applicant stressed, private: a private club, with limited access and a milieu for the sexual expression of selected participants.[164] The Court recognized that 'private life' is a broad expression, not lending itself to exhaustive definition. Article 8 clearly protects important aspects of the intimate personal sphere such as gender identification, sexual orientation, sexual life, as well as the right to identity and personal development, the right to establish relationships with other human beings.[165] As such, Article 8 applies to professional or business activities. "Private life," therefore, may well cover interaction among persons in what is physically conceived as a public context.[166] One of these zones of interaction was the BDSM nightclub. The Court noted, indeed, that the nightclub where the applicant's performance took place was 'likely to be frequented only by [a] self-selecting group of like-minded people and that the photographs of his act which were published on the internet were anonymized.'[167] Further, the ECtHR specified that the interference with his private life did not materialize in the prohibition of practicing BDSM activities. The dismissal from his job was, however, a direct consequence of sadomasochistic activities.[168] In the light of this interpretation of the scope of 'private life,' although without finally deciding on this point, the Court maintained that Article 8 was applicable.[169]

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[160] *Id.* ¶ 11.
[161] *Id.* ¶ 7.
[162] *Id.* ¶ 9.
[163] *Id.*
[164] *Id.* ¶ 9.
[165] *Id.* ¶ 11.
[166] *Id.*
[167] *Id.* ¶ 12.
[168] *Id.* ¶ 10.
[169] *Id.* ¶ 12.

Notably, the Court addressed the question of sadomasochism in the context of contemporary Western times. It recognized that 'the applicant may be correct' in believing that 'consensual BDSM roleplay . . . is increasingly accepted and understood in mainstream British society.'[170] The Court recalled tolerance, pluralism and broadmindedness as the hallmarks of a (Western) democratic society. However, the Court also held that the public authorities' cautious approach towards the applicant's sexual activities did not exceed the margin of appreciation, considering the applicant's sensitive work with sex offenders.[171] Hence, the Court did not find the measure disproportionate, and thereby declared the complaint under Article 8 manifestly-ill founded.[172] Despite the progressive statement on 'pluralism, broadmindedness and tolerance', its contextualization within the judgment makes its meaning controversial. The Court dismissed the complaint under Article 8 by accepting the respondent's position that sadomasochistic performance may hinder the public reputation of the probation service. The Court did not fully explain why the probation officer's reputation would be jeopardized, leaving a twofold implication. First, consensual sadomasochism is inaccurately conflated with non-consensual sex offending.[173] Secondly, upholding the dismissal of an employee whose sexual performance does not meet conventional standards without explaining why it clashes with his duties risks future application to any other public employment with no further justification.[174]

The applicant claimed that sadomasochism, as an erotic form of artistic expression, fell within the scope of Article 10. The Court identified that the probation office dismissed the applicant from his job due to the expression of certain traits of his sexual identity. Yet, for the same reasons applied to the Article 8 complaint, the Court considered the interference necessary in a democratic society.[175] Finally, regarding the alleged discrimination on sexual orientation-grounds under Article 14, the applicant complained that he was a victim of differential treatment due to his sexual identity.[176] The Court held that the dismissal was not motivated by the applicant's sexual orientation, but his involvement in BDSM nightclub performances which, being likely to come to the knowledge of the general public, might hinder the quality of his work.[177] For these reasons, the complaint was declared manifestly ill-founded.[178]

For the purposes of this investigation, *Pay* is unique for different reasons. First, the Court for the first time embarks on a discussion on sadomasochism and, more broadly, considering these activities a form of sexual expression. Not only does sadomasochism belong in the realm of sexual expression, but the sadomasochistic performance is an essential component of sexual expression and sexual identity. Secondly, *Pay* abandons dichotomic conceptions of spheres

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[170] *Id.* ¶ 13.
[171] *Id.*
[172] *Id.*
[173] Chatterjee, *supra* note 6 at 750.
[174] *Id.* at 748.
[175] Pay v. U.K. ¶ 13.
[176] *Id.* ¶ 8.
[177] *Id.* ¶ 15.
[178] *Id*.

(public/private) and subjects (victim/perpetrator). Therefore, the Court scrutinizes subjectivities, their locations and their positionalities within the BDSM arena through a sophisticated gendered lens. For instance, the distinction between the private and the public realms loses sharpness. With BDSM performances happening in a club in front of other individuals sharing the same ethos of the applicant-performer, the border between the private sphere and the public sphere blurs. By claiming that 'the environment was one of shared sexual expression,'[179] the Court underscores that a commonality of interests can turn a so-called 'public' space into a 'private' one. That is, a space considered public because of its location outside home and the presence of 'other' people (unknown persons, or otherwise not part of one's family in the broad sense) becomes private because the shared form of sexual expression replaces the extraneousness of these people. In this way, the evaluation of what is private and what is public in the realm of sexual expression should be made on a case-by-case basis. A community of individuals performing sadomasochism gathering in a specific place outside home may therefore constitute a private space. Sites can be hybrid: not solely private, not solely public. '[P]ublicity and privacy' Phil Hubbard argues, 'co-join differently in different places.'[180] Spatiality is a construct: in fact, the ethos and the actions of the gendered subjects making use of it determine its private/public connotations. Sexual performances can take different shapes. Sadomasochism can be conceptualized as

> a desire for a *private life*, but performed as communicative, democratic and equal, requiring a specifically *public* context of performance such that it is not socially and legally closeted, repressed or otherwise subjugated.[181]

A group of individuals sharing a specific way of living their gendered expressions create a milieu defined 'private' because of the closeness of its members and the closure to outsiders. As the applicant of this case shows by stressing the importance of considering his (public) performance as part of his (private) sexual identity, sadomasochism transcends the rigidity of public/private divides.

In addition, the Court avoids the rhetoric of victims of sadomasochistic activities. This might be due to the circumstances of the case, precisely the specific focus on the applicant's dismissal from work due to the potential impact of his sexual activities upon his sensitive work with sex offenders. Yet, unlike the conclusions reached in the above subsection on the role of the wife-victim in *K.A. and A.D.*, *Pay* does not show the existence of 'victims' in relation to sadomasochism. Women occupy a subordinate role, but only because of sadomasochistic dynamics. The only details known are the following. First, there were two semi-naked women in the photograph portraying the applicant.[182]

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[179] *Id.* ¶ 9.
[180] Phil Hubbard, *Sex Zones: Intimacy, Citizenship and Public Space*, 4 SEXUALITIES 51, 67 (2001).
[181] Chatterjee, *supra* note 6, at 752.
[182] Pay v. U.K. ¶ 2.

Second, the applicant's sadomasochistic performance took place in a private members' club and 'involved male domination over submissive women.'[183] Otherwise, the Court only deploys 'victims of sex crime'[184] to refer to the persons negatively impacted, according to the Lancashire Probation Service, by the advertisement of the applicant's sexual activities.

Pay was a decision not on merits but on (in)admissibility. A decision on the merits would have presented more detailed information on the facts and therefore a greater occasion to build a narrative—on victimhood, womanhood, and so forth. Nevertheless, this study notes that the Court recognizes *prima facie* in an admissibility decision that sadomasochistic performance is part of sexual expression[185] without explicitly victimizing the actors of the BDSM play.

III.3.4. SADOMASOCHISM BEHIND THE CURTAIN

Sexual expression under Article 10 is the veil behind which the Court hides sadomasochism in two cases that this section examines: *Akdaş c. Turquie*[186] and *Mosley v. UK*[187].

In *Akdaş*, the Court deals only indirectly with sadomasochism regarding the right to expression under Article 10. More precisely, *Akdaş* addressed the right to artistic expression regarding narration of erotic acts including sadomasochistic activities. The case dealt with publication of the Turkish version of Guillaume Apollinaire's *Les onze mille verges*. The erotic novel described explicitly sexual practices including sadomasochism, pedophilia and vampirism.[188] The publisher had been convicted domestically for publishing a work of obscene and immoral nature, exciting and exploiting the population's sexual desire.[189] The publisher alleged a violation of his right to freedom of expression under Article 10, considering the seizure of the book an unjustified interference.[190] In the present case, the Court did not address whether sadomasochism is a legitimate sexual activity when evaluating the necessity of the State's intervention in a democratic society.[191] While discussing the changeable meaning of morals[192] across different times and cultures, the Court stressed that States should acknowledge the coexistence of different cultural, religious and philosophical communities.[193] Nevertheless, the Court did not develop the notion of cultural communities as

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[183] *Id.* ¶ 2.
[184] *Id.* ¶ 13.
[185] *Id.* ¶ 12.
[186] Akdaş c. Turquie, App. No. 41056/04, (Feb. 16, 2010), https://hudoc.echr.coe.int/eng?i=001-97297.
[187] Mosley v. U.K., App. No. 48009/08, ¶ 3 (Sep. 15, 2011), https://hudoc.echr.coe.int/eng?i=001-104712.
[188] Akdaş c. Turquie ¶¶ 5–6.
[189] *Id.* ¶ 8.
[190] *Id.* ¶ 22.
[191] *Id.* ¶¶ 26–27.
[192] On the violation of the right to freedom of expression in a case where public morals were deemed an insufficient justification for the seizure order and the confiscation of all the copies of the issue of a magazine published by a cultural research and solidarity association for homosexual people, *see Kaos GL v. Turkey*, App. No. 4982/07 (Nov. 22, 2016), https://hudoc.echr.coe.int/eng?i=001-168765.
[193] Akdaş c. Turquie ¶ 27.

including sexual communities such as the sadomasochistic community. In the light of the diverse social components, the Court explained, the State would be accorded, in principle, a broad margin of appreciation. However, the Court underscored that the work had already been published throughout Europe in different languages, having become part of the public European cultural patrimony.[194] Therefore, according to the Court, no pressing social needs justified the Turkish legislation providing for, *inter alia*, the seizure of the book.[195] The Court held that neither the seizure nor the heavy punishment inflicted to the applicant constituted a proportionate measure.[196] It therefore found a violation of Article 10, concluding that the intervention was unnecessary in a democratic society under Article 10(2).[197]

The conflict between the right to private life (sadomasochistic encounter) and the right to expression (publication of pictures and videos) is at the heart of the case *Mosley v. UK*. The case triggered great uproar at international level because of the person at the center of the issue and the type of activities he had been supposedly involved in. The applicant was Max Mosley, former president of the *Fédération Internationale de l'Automobile* (FIA), who alleged that the UK had violated its positive obligations under Article 8 and Article 13, failing to protect his right to private life.[198] Unlike the previous cases on (de)criminalization of and the State's interference in private life, in this case the ECtHR does not develop further its conceptualization of sadomasochism as a sexual practice. One of the reasons why the Court does not elaborate on the connotation of sadomasochist practices is the scope of the *quaestio iuris*. The applicant's complaint does not concern directly, for instance, the sexual activities he was involved in or the State's interference in his personal life. Rather, the question at stake here is whether Articles 8 and 10 provide for a duty for newspapers to pre-notify to the concerned person the content of a piece of news concerning them. Therefore, the legal question is about a supposed pre-notification duty rather than the States' interference in private life through the prohibition of consensual or non-consensual sadomasochism. This section will therefore examine the parts of the decision which are relevant from the purposes of this investigation, starting from the facts.

The News of the World, a Sunday newspaper owned by News Group Newspapers Limited, published an article with the headline 'F1 Boss Has Sick Nazi Orgy with 5 Hookers' on its front page. The article described Max Mosley "exposed as a secret sadomasochistic sex pervert."[199] A number of pages told the story inside the newspaper, accompanied by photographs taken from video footage one of the participants had secretly recorded upon payment. The newspaper's website also published an extract of the video and several images.[200]

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[194] *Id.* ¶¶ 28, 30.
[195] *Id.* ¶ 31.
[196] *Id*.
[197] *Id.* ¶ 32.
[198] Mosley v. U.K. ¶ 3.
[199] *Id.* ¶ 9.
[200] *Id*.

The newspaper portrayed Mosley as a 'pervert' because he had participated in a sadomasochistic encounter and because the sexual activity was allegedly Nazi-themed.[201]

Mosley alleged before the ECtHR that the UK had been in breach of Article 8, both alone and together with Article 13. The applicant complained that the UK had failed to comply with its positive obligation to impose a duty on the newspaper to pre-notify him before the publication of the article and the online material.[202] This would have allowed him to prevent the publication violating his right to respect for private life through an interim injunction.[203] The Court found that the complaint under Article 13 concerning the absence of an effective remedy was a subsidiary reformulation of the complaint under Article 8. It therefore considered only the complaint under Article 8.[204] Apart from this complaint, the applicant did not dispute that the sexual activities had taken place, but contested the connotation of the acts as Nazi-themed.[205] The Court's reasoning focused on the (i) balance between Article 8 and 10; and (ii) the legal question as to whether Article 8 provides for a legally binding pre-notification requirement to be put into place by the State.[206] The two points intermingle.

Article 8, the Court held, provides for the States' (negative) obligation not to interfere with private life and (positive) obligation to ensure the enjoyment of the right to privacy by individuals.[207] The choice of the type of measures adopted to comply with the latter positive obligation falls within the State's margin of appreciation.[208] As to the pre-notification requirement under Article 10, the Court stressed that this article does not prohibit prior restraints on publication, although the dangers inherent to such an imposition call for a close scrutiny.[209] In general, prior restraints may be justified where there are no pressing needs for immediate publication and for contributing to a debate of public interest.[210] In order to assess the existence of a pre-notification duty, the Court then noted the availability in the country of: (a) civil proceedings and interim injunctions; as well as a (b) system of self-regulation of the press, established with the guidance and oversight of a number of professional organizations.[211] Article 8, nevertheless, did not require that States establish a legally binding pre-notification requirement. The Court concluded that there had been no violation of Article 8 in the absence of such a requirement in UK's law.[212]

Further, the Court distinguished between sensationalist reporting, as in the case at stake, and, on the other hand, political reporting and serious investigative journalism. A duty of pre-notification would be general and

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[201] *Id.* ¶ 12.
[202] *Id.* ¶ 81.
[203] *Id.* ¶ 65.
[204] *Id.* ¶ 66.
[205] *Id.* ¶ 12.
[206] *Id.* ¶ 72.
[207] *Id.* ¶ 106.
[208] *Id.* ¶ 107.
[209] *Id.* ¶ 117.
[210] *Id*.
[211] *Id.* ¶ 119.
[212] *Id.* ¶ 33.

therefore affect both types of press,[213] while only investigative and political journalism would be of public interest, thereby justifying an interference to the right to private life. Indeed, the evaluation of the existence of a public interest in the publication should concentrate on "whether the publication is in the interest of the public and not whether the public might be interested in reading it."[214] In this respect, the editor and the reporter of the newspaper claimed that the publication was justified because the sexual activities had 'nazi overtones.'[215] The Court relied on the domestic considerations of the High Court's judgment where sexual activities were connotated by no Nazi element. This detail was important for the ECtHR to explain why there had been no public interest to justify the publication of the photographs, articles and video images. As a result, there had been a 'flagrant and unjustified invasion' of Mosley's private life.[216] The Court specified that the protection under Article 10 may yield to the requirements of Article 8 if the information is 'of a private and intimate nature and there is no public interest in its dissemination.'[217]

What is more meaningful for the purposes of this investigation is the relation between the character of the activities (intimate sphere of private life) and the margin of appreciation accorded to the State. The Court's reasoning is quite subtle. The intimate details of the sexual encounter would attract, normally, a narrow margin of appreciation,[218] as already stated in relation to: the interference of domestic law with a crucial facet of personal identity (*Christine Goodwin v. UK*);[219] an important aspect of identity or existence (*Evans v. UK* and *A, B and C v. Ireland*);[220] and the most intimate aspects of private life (*Dudgeon v. UK* and *A.D.T. v. UK*).[221] Nevertheless, the specific complaint concerning the pre-notification requirement makes this case different from the preceding ones. Given the absence of European consensus on a pre-notification requirement and the broader impact of imposing such a duty beyond the present case, the Court concluded that the State's margin of appreciation in this case was wide.[222]

Overall, in *Mosley v. UK* the ECtHR addressed sadomasochism to a limited extent. The Court touches upon the character of sadomasochist group practices by relying on the domestic court's conclusions. The definition of the practice as sadomasochism is not disputed. Yet the supposed connotation of sadomasochistic activities, that is a Nazi role-play according to the editors of the

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[213] *Id.* ¶¶ 121, 135.
[214] *Id.* ¶ 114.
[215] *Id.* ¶ 127.
[216] *Id.* ¶ 104.
[217] *Id.* ¶ 131.
[218] *Id.* ¶¶ 109, 123.
[219] Christine Goodwin v. U.K., App. No. 28957/95, ¶ 77 (July 11, 2002), https://hudoc.echr.coe.int/eng?i=001-60596.
[220] Evans v. United Kingdo*m,* 2007-I Eur. Ct. H.R. 353, ¶ 77 (2007)*;* A, B and C v. Ireland*,* 2010-VI Eur. Ct. H.R. 185 ¶ 232 (2010).
[221] Dudgeon v. United Kingdom, App. No. 7525/76 ¶ 52 (October 22, 1981) https://hudoc.echr.coe.int/eng?i=001-57473; A.D.T. v. U.K., App. No. 35765/97, ¶ 37 (Oct. 31, 2000), https://hudoc.echr.coe.int/eng?i=001-58922.
[222] Mosley v. United Kingdom, App. No. 48009/08, ¶¶ 124, 132 (Sep. 15, 2011), https://hudoc.echr.coe.int/eng?i=001-104712.

newspaper, is relevant to classify the published news 'of public interest.' The case deals with the intersection of and the clash between the right to privacy and the right to expression. Perhaps because of this specific focus, it is difficult to detect any implicit or explicit Court's opinion on the compatibility of one's participation in sadomasochistic practices with their social, public or professional position. Notably, it is not expressed nor assumed whether the applicant's involvement in sadomasochistic activities would be incompatible with his role as President of the FIA.

A (weak) criticism may stem from the relation between the ECtHR and the domestic court. The ECtHR relies on the High Court's assumption that, had Mosley's activities been Nazi-themed, a public interest in knowing the fact would arise.[223] This would have made him unsuitable for his role.[224] Yet the ECtHR does not call into question directly in the present decision the applicant's suitability as President of the FIA because of his involvement in sadomasochistic activities. It would be a hasty conclusion to liken *Mosley v. UK* to *Pay v. UK*. In the latter, the Court dismissed the complaint under Article 8, assuming that the applicant's sadomasochistic performance may hinder the public reputation of the probation service where he was employed. This is not vaguely intimated in *Mosley v. UK*.

There is a substantive difference between the two cases in relation to the form of the violation and the State's direct or indirect involvement in it. While in *Pay v. UK* the applicant complained about the acts of a State institution (the Lancashire Probation Service), in *Mosley v. UK* the applicant complained about the State's failure to protect his rights (by preventing the newspaper from publishing the visual material). Yet this difference is not particularly relevant for the purposes of this inquiry. What is less disputable is the wasted opportunity for the Court to dismantle the oft-mentioned link between sadomasochism and unsuitability to work in a certain domain and/or specific roles. The Court missed the opportunity to deny the notion that the shape of one's sexual preferences raises doubts about their attitudes towards other subjects in social and professional interactions.

A final note, that the ECtHR did not make explicit. The involvement in Nazi-themed sadomasochistic practices does not imply any affinity for or affiliation with Nazism. This is especially true if one denies the essence of sadomasochism as a replication of historical oppression, whilst considering it a role-play, a make-believe game, or, in any case, a simulation of social power differentials.[225] However, there is always the risk deriving from the mismatch between how the individual conceives that practice and what the public perception of it is. There might also be a widespread impression that the concerned person is unsuitable for a public role. Indeed, meanings attributed to the sadomasochistic practice involving a (Nazi) role-play can well differ.[226]

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[223] *Id.* ¶ 104.
[224] *Cf.* Bennett, *supra* note 30 at 93.
[225] On the different conceptions of sadomasochism as replication, simulation and erotic game, *see* above, § 1.2.2.
[226] *See* Bennett, *supra* note 30 at 105.

IV. SOME SEX IS BETTER THAN OTHER

As seen throughout the above sections, sadomasochism and sexual orientation intercross in at least two ways. First, from a formal perspective, a consistent fraction of cases brought before the ECtHR concern sadomasochistic activities between homosexual individuals. For instance, in *A.D.T. v. UK*, the applicant raised sexual orientation as a discriminatory ground in private life under Article 14 taken together with Article 8*,* given that 'no provision of domestic law regulated sexual acts between consenting adult heterosexuals or between lesbians.'[227] Yet the Court, having found a violation of Article 8 and referring to the precedent of *Laskey, Jaggard and Brown v. UK*,[228] did not deem it necessary to examine the case under Article 14.[229] Secondly, both heterosexual and homosexual orientations are involved in the sadomasochistic practices and identities often stigmatized by the Court's misunderstanding of pain-driven pleasure.[230]

There is also a third lens through which to look at the relation between sadomasochism and sexual orientation. The ECtHR case law on the (de)criminalization of, on the one hand, homosexual intercourses between consenting adults and, on the other hand, sadomasochistic practices between (homo-/heterosexual) consenting adults shows that these two groups of complainants occupy different positions.[231] Non-sadomasochistic homosexuality seems a cause of vulnerability which deserves protection by the Court. Homosexual individuals constitute a group in need of protection only where their activities, however, are made of romantic sex. Persons practicing and receiving painful sexual acts have not gained a similar status in front of the Court yet. In *Laskey,* the Court analyzed the interference with the applicants' right to respect for private life on general health grounds. It concluded that it is not necessary to evaluate whether the interference would be justified based on the protection of morals.[232] Yet the concurring opinion of Judge Pettiti stresses the centrality of morality to the interpretation of Article 8(2), referring indirectly to sadomasochistic practices as base and criminally immoral. Judge Pettiti affirms:

> The protection of private life means the protection of a person's intimacy and dignity, not the protection of his baseness or the promotion of criminal immoralism.[233]

Discussing the content of the protection of the right to private life, Judge Pettiti concludes his concurring opinion with a tone particularly paradigmatic of the judicial and popular disapprobation towards sadomasochism outlined above. This

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[227] A.D.T. v. U.K. ¶ 40.
[228] Laskey, Jaggard and Brown v. U.K. ¶ 70.
[229] A.D.T. v. U.K. ¶ 401.
[230] *See* Ammaturo, *supra* note 79 at 582.
[231] *Cf.* PATRICK CALIFIA, PUBLIC SEX: THE CULTURE OF RADICAL SEX 144 (1994).
[232] Laskey, Jaggard and Brown v. U.K. ¶ 51.
[233] *Id.* ¶ 16.

judicial adverse attitude towards sadomasochism may also indicate to the influence of the medical field, particularly mainstream psychiatry, on justices.[234] As sketched at above,[235] medical authorities have historically pathologized sadomasochism. Both sadism and masochism were considered disorders of sexual development for a long time. The current edition of the American Psychiatric Association's Diagnostic and Statistical Manual (DSM-5) does not classify sadomasochism as a mental disorder *per se*, but only in situations where the individual experiences obsessive thoughts or psychosocial distress deriving from the activities practiced.[236] One thing is the DSM-5 as a book—along with its scientificity venerated by many and criticized by many; another thing is the living social disapprobation for practices which have been officially depathologized quite recently.[237]

The message is clear. Some sex is good. Other sex is bad, including sadomasochism—but also fetishism, prostitution, transvestitism, and certainly many other deviations from binary-normative romantic sexual interactions.[238] This argument mirrors Gayle Rubin's "hierarchical system of sexual value" according to which sexual activities and individuals performing them are ranked on the basis of their social, legal, political and moral acceptability.[239] This hierarchy takes the shape of an 'erotic pyramid.'[240] In this vein, some have compared *A.D.T.* to *Laskey* because of their difference in terms of margin of appreciation on the one hand, and, on the other, the similar absence of sadomasochistic acts in the seized videotapes.[241] For instance, Francesca Ammaturo stresses that in *A.D.T.* (small number of people performing sex) the margin of appreciation enjoyed by the State is narrower than in *Laskey* (group sex). The wider margin accorded to the State in *Laskey* is an indicator of,

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[234] *See* Lord Templeman's views on sadomasochism expressed in R v. Brown and reported by the ECtHR in Laskey, Jaggard and Brown v. UK: "The violence of sado-masochistic encounters involves the indulgence of cruelty by sadists and the degradation of victims. Such violence is injurious to the participants and unpredictably dangerous. I am not prepared to invent a defence of consent for sado-masochistic encounters which breed and glorify cruelty . . . Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilized." *Id.* ¶ 20.

[235] S*ee id.* § 1.

[236] *See id*. § 1.1; Ammaturo, *supra* note 79 at 582.

[237] For example, at the outset of 2020, Indonesia's Draft 'Family Resilience' Bill has been harshly criticized for treating homosexuality, incest and sadomasochism a 'sexual deviation' for which individuals would be subject to government-sanctioned rehabilitation centers for treatment. Stanley Widianto, Tabita Diela & Agustinus Beo Da Costa, *Indonesia bill on family targets surrogacy, "sexual deviations,"* REUTERS, Feb. 19, 2020, https://www.reuters.com/article/us-indonesia-rights/indonesia-bill-on-family-targets-surrogacy-sexual-deviations-idUSKBN20D0ZZ.

[238] *See* Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *in* PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267–319 (Carole S. Vance ed., 1984); Bennett, *supra* note 3 at 541.

[239] Rubin, *supra* note 238 at 151; Gayle Rubin coined also the expression 'sex/gender system' to refer to the set of arrangements by which 'a society transforms biological sexuality into products of human activity, and in which these transformed sexual needs are satisfied'; Gayle Rubin, *The Traffic in Women: Notes on the "Political Economy" of Sex*, *in* TOWARD AN ANTHROPOLOGY OF WOMEN 159 (Raina Reiter ed., 1975).

[240] Rubin, *supra* note 238 at 151.

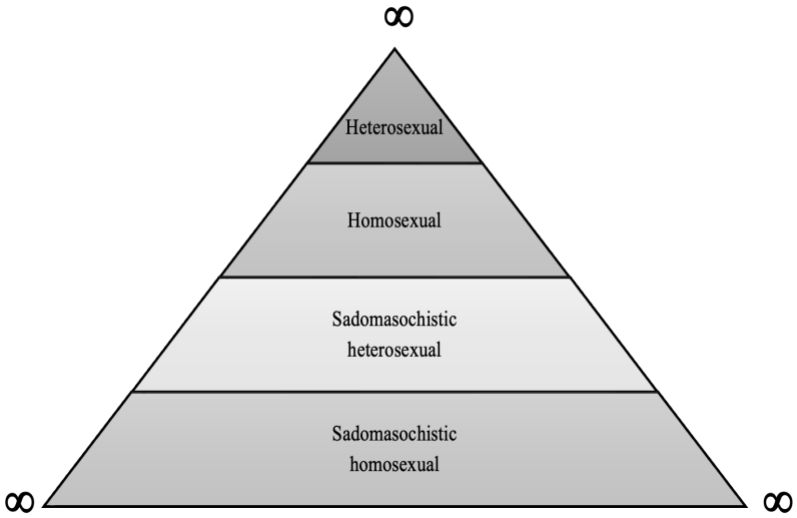
[241] Ammaturo, *supra* note 79 at 582–83; PAUL JOHNSON, HOMOSEXUALITY AND THE EUROPEAN COURT OF HUMAN RIGHTS (2014); Grigolo, *supra* note 97.

Ammaturo suggests, the lower rank attributed in the ECtHR's erotic pyramid to the sadomasochistic intercourse in a homosexual couple compared to sadomasochistic group sex.[242] That is, the group trumps the couple because the couple is sacred. This is certainly an original application of the erotic pyramid to human rights law-making. Its development can be further imagined. At the top of the pyramid is non-sadomasochistic heterosexual sex within a couple, followed by non-sadomasochistic heterosexual group sex. This apex surmounts the category of sadomasochistic sex, including, in order, group sex and couple sex. Sadomasochistic couple sex occupies the lowest level of the hierarchy because it challenges the supposedly golden pure practices occurring in heterosexual couple sex. Depending on the weight attributed to one element or another, the basis of the hierarchy may be otherwise occupied by sadomasochistic group sex as it challenges both the romantic standard and the exclusiveness characterizing the you-and-me sexual intercourse. This analysis is piercing. It uncovers, in fact, not only the heteronormative hierarchy of sexual intercourse constructed by the Court, but also the (moral) admissibility of sadomasochistic practices under human rights law. However, what is unconvincing is the use of the number of persons involved in the sexual act as a discriminatory criterion for the Court to build the erotic pyramid, since the argument is based on two decisions only. Rather, what is particularly relevant is the convergence of sexual orientation with sadomasochism.

Three unsuccessful cases brought before the Court concern sadomasochistic activity between consensual heterosexual individuals, namely *Mosley*, *K.A. and A.D.V.*, and *Pay*. More precisely, *K.A. and A.D.V.* and *Pay* contain the ECtHR's unease at best; discomfort at worst with adjudicating 'non-conventional' sexual practices. In these cases, the Court addresses morality as the value to be balanced with the objective of cultivating a broad-minded society. In *Mosley*, the Court only touches upon the issue of morality with the aim of appraising the lawfulness of sadomasochism. This is blatant: the ECtHR constructs a hierarchy of sex value where 'non-traditional' sexual acts are relegated to lower positions. Then comes the sub-order considering the sexual orientation of those who perform the act.[243] As the following explanatory figure shows, sexual orientation intersects with sadomasochistic and non-sadomasochistic sexual activities, creating a sexual hierarchy based on heteronormative assumptions.

[242] Ammaturo, *supra* note 79 at 582–83.
[243] *Cf. id.* at 582–83.

Figure 2. Erotic pyramid: sexual intercourse as interpreted by the ECtHR.



While the heteronormative rule operates transversally, the overriding hierarchical criterion is the nature of the conduct (sadomasochistic or non-sadomasochistic) rather than the sexual orientation of the persons involved in the act. This means that homosexual intercourse prevails over the sadomasochistic heterosexual act. This scheme is meant to show how sexual orientation and the variety of (some) sexual practices intermingle and exist according to hierarchical relations. Nothing more: this pyramid is flawed because of its limited levels. For example, it is conceptually and practically incorrect to unify all same-sex sexual activities under one adjective 'homosexual.'[244] Subjective specificities within the groups of men and women, as well as systemic subordination of women under men caution against the homogenization of gay and lesbian experiences. The sexual practices analyzed in this paper concern all persons who identify themselves as men. To hypothesize where the ECtHR would place sexual activities conducted by (the diverse group of) women in the erotic pyramid, lesbian sex would be placed above sadomasochistic gay sex, but below gay sex. Gay sex would occupy the top position of homosexual sex, while sadomasochistic lesbian sex the last position among homosexual practices, both sadomasochistic and non-sadomasochistic. A similar discourse applies also to the array of queer existences, who live and perform sexualities variously.

This pyramidal model is useful for exemplificatory purposes, but it has a limited contextual sensitivity. If (mis)understood as a comprehensive

[244] *See, e.g.,* Monique Wittig, *One is Not Born a Woman*, *in* THE LESBIAN AND GAY STUDIES READER 103–09 (Henry Abelove, Michele Barale, & David Halperin eds., 1993). Monique Wittig's point on lesbians' ambiguous positioning in the sex-gender binary: women have a double identity (1) being morphologically women and (2) not women, not meeting the heteronormative rule of attraction to men; *see* Mira J. Hird, *Gender's nature: Intersexuality, transsexualism and the "sex'/'gender" binary*, 1 FEMINIST THEORY 347, 348–49 (2000).

representation of the sexual world, this type of pyramid is misleading. Let us take two examples. First, the ranking order depends upon the perspective of who designs the pyramid, therefore it is prone to subjective changes according to the perceptions and expectations of its creator. For instance, the mind behind the above pyramid is a queer person (the author), describing themselves as a gender non-conforming person, with sexual and romantic preferences for women. This queer view of the sexual hierarchy is different from many others that one can imagine. For example, many Western heterosexual men, those who usually dictate the norms of gender, conceive lesbian sex as something exciting and erotic to be seen. From the perspective of this form of voyeurism, lesbian sex is just sex between women, in absence of a man, being performed for the sole pleasure of the voyeur man's eye.

Secondly, several factors influence the construction of the pyramid. These can be linked to the subjective perception not of (same-)sex as such, as in the case of voyeurism, but of the different markers attached to the persons performing the sexual activity. I have already stressed above that in the same sexual interaction multiple dimensions may overlap and determine a different placement of type of sexual activity in the pyramid. The example outlined above portrays the pedophile male homosexual sexual act at the lowest hierarchical level. Many other layers can multiply depending on the connotations the designer selects as relevant to construct the pyramid. Hence, gender, age, and sexual orientation, do not clearly exhaust the possibilities of intersecting personal features. In addition, the other (i) attaches specific social markers to a person, who might or not identify with that marker, including the designer of the pyramid, who (ii) judges morally that sexual activity, relying on their personal conceptions and biases.

Thirdly, the pyramid is inherently unable to mirror the existing variety of sexualities, by dividing the world of lust dichotomously into homo/hetero and non-sadomasochistic/sadomasochistic acts. In any case, it would be pretentious for the author to claim to be able to know all the human characteristics existing and the sexualities performed *now* in *this* world. This is the reason for the inscription of the sign of infinity (∞) at the three angles of the figure. It would be simply naïve to believe that this paper offers enough space to draw a pyramid of indefinable height.

V. RIGHTS AND PAIN

V.1. A HUMAN RIGHT TO SADOMASOCHISM?

It is unclear what legal status sadomasochism has gained before the ECtHR. What is clear, instead, is the Court's suspicious attitude toward sadomasochism. The legitimacy of sadomasochism as one among a manifold of sexual practices is in doubt even if it is performed in private between consenting adults. Notwithstanding the Court's shy reference to sadomasochistic acts as

sexual activities in *Laskey*,[245] the individual positions of those practicing such erotic activities do not seem worthy of the Court's legal protection so far. The Court appears to navigate with more confidence the 'certainty' and 'stability' of the heterosexual and homosexual binary as the only protected sexualities.[246] However, this type of approach disregards the infinite ocean of sexual encounters that inhabit human lives along with their most varied configurations. It would be a step too far to uphold, after this kind of analysis, the existence of a human right to engage in sadomasochistic activities. Yet, divorcing from the variety of erotic realities can hardly be considered a human rights-oriented choice.

V.2. THE SUBJECTIVE PERCEPTION OF PAIN

The agreement upon a safe word before the erotic game starts, its modes of expression and the respect of it by the other participants are key for sadomasochism to be an admissible practice under human rights law. The recent case law points out that the safe rule does not suffice. Public interference can be legitimate if they are necessary in a democratic society. Therefore, sadomasochistic acts should not cause, actually or potentially, a significant degree of injury. The time is not yet ripe to uncover through the voice of the Court when and how the threshold of 'significant injury' is met. In the current absence of specific case law on the (in)tolerability of harm in sadomasochist intercourses, the socio-cultural construction of pain and its contextual relativity should caution against any automatic and rigid application of precedent decisions to new controversies.

A high degree of subjectivity is involved in evaluating when and how one perceives that pain has achieved a level of significance which is intolerable and, therefore, attracts legitimate public intervention. The pain-test is challenging because of its *ex post* (actual injury) or *ex ante* (potential injury) and externally-driven nature. Added to these elements of difficulty is the instability of meanings attached to the signifier 'pain.' Indeed, the evaluation is made by a subject different from the one who experienced the 'pain.' As such, the evaluation is not simultaneous. It either occurs after the infliction of the injury or it consists of a projection of harm where its potentiality should be foreseen. Overall, the assessment of the tolerability of pain should take into account the changeability of its meaning, that is what pain means to that specific individual living in that specific culture, milieu and circle.

CONCLUSION

The examination conducted in this paper showed how sadomasochism unsettles the binaries of domination/subordination and perpetrator/victim. The sadomasochistic stance brings to the human rights stage a different—sometimes opposite—perspective. For instance: subordination is not always synonymous with abuse; the dominator controls the dominated for the pleasure of both. A

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[245] Laskey, Jaggard and Brown v. U.K. ¶ 36.
[246] *See* GONZALEZ-SALZBERG, *supra* note 64 at 75; Carol Johnson, *Heteronormative Citizenship and the Politics of Passing*, 5 SEXUALITIES 317, 329 (2002).

dominator inflicting pain is not necessarily a perpetrator; an individual is excited being subjugated to the other's control; the slave is not a victim in the same way as the master is not a perpetrator. The exploration of the ECtHR's case law on sadomasochistic practices under Article 8 ECHR and, partially, Article 10 ECHR, proved that power differentials enacted for the purposes of lust do not simply reproduce but simulate the power inequalities existing in today's gendered system. Sadomasochistic performances dismantle gender binaries in various ways: (a) introducing women-masters dominating men-slaves; (b) confusing the genders of who controls and who is controlled; (c) erasing the heteronormative boundaries of sexual activities, not necessarily based on sex-as-penetration; and (d) transcending the heteronormative rules as to whom is expected to behave how according to their gender. This gendered revolution also happens in front of the ECtHR. Yet, sadomasochism as just one among a plethora of sexual practices has not gained full legitimacy before the Court. Overall, the ECtHR makes generalized assumptions when dealing with the prohibition of sadomasochism about the ethical significance of sadomasochism, as one single marble block of sexual practices. Otherwise, the Court is reluctant to develop an analysis of sadomasochism as a sexual activity protected under specific conditions under Article 8. A context dependent approach would provide a better understanding of the gendered human rights implications of the concerned practices. This entails a close examination of the specifics of the sadomasochistic performance, including the subjects' roles, positionalities and situational meanings.

Solving the Puzzle of Gender in the International Criminal Court: Does the Rome Statute Protect the LGBTQ+ Community from Persecution?

Gara Lanzas Peláez*

ABSTRACT

Despite the oppression that the LGBTQ+ community endures, persecution on the grounds of sexual orientation or gender identity has not yet come to the attention of the International Criminal Court. This study analyzes one of the main difficulties that a crime like persecution on the grounds of sexual orientation might face: whether sexual orientation and gender identity could be contemplated within the specific discriminatory grounds that art. 7(1)(h) of the Rome Statute provides for the crime of persecution. I argue that they are indeed included and that this ground is contained within the crime of gender-based persecution.

To reach this conclusion, I examine the definition of gender within international law. First, I look into the elements of the crimes against humanity of persecution, to then examine the travaux préparatoires of the Rome Statute and the drafting process of its definition of gender. Second, given the relative lack of jurisprudential references on gender-based persecution in international criminal law, I delve into how other fields of international law have interpreted it. Particularly, I analyze the developments regarding the definition of gender in international human rights law and international refugee law. For this, I investigate international practice in cases of gender-based persecution, observing, in a somewhat consistent manner, that persecution against LGBTQ+ individuals has been regarded as gender-based persecution.

This investigation suggests the existence of a tendency within international law, which could apply to eventual gender-based persecution cases before the International Criminal Court, that this crime is applicable when it is committed because of the sexual orientation or gender identity of the victim. I observe a proclivity towards an extended interpretation of gender, understanding the term as a social construction, a cumulus of social roles and norms. This would mean, I contend, that persecution against the LGBTQ+ community must be included within gender-based persecution since this persecution occurs because

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of the manifestation of one's gender and how this manifestation differs from what society expects from, in the case of the Rome Statute, a "female" or a "male."

RESUMEN

A pesar de la opresión que sufre la comunidad LGBTQ+, la persecución por razón de orientación sexual o identidad de género no ha recibido demasiada atención por parte de la Corte Penal Internacional. Este trabajo analiza una de las principales dificultades que este crimen podría enfrentar de llegar a un caso en la Corte Penal Internacional: si orientación sexual e identidad de género podrían entrar en los motivos de discriminación del art. 7(1)(h) del Estatuto de Roma. Defendemos que la orientación sexual e identidad de género están incluidos entre estos motivos, y, específicamente, en el tipo de persecución por razones de género.

Para llegar a esta conclusión examinamos la definición de género en derecho internacional. En primer lugar, analizamos los elementos del tipo del crimen de lesa humanidad de persecución, así como los travaux préparatoires del Estatuto de Roma y la redacción de su definición de género. Tras ello, y dada la escasez de referencias jurisprudenciales en derecho penal internacional, examinamos cómo otras ramas del derecho internacional han interpretado el concepto de género. Particularmente, analizamos su desarrollo en derecho internacional de los derechos humanos y en derecho internacional de los refugiados, estudiando doctrina y práctica en diferentes casos de persecución por motivos de género. En este estudio, observamos una tendencia que incluye la persecución contra la comunidad LGBTQ+ como persecución por motivos de género.

Esta investigación sugiere que existe una tendencia en derecho internacional que podría hacer aplicable el tipo del art. 7(1)(h) del Estatuto de Roma a actos de persecución por motivos de orientación sexual o identidad de género. Observamos que se emplea una interpretación extensiva del concepto de género, entendiendo el término como un constructo social, un cúmulo de normas y roles sociales asociadas a cada género. Argumentamos que esto implicaría la inclusión de la persecución contra la comunidad LGBTQ+ dentro del tipo de persecución por motivos de género, ya que la primera ocurre, precisamente, por la expresión de género de cada cual, y de cómo esta difiere de las expectativas de la sociedad de, en el caso del Estatuto de Roma, los sexos "femenino" y "masculino."

I. INTRODUCTION

I.1 OBJECTIVES AND MOTIVATION

Already codified in the context of the International Military Tribunal (IMT), the crime of persecution was among the first to be recognized as a crime against humanity.[1] Persecution has long been recognized as a crime by International Criminal Law,[2] and continues to be part of the Statute of the International Criminal Court (ICCSt).[3] In this research, I will delve into the crime against humanity of persecution, particularly when it is committed on the grounds of gender and specifically directed against the Lesbian, Gay, Bisexual, Trans, Queer (LGBTQ+) community, as well as other persons within the wider LGBTQ+ community who rely on other terms for self-identification. I will analyze the ICCSt's concept of gender[4] and examine whether persecution against the LGBTQ+ community can be included within the International Criminal Court's (ICC) concept of gender-based persecution. I will further touch on the persecution of transgender persons in the context of the scarcity of legal protection and lack of doctrinal and jurisprudential analysis of these persons relative to the rest of the LGBTQ+ community.[5]

In furtherance of this objective, I will describe and examine the doctrine and practice on gender-based persecution and the definition of gender in the Statute of the International Criminal Court. Then, given the relative lack of jurisprudential sources, aside from the relevant International Criminal Court Office of the Prosecutor (OTP) Policy Papers,[6] regarding gender-based persecution in International Criminal Law (ICL), this research will examine other fields of law that have considered this issue, such as International Human Rights Law (IHRL) and International Refugee Law (IRL).[7]

I will also examine relevant instances of LGBTQ+ persecution around the world in order to establish the current relevance of this research and to analyze possible grounds of application. I will thus draw from facts of ongoing persecutions against the LGBTQ+ community, as reported by Non-governmental Organizations (NGOs), International Organizations and Tribunals, and trustworthy news reports.

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[1] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 280 [hereinafter IMT Charter].

[2] David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 102, (2004).

[3] Rome Statute of the International Criminal Court, art. 7(1)(g), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

[4] *Id*. at art. 7(3).

[5] Brian Kritz, *The Global Transgender Population and the International Criminal Court*, 17 YALE HUM. RTS. DEV. L. J. 1, 3–4 (2014).

[6] Int'l Crim. Ct. Office of the Prosecutor, Policy Paper on Sexual and Gender- Based Crimes (ICC Office of the Prosecutor 2014) [hereinafter ICC Office of the Prosecutor 2014]; Int'l Crim. Ct Office of the Prosecutor, Policy on the Crime of Gender Persecution (ICC Office of the Prosecutor 2022) [hereinafter ICC Office of the Prosecutor 2022]. I will delve into these in Chapters V and VII below.

[7] Valerie Oosterveld, *Gender, Persecution, and the International Criminal Court: Refugee Law's Relevance to the Crime against Humanity of Gender-Based Persecution*, 17 DUKE J. COMPAR. & INT'L L. 49, 51–52 (2006); Charles Barrera Moore, *Embracing Ambiguity and Adopting Propriety: Using Comparative Law to Explore Avenues for Protecting the LGBT Population under Article 7 of the Rome Statute of the International Criminal Court*, 157 MINN. L. REV. 1287, 1307, 1321–25 (2017).

Lastly, I will critique the concept of gender at the ICCSt, with a normative conclusion on whether the LGBTQ+ community is adequately protected by the ICC. I will conclude by providing prescriptive recommendations on how the ICC should interpret the concept of gender in cases of LGBTQ+ persecution.

I.2 STRUCTURE

This research will be divided into eight chapters. Aside from this introduction, the second chapter will compile several situations of LGBTQ+ persecution taking place around the world, which provide the basis for my analysis. In the third and the fourth chapters, I will delve into the crime of persecution, its history, and elements within the ICC system. In the fifth chapter, I will turn to the definition of gender to examine how LGBTQ+ persecution can be defined as gender-based persecution and thereby examine the *travaux préparatoires* of the ICCSt and subsequent practice of the ICC. In the sixth, I will turn to analyze developments on the concept of gender in IHRL, and IRL. In the seventh chapter, I will analyze whether Sexual Orientation and Gender Identity (SOGI) can be considered within gender-based persecution as defined by the ICCSt. In the last chapter, I will present my conclusions.

I.3 SOME CONSIDERATIONS ABOUT THE LGBTQ+ COMMUNITY

To contextualize this research, I begin with some brief definitions relating to SOGI and the LGBTQ+ community.

Sexual orientation defines the gender or genders towards which a person feels sexually and/or romantically or affectionately attracted, usually conflated into categories such as heterosexual (attraction to the opposite gender), homosexual (attraction to the same gender), or bisexual (attraction to more than one gender), among others.[8] Gender identity is defined as the internal and individual conception of one's gender, whether female, male, or non-binary, which may coincide with the Assigned Gender At Birth (AGAB).[9] It follows that lesbian and gay (LG) persons are those attracted to the same gender, female or male, respectively; and bisexual (B) persons are those attracted to two or more genders. A trans (T) person's gender identity does not coincide with their AGAB, whereas a cisgender person's does coincide with their AGAB.

Finally, queer (Q) is an umbrella term that includes other SOGI minorities,[10] while the plus (+) sign represents persons who, within the wider LGBTQ+ community, use other terms for self-identification.[11]

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[8] INTERNATIONAL COMMISSION OF JURISTS, YOGYAKARTA PRINCIPLES - PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY, 6 (2007).

[9] *Id.*

[10] Merriam-Webster, https://www.merriam-webster.com/dictionary/queer (last visited May. 13, 2023).

[11] ICC Office of the Prosecutor 2022, *supra* note 6, at 3.

II. THE PERSECUTION OF THE LGBTQ+ COMMUNITY: DRAWING FROM REALITY

SOGI persecution still occurs all over the globe and widely varies from the gravest forms of assaults on human life and physical integrity, such as killings, corrective rapes, or torture, to subtler forms of discrimination, like the refusal to recognize someone's identity or denial of access to healthcare. Some of this conduct has already been denounced before the ICC. For example, the City University of New York, MADRE, and the Organization of Women's Freedom in Iraq submitted a communication to the Office of the Prosecutor reporting gender based persecution, including acts of torture, killing, and sexual violence against persons based on their real or perceived sexual orientation or gender identity.[12] These were allegedly committed by members of the Islamic State of Iraq and al-Sham/Greater Syria (also known as ISIS, ISIL, Daesh, or IS) against civilians in Iraq between 2014 and 2017.[13] One notable instance described was when two female university students were seen kissing each other and were issued death warrants for committing "homosexual acts," which they could only avoid by going into hiding and seeking help from humanitarian organizations.[14] The communication also contains reports of summary executions of women for suspected and/or actual homosexuality,[15] and it shows how ISIS equated homosexuality with the transgression of their imposed gender norms.[16] In a similar fashion, ISIS persecuted and sentenced to death homosexual men and their families, based on their actual homosexual behavior or perceived gender non-conformity (which could include having "trendy hairstyles" and wearing "fashionable clothes").[17]

Another notable case of violence against the LGBTQ+ community is the "gay purge" conducted by the regional authorities of Chechnya. There have been numerous reports of gay men being detained, tortured, and even killed in the Russian region from 2017–2019.[18] Men suspected of homosexuality were

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[12] CUNY, MADRE AND OWFI, COMMUNICATION TO THE ICC PROSECUTOR PURSUANT TO ARTICLE 15 OF THE ROME STATUTE REQUESTING A PRELIMINARY EXAMINATION INTO THE SITUATION OF: GENDER BASED PERSECUTION AND TORTURE AS CRIMES AGAINST HUMANITY AND WAR CRIMES COMMITTED BY THE ISLAMIC STATE OF IRAQ AND THE LEVANT (ISIL) IN IRAQ (2017). This communication was publicly shared by the submitters and is available at https://www.madre.org/sites/default/files/PDFs/CUNY%20MADRE%20OWFI%20Article%2015%20Communication%20Submission%20Gender%20Crimes%20in%20Iraq.pdf (last visited May 13, 2023).

[13] *Id.* ¶ 61.

[14] *Id.* ¶ 63.

[15] *Id.* The Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD) also confirmed this aspect over the course of its investigative activities. *See* UNITAD, Letter dated 7 November 2022 from the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant addressed to the President of the Security Council, ¶ 43, U.N. Doc. S/2022/836 (Nov. 8, 2022).

[16] *Id.*

[17] *Id.* ¶¶ 67–73.

[18] Andrew E. Kramer, *Chechen Authorities Arresting and Killing Gay Men, Russian Paper Says*, N.Y. TIMES, Apr. 1, 2017; HUMAN RIGHTS WATCH, "THEY HAVE LONG ARMS AND THEY CAN FIND ME": ANTI-GAY PURGE BY LOCAL AUTHORITIES IN RUSSIA'S CHECHEN REPUBLIC (Human Rights Watch 2017).

irregularly detained and tortured.[19] Their status was also disclosed to their families, who were encouraged by the local authorities to carry out honor killings,[20] accompanied by threats of executions if the families did not do it.[21] This violence affected over one hundred persons in 2017,[22] and authorities have not carried out any effective investigations.[23]

More recently, in 2021, there have been reports of a surge of State violence against LGBTQ+ persons in Cameroon. According to Human Rights Watch, between February and April 2021, twenty-four persons were arrested, beaten, or threatened for SOGI reasons or gender nonconformity.[24] The authorities have also raided LGBTQ+ civil society organizations, sometimes arresting their staff and members.[25] Specifically, authorities targeted transgender women for arrest, subjected them to forced HIV tests and anal examinations, and charged them with homosexual conduct, lack of identity cards, and public indecency.[26]

In addition to physical violence, the LGBTQ+ community continues to face many legal impediments and discrimination. According to the regular reports of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), sixty-seven United Nations (UN) member States continue to officially criminalize same-sex consensual sexual conduct, and two others do so *de facto*.[27] In six of those States, the death penalty is the required legal sanction for homosexual acts, and in five others, the death penalty is a punishment option.[28] The ILGA also reports other kinds of restrictions, such as legal restrictions on the freedom of expression, present in forty-two UN States,[29] and the freedom of association, in fifty-one UN member States.[30] Moreover, a majority of States still do not protect LGBTQ+ individuals against discrimination.[31]

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[19] Kramer, *supra* note 18; HUMAN RIGHTS WATCH, *supra* note 18, at 17–19.
[20] HUMAN RIGHTS WATCH, *supra* note 18, at 19–20.
[21] Matt Moore, *Council of Europe to tackle Chechnya over gay 'purge' reports*, GAYTIMES, https://www.gaytimes.co.uk/life/council-of-europe-to-tackle-chechnya-over-gay-purge-reports/ (last visited May 13, 2023).
[22] HUMAN RIGHTS WATCH, *supra* note 18 at 2.
[23] Matt Moore, *Russia: Two years after Chechnya's gay purge victims still seek justice as LGBTI defender receives death threats*, AMNESTY INTERNATIONAL (Apr. 1, 2019), https://www.amnesty.org/en/latest/news/2019/04/russia-two-years-after-chechnyas-gay-purge-victims-still-seek-justice-as-lgbti-defender-receives-death-threats/; Human Rights Watch, *Russia: New Anti-Gay Crackdown in Chechnya*, HUMAN RIGHTS WATCH (May 8, 2019), https://www.hrw.org/news/2019/05/08/russia-new-anti-gay-crackdown-chechnya.
[24] Human Rights Watch, *Cameroon: Wave of Arrests, Abuse Against LGBT People*, HUMAN RIGHTS WATCH (Apr. 14, 2021), https://www.hrw.org/news/2021/04/14/cameroon-wave-arrests-abuse-against-lgbt-people.
[25] *Id.*
[26] *Id.*
[27] KELLYN BOTHA, RAFAEL CARRANO LELIS, ENRIQUE LÓPEZ DE LA PEÑA, ILIA SAVELEV & DARON TAN, INT'L LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOC., STATE-SPONSORED HOMOPHOBIA: GLOB. LEGIS. OVERVIEW UPDATE (December 2020).
[28] *Id.* at 25.
[29] *Id.*
[30] *Id.* at 25–26.
[31] *Id.* at 26–28.

Transgender persons face a slightly different situation. Express criminalization of transgender persons is uncommon; discrimination is usually disguised in the form of "cross-dressing" laws. As of 2020, these laws exist in thirteen States.[32] Nevertheless, this lack of express criminalization does not mean that transgender persons are not persecuted.[33] In fact, other laws that do not expressly mention transgender individuals are used against them, such as those said to protect morality, public decency, or legal identification of persons.[34]

This legal and de facto discrimination could constitute severe violations of fundamental human rights and is reflected in the different types of crimes against humanity enumerated in the ICCSt, such as murder (protecting the right to life),[35] torture (protecting the right to physical integrity and freedom from torture),[36] or imprisonment in violation of fundamental rules of international law (protecting the right to liberty and security).[37] Thereby, the instances presented in this chapter could amount to acts of persecution under the ICCSt, including the mere enforcement of anti-LGBTQ+ laws,[38] so long as they meet the elements of the crime against humanity of persecution, as will be laid out in the following chapters.

III. A BRIEF HISTORY OF THE CRIME OF PERSECUTION AS AN INTERNATIONAL CRIME

The crime of persecution, as a crime against humanity, has had a long history and was already present in the charters of the IMT[39] and the International Military Tribunal for the Far East (IMTFE).[40] These crimes, as continued to be the case in contemporary ICL, were restricted to certain grounds on which the persecution could take place: namely, political, racial, or religious, in the IMT Charter;[41] and political or racial grounds, in the IMTFE Charter.[42] Additionally, other sources of law criminalized persecution outside the context of these military tribunals. This fact is illustrated, for example, in the Control Council Law number

[32] ZHAN CHIAM ET AL., INT'L LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOC., TRANS LEGAL MAPPING REPORT: RECOGNITION BEFORE THE LAW (2020).
[33] *Id.* at 11.
[34] *Id.*
[35] International Covenant on Civil and Political Rights art. 6(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Rome Statute, *supra* note 3, art. 7(1)(a).
[36] ICCPR, *supra* note 35, art. 7(1); Rome Statute, *supra* note 3, art. 7(1)(f).
[37] ICCPR, *supra* note 35, art. 9(1); Rome Statute, *supra* note 3, art. 7(1)(e).
[38] Josh Scheinert, *Is Criminalization Criminal?: Antisodomy Laws and the Crime Against Humanity of Persecution*, 24 TUL. J. L. & SEXUALITY 99, 143 (2015).
[39] IMT Charter, *supra* note 1, art. 6(3).
[40] Charter of the International Military Tribunal for the Far East art. 5(c), Jan. 19, 1946, 1589 T.I.A.S. 20 [hereinafter IMTFE Charter]. For a more nuanced discussion of the history of the crime of persecution, *see* Helen Brady & Ryan Liss, The Evolution of Persecution as a Crime Against Humanity, in Historical Origins of International Criminal Law: Volume 3 429 (Morten Bergsmo et al. eds, 2015).
[41] IMT Charter, *supra* note 1, art. 6(3).
[42] IMTFE Charter, *supra* note 40, art. 5(c).

ten, which prohibits persecution for political, racial, or religious reasons.[43] In this context, the IMT had the opportunity to give specific examples of what could be considered persecution. Acts that were considered persecution were citizenship stripping, prohibition from holding public office, holding a group to public ridicule, and restricting family life, among others.[44]

The contours of the crime of persecution have been consistent in modern international criminal tribunals, including within the UN. The Statute of the International Criminal Tribunal for Rwanda (SICTR) includes a crime against humanity of persecution based on national, political, ethnic, racial, and religious grounds.[45] The Statute of the International Criminal Tribunal for the former Yugoslavia (SICTY) also contemplates a crime of persecution, in this case on political, racial, and religious grounds.[46] Specifically, it was in the context of the *Tadić* case before the International Criminal Tribunal for the former Yugoslavia (ICTY) where the criteria of the crime of persecution were developed. In that case, the prosecution, with no objection by the defense counsel, stated that the elements of persecution are:

> (1) the accused committed a specified act or omission against the victim; and (2) the specified act or omission was intended by the accused to harass, cause suffering, or otherwise discriminate against the victim based on political, racial or religious grounds.[47]

The ICTY gave examples of acts of persecution that the defendant committed, such as "the seizure, collection, segregation and forced transfer of civilians to camps, calling-out of civilians, beatings and killings,"[48] and classified them as violating the victims' fundamental rights.[49]

It is with these antecedents that the crime of persecution arrived to the ICCSt[50] as a crime against humanity.

IV. THE CRIME OF PERSECUTION IN THE ICCST

IV.1 ELEMENTS OF CRIMES AGAINST HUMANITY

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[43] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, Dec. 20, 1945, OFFICIAL GAZETTE CONTROL COUNCIL FOR GERMANY at 3, § II(1)(c) (Ger.).
[44] France et al. v. Göring (Hermann) et al., 22 IMT, Judgement, ¶¶ 75–77 (Oct. 10, 1946).
[45] S.C. Res. 955, art. 3 (Nov. 8, 1994).
[46] U.N., UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA art. 5(h) (U.N. 2009).
[47] Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgement, ¶ 698 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997). https://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf.
[48] *Id.* ¶ 717.
[49] *Id.*
[50] Rome Statute, *supra* note 3, art. 7(1)(h).

The crime of persecution is situated in the larger category of "crimes against humanity." Crimes in this category have certain common elements (also known as "contextual"), as defined in the ICCSt.[51] A detailed explanation of each of these elements is outside the scope of this Note, in which I focus on the specific crime of persecution.

The first common element referred to in art. 7(1) ICCSt refers to the "widespread or systematic" character of the crime. This test is considered to be disjunctive, and so only one of the thresholds must be satisfied.[52] The application of the first test focuses on the "large-scale nature of the attack and the number of victims,"[53] as can be derived from the factual background of the case.[54] It can refer either to multiple criminal acts assessed cumulatively, as the joint result of a large number of separate criminal acts part of a course of attack, or to a single act of great magnitude.[55] On the other hand, the second test has been interpreted in different ways.[56] Specifically, as illustrated by Cryer and colleagues, the most recent jurisprudence has tended towards defining systematicity as a high degree of organization, taking into account the planning of the criminal acts, its political objectives, and the probability or improbability of random occurrence, among others.[57] This is different from definitions of systematicity in *Akayesu* and *Blaškić*, which emphasized a thorough organization and the establishment of a regular pattern of facts occurring on the basis of a common policy involving significant public or private resources and/or high-level authorities.[58]

The second common element is the existence of an "attack," as defined in the ICCSt.[59] This refers to the commission of multiple criminal acts against a civilian population, following a State or organizational policy. However, there is more controversy surrounding the policy element. This policy element was included to ensure that isolated or random attacks would not be considered crimes against humanity and, as such, is a threshold meant to exclude the international criminality of random or unorganized action.[60] According to Cryer and colleagues, the policy element has three major features:

1. The policy does not need to be formalized or clearly adopted.[61] Rather, it must be seen as a course of action adopted as advantageous or expedient.[62]

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[51] *Id.* at art. 7(1).
[52] ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 232 (Cambridge University Press 4th ed. 2019).
[53] Prosecutor v. Tadić, *supra* note 47, ¶ 652.
[54] CRYER ET AL., *supra* note 52, at 232.
[55] *Id.*
[56] *Id.* at 232–33.
[57] *Id.* at 233.
[58] *Id.* at 232–33.
[59] Rome Statute, *supra* note 3, art. 7(2)(a). Here, an "attack" is defined as "a course of conduct involving the multiple commission of acts . . . against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack."
[60] CRYER ET AL., *supra* note 52, at 235–36.
[61] *Id.* at 236–37.
[62] *Id.* at 237.

2. The policy can be inferred from the circumstances of the act, sufficing a certain lack of probability of random occurrence.[63]
3. The policy can be either active or passive.[64]

Finally, an attack must be directed "against any civilian population."[65] The jurisprudence of the Special Court for Sierra Leona (SCSL) indicates that an attack is directed against a civilian population when that population is the *primary* target of the attack, rather than an incidental/collateral target.[66] However, this issue is not settled; some authors argue this element should be construed as one of intention, meaning the attack must be *intentionally* directed against the civilian population, rather than *primarily* directed against it.[67] The ICTY has pointed to several factors that should be taken into account when evaluating this element, including the status and number of victims, the discriminatory nature of the attack, and the nature of the crimes committed.[68]

Lastly, the mental state of the perpetrator is also considered. Namely, they must have knowledge of the attack.[69] This means the perpetrator must be aware of the attack against the civilian population, and this knowledge suffices even when the perpetrator does not agree with the aim of the attack and acts out of personal or opportunistic reasons.[70] This knowledge may be inferred from the facts.[71] Additionally, actual knowledge is not an absolute requirement. Instead, willful blindness suffices.[72]

IV.2 ELEMENTS OF THE CRIME OF PERSECUTION

The crime of persecution is an offense committed in connection with another crime within the jurisdiction of the ICC, purposely directed against a certain group with discriminatory intent that results in severe deprivation of that group's human rights.[73] These different elements of the crime of persecution can be misleadingly straightforward; below, I discuss the complexity and dimension of each.

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[63] *Id.*
[64] *Id.*
[65] Rome Statute, *supra* note 3, art. 7(1).
[66] Prosecutor v. Kunarac et al., Case No. IT-96-23, Appeals Judgement, ¶ 92 (Int'l Crim. Trib. for the former Yugoslavia June 12, 2002), https://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf; Prosecutor v. Fofana and Kondewa, SCSL-04-14-A, Appeals Judgement, ¶ 299 (May 28, 2008), http://www.rscsl.org/Documents/Decisions/CDF/Appeal/829/SCSL-04-14-A-829.pdf.
[67] Chile Eboe-Osuji, *Crimes Against Humanity: Directing Attacks against a Civilian Population*, 2 AFRICAN J. LEGAL STUD. 118, 122 (2008).
[68] Prosecutor v. Kunarac et al., Case No. IT-96-23, Appeals Judgement, ¶ 91 (Int'l Crim. Trib. for the former Yugoslavia June 12, 2002), https://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf.
[69] Rome Statute, *supra* note 3, art. 7(1).
[70] CRYER ET AL., *supra* note 52, at 241–42.
[71] INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES 1 (2011).
[72] Prosecutor v. Tadić, *supra* note 47, ¶¶ 656–59.
[73] Rome Statute, *supra* note 3, arts. 7(1)(h), 7(2)(g).

For "severe deprivation of fundamental rights," we can turn to *Kupreškić*. Under the definition established in *Kupreškić* and adopted by the ICTY, this element is met when there has been a gross or blatant denial of a fundamental right, as defined by customary international law, on discriminatory grounds, that reaches the same level of gravity as other crimes against humanity.[74] Defining the exact fundamental rights protected by the crime of persecution is unnecessary if doing so would vex the interests of justice, as expressed by the ICTY in *Kupreškić*.[75] Indeed, according to the ICTY, including certain human rights would implicitly exclude others (*expressio unius est exclusio alterius*).[76]

The element of gravity is subsequently subsumed in the previous element of severe deprivation of fundamental rights.[77] Criminal acts must be of a gravity comparable to that of other crimes against humanity.[78] This requirement is supplemented by the ICCSt with the condition that the crime of persecution must be committed "in connection with any act referred to in this paragraph [crimes against humanity] or any crime within the jurisdiction of the Court."[79] This supplementary requirement used within the ICC system was rejected by the *Kupreškić* court; this reflects broader skepticism within ICL.[80] Cryer and colleagues point out the potential irrelevance of this supplementary requirement, given the likelihood that any situation warranting prosecution for persecution in the international sphere will be linked to at least one of the crimes under the jurisdiction of the ICC.[81]

Additionally, a certain mental state is required. According to jurisprudence, knowledge of acting on discriminatory grounds is not sufficient. There must be a particular intent to act in a discriminatory fashion, as repeatedly affirmed in case law including judgments of the Tadić, Kupreškić, Kordić, and Ongwen courts, *inter alia*.[82]

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[74] Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, Trial Judgement, ¶ 621 (Int'l Crim. Trib. for the former Yugoslavia Jan. 14, 2000), https://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf.
[75] *Id.* ¶ 623.
[76] *Id.*
[77] CRYER ET AL., *supra* note 52, at 253.
[78] Prosecutor v. Kupreškić et al., *supra* note 74, ¶ 619–21
[79] Rome Statute, *supra* note 3, art. 7(1)(h).
[80] "[T]his requirement [in reference to the required connection of persecution with other crimes under the ICCSt] is especially striking in the light of the fact that the ICC Statute reflects customary international law . . . . In short, the Trial Chamber finds that although the Statute of the ICC may be indicative of the opinio iuris of many States, Article 7(1)(h) is not consonant with customary international law. . . . Accordingly, the Trial Chamber rejects the notion that persecution must be linked to crimes found elsewhere in the Statute of the International Tribunal." *See* Prosecutor v. Kupreškić et al., *supra* note 74, ¶ 580–81
[81] CRYER ET AL., *supra* note 52, at 253–54.
[82] INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES 7 (2011). *See also* Prosecutor v. Tadić, Case No. IT-94-1-T, Appeals Judgement, ¶ 305 (Int'l Crim. Trib. for the Former Yugoslavia July 7 15, 1999), https://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf.; Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, Trial Judgment, ¶ 634-36 (Int'l Crim. Trib. for the former Yugoslavia Jan. 14, 2000), https://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf.; Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2, Trial Judgement, ¶ 212 (Int'l Crim. Trib. for the former Yugoslavia Feb. 26, 2001), https://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf; Prosecutor v. Ongwen, ICC-02/04–01/15, Trial Judgement, ¶ 2739 (Feb. 4, 2021), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01026.PDF.

Finally, the ICCSt states that the discriminatory grounds on which the targeting for the crime of persecution is based are limited to political, racial, national, ethnic, cultural, religious, and gender-related acts of persecution, as well as other grounds universally recognized as prohibited under international law.[83]

IV.3 PREVIOUS APPLICATION OF THE CRIME AGAINST HUMANITY OF PERSECUTION IN THE ICC

The crime of persecution does not often appear in the jurisprudence of the ICC. The few rulings issued by the ICC, however, do outline the margins and details of the crime of persecution within the meaning of the ICCSt.

First, the ICC has referred to the element of severe deprivation of fundamental rights in several of its rulings and has given examples of rights that can be considered as such. In *Ntaganda*, the ICC referred to rights recognized in the Universal Declaration of Human Rights (UDHR),[84] the different UN human rights covenants and other related international instruments, and rights recognized in international humanitarian law.[85] Specific examples given by the ICC are the rights to life, to liberty, to security of the person, to not be subjected to cruel, inhuman, or degrading treatment or punishment, to freedom of association, and to education, among many others.[86] Moreover, the ICC has established that these deprivations of fundamental rights, when perpetrated by a State or a non-State armed agent,[87] and with consideration of their cumulative effect (if there are multiple instances of persecution),[88] must be contrary to international law in general, and international human rights law in particular,[89] to fall within the scope of persecution as a crime against humanity. Furthermore, the ICC has affirmed that any crime against humanity can be tantamount to persecution when committed on discriminatory grounds.[90]

Second, the ICC has repeatedly taken into account the subjective views of the perpetrator and the victim when considering how membership in a protected group is to be identified.[91] Actual membership within the group might not be

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[83] Rome Statute, *supra* note 3, art. 7(1)(h).
[84] G.A. Res. 217 (III), (Dec. 10, 1948).
[85] Prosecutor v. Ntaganda, ICC-01/04-02/06, Trial Judgement, ¶ 991 (July 8, 2019), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03568.PDF.
[86] *Id.*; Le Procureur c. Al Hassan AG Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18, Rectificatif à la Décision Relative à la Confirmation des Charges, ¶ 664 (Nov. 13, 2019), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_06927.PDF; Prosecutor v. Ongwen, *supra* note 82, ¶ 2733.
[87] Prosecutor v. Ntaganda, *supra* note 85, ¶ 993.
[88] *Id.*; Le Procureur c. Al Hassan AG Abdoul Aziz Ag Mohamed Ag Mahmoud, *supra* note 86, ¶ 664; Prosecutor v. Ongwen, Case No. ICC-02/04–01/15, Trial Judgement, ¶ 2733 (Feb. 4, 2021), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01026.PDF.
[89] Prosecutor v. Ntaganda, *supra* note 85, ¶ 999.
[90] *Id.* ¶ 994.
[91] Prosecutor v. Ongwen, ICC-02/04–01/15-422-Red, Decision on the Confirmation of Charges, ¶¶ 1009, 2736 (Mar. 23, 2016), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02331.PDF.

needed.[92] The fact that the perpetrator perceived the victim as part of the group can be sufficient to establish this element. This view recognizing persecution on the basis of *perceived* political affiliation has been widely applied.[93] Additionally, the protected group can be defined positively, meaning that the perpetrator aims to target persons belonging to a specific group,[94] as well as negatively, when the perpetrator targets persons who do not belong to a particular group (*see e.g.*, *Ntaganda*, where the Trial Chamber found he targeted all ethnic groups save for one).[95]

Finally, regarding the mental element, the ICC, in *Al-Hassan* and *Ongwen*, affirmed that discriminatory intent can be inferred from the general behavior of the perpetrator and the circumstances surrounding the crime.[96] Additionally, the existence of other personal motives does not exclude the discriminatory intent,[97] and the perpetrator does not need to have completed a "value judgment" regarding the severity of the deprivation that they have inflicted.[98] This means the perpetrator needs not have assessed the intensity of the human rights violation inflected as "severe" at the time of its commission.

V. THE CONCEPT OF GENDER WITHIN THE ICCST: CONSIDERING THE TRAVAUX PRÉPARATOIRES AND SUBSEQUENT PRACTICE OF THE ICC

> Article 7(3): 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.[99]

The above definition of gender used in art. 7(3) ICCSt has sparked controversy among progressive thinkers, who advocate for a social definition of gender, and a more conservative group, who prefer using the word "sex" as defined by the biological differences between persons of the male and female sex. The apparent and bizarre combination of the definitions of sex and gender uniquely applied by the ICC has been controversial since the moment of its drafting and during the *travaux préparatoires* of the ICCSt.

As Oosterveld illustrates, opinions on the matter vary widely. One side qualified these definitions as "stunningly narrow," "a failure," and "puzzling and

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[92] Id. ¶ 2736; Prosecutor v. Ntaganda, *supra* note 85, ¶ 1011.
[93] Prosecutor v. Ruto, Kosgey and Sang, ICC-01/09-01/11, Decision on the Confirmation of Charges, ¶¶ 172, 273 (Jan. 23, 2012), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_01004.PDF; Prosecutor v. Gbagbo, ICC-02/11–01/11-656-Red, Decision on the Confirmation of Charges, ¶ 204 (June 13, 2014), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2014_04863.PDF; Prosecutor v. Ongwen, *supra* note 91, at ¶¶ 25, 39, 52, 65.
[94] Prosecutor v. Ntaganda, *supra* note 85, ¶ 1009. Later reaffirmed in Prosecutor v. Ongwen, *supra* note 82, ¶ 2735.
[95] *Id.*
[96] Le Procureur c. Al Hassan AG Abdoul Aziz Ag Mohamed Ag Mahmoud, *supra* note 86, ¶ 671; Prosecutor v. Ongwen, *supra* note 82, ¶ 2739.
[97] Le Procureur c. Al Hassan AG Abdoul Aziz Ag Mohamed Ag Mahmoud, *supra* note 86, ¶ 671.
[98] Prosecutor v. Ongwen, *supra* note 82, ¶ 2740.
[99] Rome Statute, *supra* note 3, at art. 7(3).

bizarre."[100] While the other side critiques them as "creating a third sex," "permitting sexual orientation and deviation," and undermining "traditional values."[101] Nevertheless, the ambiguous result was an expected outcome of the negotiations of the ICCSt, given the polemics around the term and how the views between more conservative and more progressive States varied.[102]

Gender as a ground for persecution was included in the draft text of the ICCSt in 1997. The draft included other references to the term in the context of the election of judges and the role of the OTP and victims.[103] Disagreements became more apparent with the start of the Rome Diplomatic Conference, where the inclusion of gender considerations in judicial provisions was removed[104] and the crime of gender-based persecution was disputed.[105]

Indeed, States opposing the inclusion of gender as a ground for persecution feared this recognition would exceed the States' domestic recognition of women's or SOGI human rights. They also feared that the inclusions would "impose[] other cultures which permit 'sexual orientation and deviation,'"[106] supporting a concept of gender associated as closely as possible with their understanding of biological sex and cis-heteronormativity.[107] They also argued the term could not be adequately translated into all the official languages of the UN and the term gender did not possess the clarity needed to fulfill the requirement of certainty under ICL.[108] Other States argued for the significance of different sexual identities in different societies, including different sexual orientations.[109] Supporters deemed that the inclusion of "gender" without qualifications was important to represent "'an accurate reflection of international law'," in which the usage of "gender" instead of "sex" was already settled.[110] An effort was made to reach a compromise, trying to capture both contending definitions of sex as a biological determination and of gender as a social construct.

The two sides considered different approaches in this compromise, including both positive (defining what gender is) and negative (defining what gender is not) definitions of the concept, favoring the former.[111] Finally, the sides approached an agreement—a precept referring to the traditional view of gender as sex *and* gender in the context of society.[112] This agreement led to the current definition of gender in art. 7(3) ICCSt, which mentions both "the sexes, male and

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[100] Valerie Oosterveld, *The Definition of Gender in the Rome Statute of the International Criminal Court: Step Forward or Back for International Criminal Justice*, 18 HARV. HUM. RTS. J. 55, 55–56 (2005).
[101] Valerie Oosterveld, *Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court*, 16 INT'L FEMINIST J. POL. 563, 566–68 (2014).
[102] Oosterveld, *supra* note 100, at 57.
[103] *Id*. at 59.
[104] *Id.* at 61–62.
[105] *Id.* at 63.
[106] Oosterveld, *supra* note 101, at 566.
[107] Oosterveld, *supra* note 100, at 63.
[108] *Id.* at 63–64.
[109] Oosterveld, *supra* note 101, at 567.
[110] Moore, *supra* note 7, at 1301.
[111] Oosterveld, *supra* note 100, at 64–65.
[112] *Id.*

female."[113] That verbiage was enough for those supporting a more traditional view but still satisfied the less traditional camp by making a sociological reference by framing the definition in the "context of society."[114]

Regarding more current interpretations of the concept of gender within the ICC system, I must turn to the views manifested by the OTP in its diverse policy papers. Relevantly, the OTP has admitted that the ICCSt's concept of gender "acknowledges the social construction of gender, and the accompanying roles, behaviors, activities, and attributes assigned to women and men, and to girls and boys."[115] The OTP adopts a wide view of gender-based crimes as any crime within the ICCSt committed against persons because of their socially constructed gender roles, including, but not limited to, sexual violence and gender-based persecution.[116] More importantly, this point of view was later confirmed in the OTP Policy on the Crime of Gender Persecution.[117] In this groundbreaking policy, the OTP expressly defines the ICCSt's concept of gender as referring to "sex characteristics and social constructs and criteria used to define maleness and femaleness, including roles, behaviors, activities, and attributes."[118] The OTP Policy Paper on Gender Persecution further recognizes the difficult history of gender-based persecution and the rarity of its investigation and prosecution,[119] and explicitly acknowledges that the targeting of LGBTQ+ persons by virtue of their SOGI may be prosecutable under art. 7(1)(h) ICCSt.[120]

Similarly, the International Law Commission (ILC) has also examined the concept of gender within ICL in its drafting of the Draft Articles on Prevention and Punishment of Crimes Against Humanity.[121] While the ILC did not adopt a definition of the concept of gender to account for the continued evolution of its meaning, the Commentary for the abovementioned Draft Articles showed the evolution of the concept of gender within international law and how it has evolved to be understood as a social construct.[122]

In conclusion, it can be seen how these disagreements among prospective State parties on the meaning of gender could only be solved by applying what scholars have called "constructive ambiguity."[123] Indeterminate language was used to include the different points of view and solve the dispute. This meant that the interpretation of the term was left to the ICC Chambers, which, despite the

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[113] Rome Statute, *supra* note 3, art. 7(3).
[114] *Id.*; Oosterveld, *supra* note 100, at 64–65.
[115] ICC Office of the Prosecutor 2014, *supra* note 6, ¶ 15.
[116] *Id.* ¶ 16.
[117] ICC Office of the Prosecutor 2022, *supra* note 6, at 3 and ¶ 4–5. The author submitted a draft version of this manuscript to the OTP's public consultation in relation to this Policy, in order to aid and advocate for a LGBTQ+-inclusive interpretation of "gender."
[118] *Id.* at 3. This definition is nearly identical to the one used by the International, Impartial and Independent Mechanism for Syria (IIIM). *See* IIIM, Gender Strategy and Implementation Plan 8 (IIIM 2022).
[119] *Id.* at 4–5.
[120] *Id.* ¶¶ 4–5, 9, 45.
[121] ILC, Report of the International Law Commission Seventy-first session 46, U.N. Doc. A/74/10 (2019).
[122] Nicholas Leddy, *Investigative and Charging Considerations for International Crimes Targeting Individuals on the Basis of Sexual Orientation and Gender Identity*, 20 J. Int'l. Crim. Just. 911, 918 (2022).
[123] Oosterveld, *supra* note 101, at 563–64.

OTP's later progressive interpretation of gender, so far has not had the opportunity to delve into the matter.[124]

VI. LATEST DEVELOPMENTS ON THE CONCEPT OF GENDER OUTSIDE ICL

In this chapter, given the relative lack of jurisprudential and doctrinal sources in the meaning of gender in the ICCSt,[125] I will delve into the meaning into which this concept has developed in other instances that have had to face similar problems of defining gender. Here, I will concentrate on examining the term's meaning in two related fields of international law: IHRL and IRL. The possible definitions derived from these fields might become relevant in the work of the ICC as alternative sources of law pursuant to art. 21(1) and (3) ICCSt, and given the obscurity of art. 7(3) ICCSt.

VI.1 INTERNATIONAL HUMAN RIGHTS LAW

The definition of gender within IHRL is particularly relevant for the work of the ICC.[126] In fact, art. 21(3) of the ICCSt directly points to IHRL when applying the bodies of law mentioned in the same article and interpreting different personal and social characteristics, namely, gender.

Within IHRL, the term gender has been generally understood as a social construct, encompassing the gender roles that each person takes on in society, rather than as a determinative biological category.[127] The Convention on Preventing and Combating Violence Against Women and Domestic Violence (CPCVWDV) defines gender as "the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for women and men," and is the only treaty to do so apart from the ICCSt.[128]

However, different international institutions, including UN organs and other IHRL tribunals and bodies, have developed their own definition, after which the ICC could model the details and scope of the ICCSt's definition of gender.[129] For example, the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee defined both gender and sex in its General Recommendation No. 28.[130] The committee asserted that, while sex is used to refer to the biological differences between female and male persons, the term gender must reflect the socially constructed identities, attributes, and roles for women and men. The latter also includes the sociocultural meaning ascribed to

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[124] *Id.*
[125] Rome Statute, *supra* note 3, art. 7(3).
[126] *Id.*
[127] Rosemary Grey et al., *Gender-based Persecution as a Crime Against Humanity*, 17 J. INT'L CRIM. JUST. 957, 966 (2019).
[128] Convention on Preventing and Combating Violence against Women and Domestic Violence, May 11, 2011, C.E.T.S. No. 210.
[129] Rome Statute, *supra* note 3, art. 7(3).
[130] CEDAW, *General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the CEDAW*, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010) [hereinafter CEDAW General Recommendation No. 28].

these biological differences arising from sex and which result in hierarchical relationships and an asymmetric distribution of power and rights among women and men.[131] The Committee further affirmed that the social positioning of women and men is not static. Rather, it is affected by political, economic, and cultural factors, and acknowledges the inextricable intersection of gender with SOGI.[132]

As illustrated by Grey and colleagues, most UN agencies also regard gender as a social construct.[133] The most prominent human rights tribunals and organizations also hold this view or have otherwise protected SOGI-based discrimination. For example, the Human Rights Committee (HRC) has recognized that discrimination based on sexual orientation, though not explicitly mentioned, is included within the meaning of the more restrictive concept of sex in the nondiscrimination clauses of the International Convention on Civil and Political Rights (ICCPR).[134] Since this landmark decision, this position has been affirmed by the HRC in subsequent decisions,[135] as well as by other UN institutions which have openly assumed the concept of gender as a social construct.[136] The same can be said about gender identity, which has been included as a protected category within nondiscrimination clauses in the UN system.[137]

This tendency is also followed by the Inter-American Court of Human Rights (IACtHR). In its advisory opinion on gender identity, equality, and nondiscrimination of same-sex couples, it construed gender as "socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences."[138] Previously, the Inter-American Commission of Human Rights (IACHR) found that SOGI categories are included within the non-discrimination safeguards of the American Convention on Human Rights (ACHR).[139] In *Álvarez Giraldo v. Colombia*, where the applicant, an inmate, was denied an intimate visit by her same-sex partner, the IACHR confirmed that sexual orientation is included as a protected class under

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[131] *Id.* ¶ 5.
[132] *Id.* ¶¶ 5, 18.
[133] Grey et al., *supra* note 127, at. 967.
[134] Toonen v. Australia, HRC, ¶ 8.7, U.N. Doc. CCPR/C/50/D/488/1992 (1994). For the concerned discrimination clauses see ICCPR, *supra* note 35, arts. 2(1) and 26.
[135] Young v. Australia, HRC, ¶ 10.4, U.N. Doc. CCPR/C/78/D/941/2000 (2000); X v. Colombia, HRC, ¶ 9, U.N. Doc. CCPR/C/89/D/1361/2005 (2005).
[136] *See e.g.* CAT, *General Comment No. 2 on the Implementation of Article 2 by States Parties*, ¶ 21, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) [hereinafter CAT General Comment No. 2]; CESCR, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 32, U.N. Doc. E/C.12/GC/20 (July 2, 2009) [hereinafter CESCR General Comment No. 20]; CRC, *General Comment No. 13 (2011): The Right of the Child to Freedom from All Forms Of Violence*, ¶ 60, U.N. Doc. CRC/C/GC/13 (Apr. 18, 2011) [hereinafter CRC General Comment No. 13].
[137] OHCHR, *Discriminatory Laws and Practices and Acts Of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, ¶ 17, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011).
[138] Gender Identity, and Equality and Non-Discrimination with Regard to Same-Sex Couples State Obligations in Relation to Change of Name, Gender Identity, and Rights Deriving from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 And 24, in Relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24, ¶ 32 (Nov. 24, 2017).
[139] *See* American Convention on Human Rights art. 1(1), Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR].

art. 1(1) ACHR, analyzing it in conjunction with the category of sex.[140] This same conclusion was reached by the IACtHR in *Atala Riffo y niñas v. Chile*, where a mother was deprived custody of her children due to her homosexuality, not only based on sexual orientation, but also gender identity.[141] The IACtHR has repeatedly affirmed this holding, most recently in *Rojas Marín y otra v. Perú,* where the court reaffirmed that "the sexual orientation, gender identity or gender expression of a person are categories protected by the Convention," and determined that a State Party to the ACHR is forbidden to act against a person based on these parameters, real or apparent.[142]

The same can be said of the European Court of Human Rights (ECtHR), which has protected the LGBTQ+ community on the basis of arts. 8 and 14 of the European Convention of Human Rights (ECHR), the latter of which is the nondiscrimination clause.[143] This coverage is even stronger than the aforementioned approaches, because the ECtHR has declared that SOGI discrimination falls within the scope of sex under the ECHR (this normative text does not contemplate gender. Instead, it only refers to sex).[144] The ECtHR expanded this definition in a case where the surviving partner of a same-sex partnership was denied succession in the late partner's lease due to his sexual orientation, although different-sex couples had that right.[145] This was affirmed in *X v. Turkey*, where X was put in solitary confinement due to his homosexuality.[146]

The African Commission on Human and Peoples' Rights (ACHPR) has made a limited use of the term gender, alongside sex, when referring to human rights violations against persons on the basis of real or imputed SOGI.[147] In fact the ACHPR has not given much treatment to SOGI discrimination and existing jurisprudence is contradictory. On one side, in *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, there is a reference in dicta to sexual orientation as grounds for discrimination under the African Charter on Human and Peoples' Rights (AChHPR).[148] On the other, and over the course of the 73rd Ordinary Session of the ACHPR, the regional human rights mechanism rejected the application of

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[140] *See* Marta Lucía Álvarez Giraldo v. Colombia, Merits, Report, Inter-Am. Ct. H.R. (ser. L) No. 122, ¶¶ 162–66 (Oct. 5, 2018).

[141] Atala Riffo y niñas v. Chile, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 91 (Feb. 24, 2012).

[142] Azul Rojas Marín y otra v. Perú, Preliminary Exceptions, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 402, ¶¶ 86–95 (Mar. 12, 2020).

[143] Convention for the Protection of Human Rights and Fundamental Freedoms arts. 8, 14, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

[144] *Id*. at art. 14.

[145] Kozak v. Poland, App. No. 13102/02, ¶ 92 (Mar. 2, 2010), https://hudoc.echr.coe.int/fre?i=001-97597.

[146] X. v. Turkey, App. No. 24626/09, ¶ 50 (Oct. 9, 2012), https://hudoc.echr.coe.int/fre?i=001-113876.

[147] African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], *275 Resolution on Protection against Violence and other Human Rights Violations Against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity*, Afr. Comm'n H.P.R. Doc. ACHPR/Res.275(LV)2014 (2014).

[148] *See* African Charter on Human and Peoples' Rights art. 2, June 27, 1981, 1520 U.N.T.S. 217 [hereinafter ACHPR]; Zimbabwe Human Rights NGO Forum v. Zimbabwe, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 169 (May 15, 2006), https://achpr.org/public/Document/file/English/achpr39_245_02_eng.pdf.

three NGOs defending LGBTQ+ persons for observer status and claimed that "sexual orientation is not an expressly recognised right or freedom under the African Charter, and contrary [sic] to the virtues of African values."[149] Consequently, and even when at first there were arguments for the illegality of SOGI discrimination under the AChHPR.[150] The position of the ACHPR seems now reluctant towards the inclusion of SOGI under the AChHPR protections.

There is, despite very limited ACHPR doctrine, a clear tendency within IHRL towards the inclusion of SOGI within the protected classes of nondiscrimination clauses. This is sometimes accomplished by including SOGI within the residual clause of nondiscrimination provisions and as intrinsic to other categories, such as gender or sex.

VI.2 INTERNATIONAL REFUGEE LAW

Both ICL and IRL have the common objective of tackling gender-based persecution, albeit with different approaches. While the former has an aim of accomplishing this through the punishment of perpetrators and prevention of impunity, the latter focuses on the victims of gender-based persecution and helping them reach safety in the territory of other States. However, as Oosterveld highlights, IRL has more experience with the treatment of gender-based persecution, having first acknowledged it in 1985.[151] On the other hand, ICL still lacks sufficient examination of gender-based persecution, and, specifically, SOGI persecution.

I will first refer to the UN High Commissioner for Refugees (UNHCR), which created guidelines relating to gender-based persecution in 2002.[152] The UNHCR affirms the intrinsic connection between SOGI and sex and gender.[153] Particularly, the organization argued that SOGI refugee claims contain a gendered element, and that this persecution is motivated by the claimant refusing to "adhere to socially or culturally defined roles or expectations of behavior attributed to his or her sex."[154] SOGI persecution must be included as a form of gender-based persecution because it is intrinsically linked to the claimant's (or victim's, in ICL) perceived sex/gender. Further, SOGI persecution is only made possible by the refusal to adapt to society's dictates of the roles and behaviors assigned to individuals, as a woman or a man. Additionally, these guidelines also recognize

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[149] African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], Final Communiqué of the 73rd Ordinary Session Of the African Commission on Human and People's Rights, ¶ 58 (2022).

[150] ACHPR, IACHR, UN and University of Pretoria Centre for Human Rights, Ending Violence and Other Human Zimbabwe Human Rights NGO Forum v. Zimbabwe, No. 245/02, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 169 (May 15, 2006), https://achpr.org/public/Document/file/English/achpr39_245_02_eng.pdf.

[151] Oosterveld, *supra* note 7, at 50.

[152] U.N. High Comm'r for Refugees, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HRC/GIP/02/01 (May 7, 2002) [hereinafter UNHCR *Guidelines on International Protection No.* 1].

[153] *Id.* ¶ 16. Though the text does not explicitly discuss gender identity, it includes 'transsexuals or transvestites' in its discussion of persecution on the basis of sexual orientation.

[154] *Id.*

the dynamic character of gender, as opposed to sex, and highlight how gender is socially and culturally defined.[155]

The UNHCR later confirmed these views in its Guidelines on International Protection No. 9.[156] In fact, the UNHCR recognizes that the 1951 Convention is to be interpreted and applied with due regard to the IHRL prohibition on discrimination for reasons of SOGI.[157] The Guidelines also find that SOGI-based persecution occurs not only to actual LGBTQ+ persons but also to others that might be perceived as members of the group.[158] Furthermore, the guidance note supplementing the UNHCR guidelines on gender-related persecution clearly affirms that LGBTQ+ persons enjoy the protection of the 1951 Convention,[159] when persecuted.[160] These guidelines also identify how SOGI persecution might find its way within the grounds specified in the 1951 Convention.[161] This would include religious[162] and political grounds,[163] for instance, when the life experiences of LGBTQ+ persons run contrary to the predominant religious or political beliefs of their geographical area. More importantly, SOGI persecution could fall under the category of "membership of a particular social group."[164]

According to the UNHCR, a particular social group exists when their members are "a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society[,]"[165] and whose common characteristic is usually "one which is innate, unchangeable, or which is otherwise fundamental to identity . . . ."[166] Consequently, the LGBTQ+ community may be protected on these grounds, considering that SOGI are innate and immutable characteristics that are fundamental to one's identity.[167] The guidelines also recognize that it is not necessary that LGBTQ+ persons are socially visible or associated with each other.[168] These views were equally supported in the 2002 UNHCR gender guidelines, which include "homosexuals,

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[155] *Id.* ¶ 3.
[156] U.N. High Comm'r for Refugees, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HRC/GIP/12/01 (Oct. 23, 2012) [hereinafter UNHCR *Guidelines on International Protection No. 9*].
[157] Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Convention]; *Id.* ¶ 6.
[158] UNHCR *Guidelines on International Protection No. 9*, *supra* note 156, ¶ 41.
[159] 1951 Convention, *supra* note 156.
[160] UNHRC, GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO SEXUAL ORIENTATION AND GENDER IDENTITY 3 (UNHRC 2008).
[161] 1951 Convention, *supra* note 156.
[162] UNHCR *Guidelines on International Protection No. 9*, *supra* note 155, ¶ 42.
[163] *Id.* ¶ 50.
[164] *Id.* ¶ 40.
[165] U.N. High Comm'r for Refugees, *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶ 11, U.N. Doc. HRC/GIP/02/02 (May 7, 2002) [hereinafter UNHCR *Guidelines on International Protection No. 2*].
[166] *Id.*
[167] UNHCR *Guidelines on International Protection No. 9*, *supra* note 156, ¶ 47.
[168] *Id.* ¶¶ 48–49.

transsexuals, or transvestites" within the concept of gender-based persecution as well as the recognition of gender identity as a particular social group.[169] As put by La Violette, "gender is relevant to LGBT asylum and refugee claims made by both men and women."[170]

Practice gives support to UNHCR's view. Crawley and Lester, in their report for the UNHCR, give several examples of asylum being granted, exclusively or in conjunction with other reasons, to persons being persecuted for the transgression of gender-based social or religious roles.[171] This report also includes examples of the persecution of homosexual and transgender persons, defining them as a particular social group,[172] and, more generally, examples of persecution on the basis of sex.[173]

Moreover, Oosterveld argues in favor of the claim maintained by the UNHCR and mentions how different domestic refugee determinations have recognized SOGI persecution as "intimately related to the socially-constructed understanding of 'maleness' and 'femaleness.'"[174] Wilets also affirms this and considers persecution against sexual minorities an intrinsic form of gendered violence:[175] it is conceptually similar to other criminalized behaviors for women, such as being in a public space without a veil in certain States.[176] He then concludes, and I agree, that the cases of violence against sexual minorities are not so different from those more generally covered by gender-based persecution, for instance, against cisgender women showing gender non-conforming behavior.[177] As La Violette expresses, LGBTQ+ persons are non-conforming with respect to gender roles that are unequivocally based on a cis-heterosexual norm dictated by their perceived AGAB.[178] Violence and persecution against SOGI minorities is, inherently, of a gendered character, and is directly attached to the victim's real or perceived sex or gender and the expression of their sexuality and gender identity. In summary, there has been a tendency to include LGBTQ+ persons who are persecuted on the grounds of their SOGI within the protection of the 1951 Convention,[179] either by considering them victims of gender-based persecution or as members of their particular social group. In the chapter immediately below, I analyze the implications of this inclusion as well as how the views of gender-based persecution within IRL might help us solve the puzzle of gender and SOGI persecution in the ICCSt.

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[169] UNHCR *Guidelines on International Protection No. 1*, *supra* note 152, ¶ 30.
[170] Nicole LaViolette, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: a Critical Commentary*, 22 INT'L J. REFUGEE L. 173, 181 (2010).
[171] HEAVEN CRAWLEY & TRINE LESTER, AMRE CONSULTING, COMPARATIVE ANALYSIS OF GENDER-RELATED PERSECUTION IN NATIONAL ASYLUM LEGISLATION AND PRACTICE IN EUROPE ¶¶ 324, 331–33 (UNHCR 2004).
[172] *Id.* ¶ 374, 378, 380, 383 and 390ff.
[173] *Id.* ¶¶ 376–78.
[174] Oosterveld, *supra* note 7, at 80.
[175] *See* James D. Wilets, *Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective*, 60 ALB. L. REV. 1, 996–97 (1997).
[176] *See id.*
[177] *See id.*
[178] LaViolette, *supra* note 170, at 182.
[179] 1951 Convention, *supra* note 157.

VII. SOLVING THE PUZZLE: FITTING GENDER IDENTITY AND SEXUAL ORIENTATION WITHIN THE ICCST CONCEPT OF GENDER-BASED PERSECUTION

Recall one of the apparent common points between IHRL and IRL, that SOGI persecution targets those who exhibit behaviors defiant towards societies' canons for gender and thereby exists beyond the cis-heterosexual norm. In this sense, a homosexual woman disrupts societal views of gender by being attracted to, or disclosing her affection towards, another woman in a way that is typically reserved to men. Similarly, a transgender person presents and behaves in society in a gendered way not compliant with society's behavioral expectations of their AGAB. With this in mind and as outlined below, I must conclude that those who are persecuted on the basis of their SOGI are persecuted because of the manifestation of their gender and how this manifestation differs from what society expects of, in the case of the ICCSt, a "male" or a "female."

This conception of gender as a social construct has gained overwhelming traction in IHRL and IRL, as well as within the UN system.[180] Within this framework, it follows that LGBTQ+ persons are discriminated against due to their *performance* of their own gendered experience. The field of gender studies is not indifferent to this discussion and has discussed the essence and formation of gender within human societies. One of the most authoritative voices on the topic, philosopher and gender theorist Butler, defines gender in a manner I believe is compatible with the views of IHRL and IRL examined above. Indeed, Butler considers gender "a performance with clearly punitive consequences,"[181] and conceives gender as possibly constituting "a strategy of survival within compulsory systems."[182] Gender is thus an exterior manifestation (a "*performance*") of the attributes and identity of the person, constructed from a "stylized repetition of acts," that is, of socially pre-established meanings that society considers gendered. This is a combination of "bodily gestures, movements, and styles"[183] as Butler suggests, as well as the external expression of one's SOGI. Viewing gender as performance, SOGI persecution is nothing less than gender-based persecution.

Moreover, there are legal arguments that favor the construction of gender-based persecution as including SOGI persecution and the idea of gender as a social construct. As I presented above in Chapter V, the OTP has taken the position that the ICCSt's concept of "gender" must be interpreted progressively. According to its policy papers, "gender" at the ICCSt is defined as a social construct and encompasses the roles, behaviors, activities, and attributes that are typically assigned to women and men.[184] These elements define the societal

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[180] *See* Chapter VI, *supra*.
[181] JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 139 (Routledge, Chapman & Hall 1990).
[182] *Id.*
[183] *Id.* at 140.
[184] ICC Office of the Prosecutor 2014, *supra* note 6, ¶ 15.

concepts of maleness and femaleness,[185] and include SOGI.[186] These views expressed by the OTP, while not rising to the level of law, give an important and authoritative indication of the interpretation of the ICCSt by the OTP and the legal position it may argue, should a case of gender-based persecution for SOGI reasons be pleaded before the ICC Chambers.

As Oosterveld accounts, gender-based crimes and gender-based persecution criminalize the lack of compliance with the socially constructed canons of "femaleness" or "maleness,"[187] thereby including SOGI persecution within the scope of gender-based crimes. Moreover, the OTP, as mentioned, recently assumed a similar definition and acknowledged the intersection of different dimensions of gender discrimination, at its intersections with race, ethnicity and culture, inter alia.[188]

Another important argument favoring the concept of gender as including the social constructions that surround it, can be found in art. 21(3) of the ICCSt. IHRL seems to favor the social meaning of gender, consistently admitting SOGI persecution as a form of gender-based discrimination.[189] The OTP also highlights this.[190] A proper application of art. 21(3) would lead us towards including SOGI persecution as a form of gender-based persecution. Moreover, this article has been used by the ICC Chambers in a similar fashion. For instance, the ICC had recourse to art. 21(3) in *Lubanga* to argue that victims must obtain reparations without distinction, regardless of their gender or sexual orientation or other factors.[191]

The extent to which IHRL lends support to the notion of gender as a social construct and *performance*, rather than as a biologically determined fact, is clear. This is visible in the CPCVWDV definition of gender, as well as within numerous UN human rights agencies,[192] which overwhelmingly support the social definition of gender.[193] It is also visible in numerous rulings and resolutions of global and regional human rights mechanisms, as developed throughout Chapter VI. I argue these views are made relevant for the work of the ICC by the mandate of arts. 21(1)(b) and 21(3) ICCSt. Furthermore, gender as a social construction has also been welcomed in IRL, as discussed above. The ICC's application of the law and principles derived from this field of international law is similarly justified by art. 21(1)(b) ICCSt, which makes other relevant "treaties and the principles and rules of international law"[194] applicable when the ICCSt, the Elements of Crimes, and the Rules of Procedure and Evidence do not hold the answer for a question of law raised in the ICC.

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[185] ICC Office of the Prosecutor 2022, *supra* note 6, at 3.
[186] *Id*. ¶ 4–5, 9,45.
[187] *Id.*; Valerie Oosterveld, *The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law*, 24 Wm. & Mary J. Women & L. 443, 448–49 (2018).
[188] ICC Office of the Prosecutor 2022, *supra* note 6, at 3, ¶ 27.
[189] *See* Chapter VI.1, *supra*.
[190] *Id.* ¶ 26.
[191] Prosecutor v. Lubanga, Case. No. ICC-95-16-T-, Decision Establishing the Principles and Procedures to Be Applied to Reparations, ¶ 191 (Jan. 14, 2000), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_07872.PDF.
[192] *See* Chapter VI.1, *supra*.
[193] Grey et al., *supra* note 127, at. 967.
[194] Rome Statute, *supra* note 3, at art. 21(1)(b).

However, I must be cautious in the application of fields of law distinct from ICL in an eventual case of gender-based persecution (and, specifically, of SOGI persecution). As the ICTY warned in *Kupreškić*, the direct application of IHRL or IRL in a criminal procedure could compromise the principle of legality.[195] This is why, in this case, I do not argue for a direct application of the several definitions that I have found in my study. Rather, I find that art. 7(3) ICCSt presents an interpretative dilemma that can be solved through ruling with a more or less extensive definition of gender. And it is in solving this dilemma where the ICC—when presented with the opportunity—might find the definitions developed in other fields of international law as relevant interpretative aids in crafting a final interpretation of gender under the ICCSt.

This expansive interpretation of gender in other fields of law must also be followed in aiding the ICC's interpretative task regarding the concept of gender. Not only has this expansive interpretation become the ordinary meaning of the word in international law,[196] but it also appears to be the best interpretation in the light of the aim and purpose of the ICC to prevent impunity for the most atrocious crimes committed by mankind.[197] I find it difficult to see how the ICC, by not including SOGI persecution under gender-based persecution, would rule in favor of the exclusion of sexual and gender minorities. Given that art. 7(3) of the ICCSt is deliberately ambiguous, and seeing that related fields of international law have evolved to better protect the LGBTQ+ community from gender-based persecution,[198] it would be even more bizarre to see the ICC rule in favor of discrimination.

In *Ntaganda*, the ICCSt, when concerned with the material elements of the crime against humanity of persecution, referred to "gender identity" as a discriminatory ground for this criminal offense, rather than solely "gender" (as in art. 7(1)(h) ICCSt) or "the two sexes" (as in art. 7(3) ICCSt).[199] In my opinion, the express mention of "gender identity," despite its analysis focusing on ethnic-based persecution, shows a tendency towards the view of gender as a social construct. More recently, ICC judges also participated in discussions regarding the interpretation of the concept of gender in the ICCSt, suggesting a potential openness to advance the law established under the ICCSt towards the protection of LGBTQ+ persons and, particularly, non-binary and intersex individuals.[200] These jurisprudential mentions to the elements of persecution and the definition of "gender" under the ICCSt, coupled with the OTP policy papers on Sexual and Gender-Based Crimes and on the Crime of Gender Persecution,[201] might signal

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[195] Prosecutor v. Kupreškić et al., *supra* note 74, ¶ 589

[196] The ordinary meaning constitutes the preferential canon of interpretation of the law of treaties. *See* Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

[197] Rome Statute, *supra* note 3, at Preamble.

[198] *See* Chapter VI, *supra*.

[199] Prosecutor v. Ntaganda, *supra* note 85, ¶ 1009.

[200] Options discussed included "broadening the interpretation of Article 7.3 of the Rome Statute." See Africa Legal Aid, Report of the 8th Meeting - Protection of Non-Binary and Intersex People under the Rome Statute: Opposing View to Dr Rosemary Grey's Presentation on Non-Binary People and the Rome Statute 8–9 (January 2023).

[201] ICC Office of the Prosecutor 2014, *supra* note 6; ICC Office of the Prosecutor 2022, *supra* note 6.

the position of the ICC Chambers, although they still have not had the opportunity to face the art. 7(3) ICCSt directly.

The expansive interpretation of gender as a ground for the crime against humanity of persecution is also in accordance with the defining characteristics of crimes against humanity. According to Luban, crimes against humanity are examples of politics gone cancerous,[202] simultaneously attacking individuals and groups with the structure of the state.[203] Living in groups, he contends, is one of the most important, unavoidable characteristics of human beings, and attacking part of the population based on their membership in a group (in this case, the LGBTQ+ community) results in an attack on humanity itself.[204] Using the same terms as Luban, persecution against the LGBTQ+ community, when committed by the state or in an organized manner, become political crimes, crimes resulting from politics gone cancerous.

Furthermore, following such an interpretation is also in line with the authoritative definition of crimes against humanity from post-World War II jurisprudence in the *Barbie* case. In this case, the French *Cour de Cassation* defined the crime against humanity as one committed by the ideological hegemony against those who are considered its opponents, because of their mere deviation from the norm.[205] This is similar to the situation here with regard to the LGBTQ+ community, which suffers persecution by virtue of their non-compliance with the gender canons that are hegemonically accepted.

There is also doctrinal support for the use of an extensive definition of gender and the subsequent inclusion of LGBTQ+ persecution within gender-based persecution. According to Oosterveld, the incise "within the context of society"[206] necessarily includes the idea of gender as a social construct and mandates the ICC to consider gender as such.[207] Accordingly, gender-based persecution must include persecution against the LGBTQ+ community,[208] since the violence that this community suffers is intrinsically linked with societal perceptions of femininity and masculinity. Copelon argues for the inclusion of SOGI within gender-based persecution in a similar manner.[209] Additionally, she brings up her conviction that, in the face of two possible interpretations of the ICCSt, this ambiguity in the legal text must be resolved against discrimination and in favor of the inclusion of the LGBTQ+ community within the protection of art. 7(1)(h), in view of the aims with which the ICC was established.[210]

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[202] Luban, *supra* note 2, at 116.
[203] *Id.* at 117.
[204] *Id.*
[205] Le Procureur v. Klaus Barbie, 95166 Cour de cassation de la République française 15–16 (Ct. de Cassation de la République française, 1985) (Fr.).
[206] Rome Statute, *supra* note 3, at art. 7(3).
[207] Oosterveld, *supra* note 100, at 75–78.
[208] *Id.*
[209] Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law*, 46 MCGILL L. J. 217, 236–37 (2000).
[210] *Id.* at 237.

Commentators Moore,[211] Scheinert,[212] and Kritz have reached similar conclusions.[213]

Moreover, this extensive interpretation has recently gained some jurisprudential support. The Colombian Special Jurisdiction for Peace accredited, in April 2021, five LGBTQ+ persons as possible victims of gender-based persecution as an international crime in the context of the Colombian armed conflict.[214] The Colombian transitional jurisdiction followed an extensive interpretation of gender, including SOGI grounds for persecution within the discussed crime against humanity of gender-based persecution.[215]

Finally, transgender individuals are persecuted because they do not follow the social canons that correspond to their AGAB. As a consequence, the root cause of discrimination against transgender women is the rupture they cause of canons assigned to men when they assume the role of women in society. Similarly, transgender men transgress the roles assigned to what society perceives as a woman by assuming those of men.[216]

However, this interpretation leaves open the question of non-binary transgender persons, who place themselves outside the gender binary of women versus men. Kritz argues that non-binary persons might remain outside of the protection granted by art. 7 ICCSt, due to the explicit mention of males and females in subsection 3.[217] On the contrary, I argue non-binary transgender persons must be included within art. 7(3) ICCSt. Non-binary transgender people transgress societal constructs for gender by abandoning them altogether and might be persecuted equally for their lack of compliance with society's rules regarding gender. This definition is arguably compatible with the *Ntaganda* judgment, which held that, to constitute persecution, the persecuted group may be defined positively or negatively.[218] Thereby, persecution could potentially apply, not only when the perpetrator intends to explicitly persecute the LGBTQ+ community, but also when they intend to do so against non-cisgender persons, as would be the case for both binary and non-binary transgender persons.

In any case, the definition of gender under the ICCSt was deliberately construed ambiguously, based on political comity rather than legal expertise or principled reasoning.[219] A tendency favoring the view of gender as socially constructed seems to exist in international law and possibly in ICL.[220] Because of

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[211] Moore, *supra* note 7, at 1329–30.
[212] Scheinert, *supra* note 38, at 129–35.
[213] Kritz, *supra* note 5, at 36.
[214] Susann Aboueldahab, *Gender-Based Persecution as a Crime Against Humanity: A Milestone for LGBTI Rights Before the Colombian Special Jurisdiction for Peace*, EJIL:TALK!, (May 4, 2021), https://www.ejiltalk.org/gender-based-persecution-as-a-crime-against-humanity-a-milestone-for-lgbti-rights-before-the-colombian-special-jurisdiction-for-peace/.
[215] Acreditación de las Víctimas CA-01, CA-02, CA-03, CA-04 y CA-05, 202103005403 SJP ¶ 18.3 (Special Jurisdiction for Peace, 2021); *Id.*
[216] *See, e.g.,* Kritz, *supra* note 5, at 36.
[217] Rome Statute, *supra* note 3, at art. 7(3); Kritz, *supra* note 5, at 36.
[218] Prosecutor v. Ntaganda, *supra* note 85, ¶ 1009. *See* Chapter IV, *supra*.
[219] Michael Bohlander, *Criminalising LGBT Persons Under National Criminal Law and Article 7(1)(h) and (3) of the ICC Statute*, 5 GLOB. POL'Y 401, 408 (2014).
[220] *See* Chapters V and VI, *supra*.

these antecedents and the reasons explained throughout this Chapter, I consider the ICC should favor the definition of expansive interpretation of gender that predominates in IRL and, particularly, in IHRL. As seen above, gender does not merely refer to the biological differences between women and men. Rather it refers to the socially constructed roles and meanings assigned to women and men, a "stylized repetition of acts," of socially pre-established meanings that society considers as gendered, of which SOGI are an integral part.[221]

VIII. CONCLUSION

This paper deals with the question of whether acts of persecution committed because of the victims' SOGI could qualify as a crime against humanity of gender-based persecution, as defined by art. 7(1)(h) ICCSt. This has been a topic of great debate. Some have advocated for a limited understanding of gender-based persecution, constricting it to persecution based on the biological differences between females and males; others followed the UN and wider IHRL jurisprudence and IRL practice, which embraced the concept of gender as a social construction. This debate rendered the ICCSt ambiguous, with an uncomplicated answer nearly impossible. The issue was left for the judicial interpreter to solve.

To this day, the judicial interpreter has not given a definite answer. But the scarcity of jurisprudential references treating the persecution of the LGBTQ+ community (and, in general, gender-based persecution), at least within ICL, can be augmented by other related fields of international law, namely, IHRL and IRL. The examination, above, of these fields revealed a tendency to understand gender as a social construct.

This tendency, established in other fields of law and, arguably, within the OTP, should be put into prosecutorial practice and adopted by the ICC Chambers. I argue that art. 7(3) of the ICCSt allows for this interpretation, since even though it explicitly encapsulates the sexes, "female" and "male," it does so within "the context of society." This context is solely the mentioned social norms and canons are associated with the sexes and one's gender expression, of which SOGI forms an undeniable part. Consequently, a widespread or systematic attack on the LGBTQ+ community due to their SOGI can constitute a crime against humanity of gender-based persecution when the other elements of the crime are met. It would also represent enough protection of the LGBTQ+ community, at least within ICL. At the end of the day, persecution based on the victims' SOGI is nothing other than persecution on the basis of gender, whose root cause is the gender non-conformity manifested by the LGBTQ+ community, the breaking of the expectations that society places on each individual depending on their gender.

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[221] JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 140 (1990).

The Law of the Sea and Democracy

Tom Ginsburg[*]

Harry and Jane Scheiber Lecture
University of California at Berkeley, March 10, 2022

ABSTRACT

The law of the sea is not an area of international law generally associated with democracy. The United Nations Convention on the Law of the Sea (UNCLOS) is one of the world's most broadly accepted and effective treaties, incorporating all kinds of States. The central cleavages among these states—coastal vs. maritime powers, developing countries vs. industrialized nations, landlocked vs. those with access to the seas—have only coincidental links to the global division of democracy and dictatorship. Yet, the law of the sea has surprising connections with democracy in that democratic states are enthusiastic users of the UNCLOS system. Furthermore, the oceans, so long viewed as a zone free of national jurisdiction, are increasingly an arena for domestic struggles within democratic countries. The institutional structures of the UNCLOS shape, and will likely continue to shape, the availability of the seas as a space for democratic contestation. Finally, the interaction between the law of the sea and democracy is beginning to receive pushback from authoritarian regimes concerned with security. In this sense, what I have elsewhere called "authoritarian international law" is beginning to rear its head.

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DEDICATION

It is a tremendous personal and professional honor for me to deliver this Scheiber lecture on the law of the sea. Harry and the late Jane Scheiber have been central pillars of the Berkeley campus for many decades, and before beginning my substantive remarks, I would like to say a word about each of them and their sixty-three-plus year personal and professional partnership that came to a close with Jane's passing, just days before this lecture was given.

Everyone who encountered Jane knew her as a person of incredible kindness, grace, and brilliance, but we learned in her final months of another of her great virtues: bravery in the face of painful illness. She was an incredibly accomplished professional, being one of a small number of administrators to win The Berkeley Citation, the campus' highest honor which she joined Harry in receiving. She was also a scholar of incredible care and insight, yet someone who shunned the limelight. Like Harry, her dedication to the campus was matched only by her dedication to friends and family, and I feel fortunate to have been one of those friends.

Harry's contributions to the law of the sea are evidenced in his scholarly output and institutional leadership. By my count, he has authored more than forty articles and book chapters and edited nine volumes on the topic. Several of these involved the late Professor David Caron, his partner in running the Law of the Sea Institute. Harry's dedication is all the more remarkable because ocean governance is only his third or fourth field, which include American constitutional history and federalism, economic development, modern Japan, and other topics. He is a person of tremendously diverse interests, which he pursues with rigor and academic drive, and always with an eye to the development of Berkeley as an institution. Harry's willingness to follow his interests has been a source of tremendous support and inspiration to generations of students. Together, Jane and Harry have provided a model of personal and professional partnership that most of us can only aspire to, I proudly dedicate these words to them.

I.

The law of the sea is not an area of international law generally associated with democracy. It dates from the time of the Romans and has been central to modern international law since Hugo Grotius wrote his famous tract *Mare Liberum* in 1609, well before any notion of mass democracy. The United Nations Convention on the Law of the Sea (UNCLOS) is one of the world's most broadly accepted and effective treaties, incorporating all kinds of States with all kinds of governments. The central cleavages among these States have been related to distributive conflicts: between coastal states and maritime powers; between landlocked countries and coastal states; between developing countries and developed countries (as in the struggle over the deep seabed regime embodied in Chapter XI of the UNCLOS treaty); and between flag states and those that wish to enforce the rules in maritime zones.[1] These conflicts have only coincidental connections to forms of government, as there is no reason to think that any one of them is more likely to correspond to democracy or dictatorship. Indeed, the rapid development of the law of the sea between World War II and the 1982 UNCLOS must be considered one of the great areas of progress of international law during the long Cold War. Both democracies and dictatorships participated in and ultimately agreed to the "Constitution of the Oceans," as the UNCLOS is also known.

Yet, this lecture will argue that the law of the sea has surprising connections to democracy. Drawing on my recent book, *Democracies and International Law*, I will show that States participating in the negotiations and discussions about the law of the sea are more likely to be democratic.[2] Democracies are also more likely to engage in adjudication over maritime issues. These facts mean that, notwithstanding its generally technical and apolitical character, the law of the sea is one area of international law in which the interests of citizens of democracies seem to be extraordinarily well-served.

I will also argue that the oceans, long thought of as free of national jurisdiction, are increasingly arenas for domestic struggles *within* democratic countries. In this section of the lecture, I trace the history of protest at sea, which is driven by private actors who advance particular policy positions through direct and expressive action. Protest at sea has profound implications for how we think of the oceans. They are not only arenas for the struggle over resources, commercial activity, and the pursuit of scientific knowledge, but are also sites of

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[1] *See generally* DAVID BOSCO, THE POSEIDON PROJECT: THE STRUGGLE TO GOVERN THE WORLD'S OCEANS 10-15 (2022).

[2] *See* TOM GINSBURG, DEMOCRACIES AND INTERNATIONAL LAW (Cambridge 2021).

public participation, democratic contestation, and political conflict. Increasingly, the struggles are transnational, involving civil society cooperating across borders.

In this section, I briefly speculate on whether the recent resurgence of authoritarian powers, especially China and Russia, will impact the law of the sea. Drawing on the concept of "authoritarian international law," I show that the rise of authoritarian powers, with their distinct approach to international law and practice, may affect the substance of this area of law, as it has many others.[3]

The final section focuses on transnational contests over migration policy in Europe during an era of massive flows of people fleeing poverty and conflict. As the European Union has broadened its role in coordinating policy for its member states, counter-movements are apparent as civil society actors seek to undermine government policy. The open seas, it turns out, tell us something about the nature of democracy in the twenty-first century: it is messy, it spills beyond territorial borders, and it confronts a set of authoritarian governments that have very different policy goals.

II.

Democracies and International Law is an intervention into a long literature on whether international law is or should be pro-democratic in character. There are many international legal rules and institutions that support the development of citizen participation, free speech, and the rule of law, and so there are ample international resources to contribute to the development of democracy on the national plane. Indeed, in the early 1990s, scholars considered whether there was a "right" to democratic governance, such that international law could actually be said to *require* democracy.[4] At the same time, another line of work has emphasized that a functioning international legal order must recognize the basic fact of pluralism, which is a condition of the world in which we live. States have diverse, and divergent, approaches to basic questions about how to organize society and what policies to pursue. Accordingly, international law must accommodate differences among States that have very different moral and political characters.[5] As between a universalist and pluralist perspective, I tend toward the latter view, in part informed by my empirical sensibility. Even a

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[3] *See generally* Tom Ginsburg, *Authoritarian International Law*, 114 AM. J. INT'L L. 221 (2020).
[4] Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 90-91 (1992). *See also* Fernando R. Tesón, *Two Mistakes about Democracy*, 92 PROC. ANN. MEETING AM. SOC. INT'L L. 126 (1998); Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53 (1992); James Crawford, *Democracy and International Law*, 64 BRIT. Y.B. INT'L L. 113 (1993); DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad Roth eds., 2000); Susan Marks, *What Has Become of the Emerging Right to Democratic Governance?*, 22 EUR. J. INT'L L. 507 (2011).
[5] BRAD ROTH, SOVEREIGN EQUALITY AND MORAL DISAGREEMENT (2011).

cursory glance around the world suggests that democracy is neither possible, nor perhaps even desirable, in every country on Earth. This is particularly true in an era of democratic backsliding, in which the majority of States are not democracies and the majority of the world's citizens live in non-democracies.[6] For many areas of international law, especially those of a technical or apolitical character, the type of government a State has is irrelevant. The only questions we ask are what commitments has it taken on and have those commitments been upheld?

This does not mean that democratic governments behave in the same way as authoritarians. One of the major arguments of *Democracies in International Law* is that the character of democratic governments provides them with different incentives to cooperate with other countries. Because leaders in democracies have to respond to the concerns of their citizens but also know they will leave office, they benefit from cooperating with other countries and embedding their commitments in the form of law. Democratic leaders value the public and transparent nature of their commitments and the availability of third-party dispute resolution. *Democracies in International Law* demonstrates that in a wide range of areas, democracies are more likely to utilize international law than authoritarians.[7] For example, democracies are more likely to sign bilateral treaties.[8] They are more likely to bring claims before the International Court of Justice.[9] And their representatives are more likely to speak at meetings of the International Law Commission.[10]

What happens when we examine the role of democratic States in the law of the sea? As it turns out, democratic States are over-represented in many international regimes related to ocean governance. Consider the international whaling regime, something Harry Scheiber has himself written on.[11] The International Convention for the Regulation of Whaling, signed in 1946, followed a 1937 Agreement for the Regulation of Whaling.[12] The 1937 Agreement and the

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[6] GINSBURG, *supra* note 2, at 9.
[7] *Id.*, at 60-102.
[8] *Id.* at 63.
[9] *Id.* at 87-92.
[10] *Id.* at 95.
[11] Harry N. Scheiber, *Historical Memory, Cultural Claims, and Environmental Ethics: The Jurisprudence of Whaling Regulation*, in LAW OF THE SEA: THE COMMON HERITAGE AND EMERGING CHALLENGES 127 (Harry N. Scheiber ed., 2000); HARRY N. SCHEIBER, INTER-ALLIED CONFLICTS AND OCEAN LAW, 1945-53: THE OCCUPATION COMMAND'S REVIVAL OF JAPANESE WHALING AND FISHERIES (2001).
[12] International Convention for the Regulation of Whaling, Dec. 2 1946, 161 U.N.T.S. 74; International Agreement for the Regulation of Whaling (with Declaration), June 8 1937, League of Nations, 190 L.N.T.S. 80.

1946 Convention each had only two non-democracies among their signatories.[13] These frameworks built on a 1931 Convention for the Regulation of Whaling, adopted under the auspices of the League of Nations, which was similarly dominated by democratic states.[14] The purpose of the whaling regime has evolved dramatically as it shifted from a club of whaling nations to one with some scientific guidance to a conservationist body beginning in 1986.[15] This shift in focus itself reflects the changing substantive views in democratic nations as environmental concerns came to the fore in the 1960s and 1970s. Citizen movements, demanding the protection of endangered species, had a direct effect on the international regime.[16] In addition, the emergence of what Scheiber calls "the Aboriginal exception"—namely that first nations should have special carve-outs to whaling bans to preserve their cultural practices—paralleled similar developments within the governance of constitutional democracies.[17] And of course, nations like Japan, which have sought to protect traditional practices of their own discrete communities of whalers, have also invoked the cultural exception, in part because of a sense of responsibility to domestic interest groups.[18] In other words, democracies clash over outcomes demanded by their citizens and special interest groups, and the international regime is a forum for that contestation.

The dominant position of democracies in the international order following World War II drove the development of numerous other international schemes. The International Maritime Organization (IMO), for example, a specialized agency of the United Nations, has a whole series of conventions governing things like vessel safety, marine pollution, and the security of shipping.[19] Countries may sign onto such conventions as they wish. As of 2021, democracies had signed an average of twenty-nine of IMO conventions, while

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[13] The 1937 Agreement's non-democratic signatories were Germany and South Africa. *See* International Agreement for the Regulation of Whaling, Nature 180, 181 (July 31, 1937) (signatories were Australia, United States, United Kingdom, Irish Free State, New Zealand, Norway, Germany and South Africa). Of the 1946 Convention's fifteen signatories, the USSR and South Africa were the only non-democracies.

[14] Convention for the Regulation of Whaling, Sept. 24 1931, 155 L.N.T.S. 351. Of 18 ratifying states, only Mexico, South Africa and Turkey would be considered non-democracies at the time. For a list of signatories, *see* L. Larry Leonard, *Recent Negotiations toward the International Regulation of Whaling*, 35 AM. J. INT'L L. 90, 100 (1941).

[15] Scheiber, Historical Memory, *supra* note 11, at 128 ("The IWC underwent transformation form a "whalers' club" first to a whalers' club with scientific guidance, and then since 19896 to a conservationist body which at present seeks to impose an entire moratorium on high-seas whaling.")

[16] *Id.* at 138.

[17] *Id.* at 142-46.

[18] *Id.* at 142-46.

[19] *List of IMO Conventions*, INTERNAT'L MAR. ORG., https://www.imo.org/en/About/Conventions/Pages/ListOfConventions.aspx (last visited Jan. 1, 2023).

non-democracies had signed an average of eighteen.[20] For example, sixty-seven percent of countries that signed the IMO Convention on Marine Pollution of 1978 were democracies.[21]

All of this is consistent with the argument that democratic governments are incentivized to produce public goods for their citizens, and that sometimes these public goods require cooperation across borders. Authoritarians, by contrast, seek to limit benefits to the ruling coalition, and so tend to have agreements with less onerous commitments.

The development of the UNCLOS itself also reflects the relatively active role of democracies as compared to dictatorships. As one of the international conventions with the widest accession, one might think democracies and dictatorships would be equally likely to sign and ratify it. One-hundred-eighty-two States have signed UNCLOS, and only fourteen United Nations members have not.[22] But only three of these non-signatories are democracies: Andorra, Israel and Peru. Of the States that have signed, fifteen States did not ratify the convention after signing. Only four of these (26 percent) were democracies—namely the US, Colombia, Liechtenstein, and El Salvador. This means that during a period, from 1982 to today, in which democracies were more than half of countries in the world, they were under-represented in the set that did not join the UNCLOS.

Another measure of the relative influence of democracies is their participation in meetings at which international conventions are adopted. Consider several international treaties related to the oceans. For each, I provide information on the number of comments in the meetings by representatives of democracies and non-democracies, excluding the chairs. The table indicates the over-representation of democracies in terms of active participation in these meetings, with the exception of the UNCLOS III.

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[20] Data available at https://comparativeconstitutionsproject.org/download-data/. A t-test shows that the difference was significant at t=-7.05.
[21] Data available at https://comparativeconstitutionsproject.org/download-data/.
[22] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3.

TABLE 1: COMMENTS BY REPRESENTATIVES AT MEETINGS[23]

	% democracies In the world	**% comments by representatives of democracies**
Int'l Law Commission on territorial waters and high seas (1950-56)	40%	76%
UNCLOS I (1956-58)	40%	68%
UNCLOS III (1973-82)	34% to 42%	36%
UNCITRAL Int'l Transport	52%	83%

As has been argued by students of the UNCLOS, including Scheiber himself, one of the remarkable features of the iterated negotiations that produced the 1982 Convention was the important role of small States.[24] The chair of the first UNCLOS convention was Prince Wan Waithayakon of Thailand, and Sri Lankan and Yugoslav delegates were frequent speakers.[25] The critical role played by Ambassador Arvid Pardo of Malta, sometimes called the "Father of the Convention," has been well documented. He drew on earlier ideas of the "common heritage of mankind" to argue that the resources of the deep seabed should be used for the developing countries of the world.[26]

[23] Data available at https://comparativeconstitutionsproject.org/download-data/.
[24] Willy Ostreng, *Small States in the Decision-Making Process of UNCLOS III*, *in* OCEAN LAW DEBATES: THE 50-YEAR LEGACY AND EMERGING ISSUES FOR THE YEARS AHEAD 216, 222 (Harry N. Scheiber, Kilufer Oral & Moon-Sang Kwon eds., 2018).
[25] Data available at https://comparativeconstitutionsproject.org/download-data/.
[26] Bosco, *supra* note 1, at 13-14.

While the common heritage idea was an effort to benefit the majority of humanity, the fact that smaller States played an important role is not itself an indicator of democracy. The international legal system, after all, places fundamental importance on the sovereign equality of States, but the underlying inequalities among these States means that we cannot be sure a decision adopted by a majority of States is itself democratic. The majority of States might be made up of dictatorships, or they might simply be small: the largest seven countries collectively have more than 50 percent of the world's population.[27] Thus, the fact that the UNCLOS has empowered small States is not *inherently* democratic, but it also does not mean that the UNCLOS is biased toward authoritarians. The seas and their governance ultimately embody what I call "general" international law, neither inherently pro-democratic nor pro-authoritarian.[28] But the role of democracies in producing the content of this important body of law means that one can view it as indirectly reflecting the interests of democratic States, and thereby contributing to the well-being of their citizens.

The same is true when we turn to the question of dispute resolution. Article 287 of the UNCLOS provides governments with a choice of dispute resolution options. Upon accession, the State party can select the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice, or arbitration under the Permanent Court of Arbitration (PCA) as its preferred mechanism of dispute resolution.[29] Annex VII provides details on PCA Arbitration.[30]

Theory suggests that democratic States will be more likely to avail themselves of third-party dispute resolution because the results are less likely to cause sudden surprises.[31] This is exactly what we have observed to date in every forum of maritime dispute resolution. The International Tribunal for the Law of the Sea, which sits in Hamburg, has heard twenty-six contentious cases to date, twenty-four of which have been brought by democracies.[32] The ITLOS has mandatory jurisdiction over cases involving "prompt release," which occurs when

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[27] The seven countries with more than 200 million people are Nigeria, Brazil, Pakistan, Indonesia, the U.S., India and China. As of 2022, they add up to about 51% of the world's people. *See* COUNTRIES IN THE WORLD BY POPULATION (2022), https://www.worldometers.info/world-population/population-by-country/ (last visited Nov. 4, 2022).

[28] Ginsburg, *supra* note 2, at 48-49.

[29] U.N. Convention on the Law of the Sea, art. 287 (1), Dec. 10, 1982, 1833 U.N.T.S. 397, 509-10 ("When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention: (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI; (b) the International Court of Justice; (c) an arbitral tribunal constituted in accordance with Annex VII; (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.") [hereinafter UNCLOS].

[30] *Id.* at Annex VII.

[31] Ginsburg, *supra* note 2, at 45.

[32] *See* Appendix I.

a country seizes a vessel flagged in another State that demands its release. All nine of these cases brought to date have been brought by democracies.[33]

Examining the other fora contemplated by Art. 287, one also sees a propensity for democracies to bring cases. Appendix II lists all fourteen cases brought before PCA Arbitration to date. For non-democracies, one can only identify the case brought by Bangladesh against India for the delimitation of maritime boundaries.[34] Finally, looking at the history of dispute resolution related to maritime issues at the International Court of Justice, eleven of eighteen special agreements involved at least one democracy, including eight of ten maritime delimitation cases, even though democracies constituted only about 40 percent of States in existence during the period.[35]

This part of the lecture has emphasized a perspective on what I call "democracies and international law." It does not focus on the inherent democratic quality of global governance, nor the international law of democracy itself, but rather asks whether democracies act differently on the international plane. The answer, at least as far as the law of the sea is concerned, is a definitive yes.

III.

We now turn to a second issue, which is whether the law of the sea reflects what might be called "democratic global governance." This question has been asked by a number of scholars who note the distance between international decision-makers and ordinary citizens and seek to understand whether international legal institutions are "democratic" in some sense.[36] Scholars have been examining the internal structures and procedures of international organizations and courts to see whether they reflect and advance democratic values and processes. They tend to look to enhance individual and civil society participation in global governance and promote values like transparency and participation.[37]

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[33] Data on file with author.

[34] One may also consider a case brought by Malaysia against Singapore, though Malaysia is a bit ambiguous in measures of democracy.

[35] Ginsburg, *supra* note 2, at 61. Simple math suggests that about 48% of dyads would involve at least one democracy. 16% (.4 x .4) would have two democracies and 36% (.6 x .6) would involve two dictatorships.

[36] *See generally* Allen Buchanan & Robert Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFFS. 405 (2006); Robert O. Keohane, Stephen Macedo & Andrew Moravcsik, *Democracy Enhancing Multilateralism*, 63 INT'L ORG. 1 (2009); Julia C. Morse & Robert O. Keohane, *Contested Multilateralism*, 9 REV. INT'L ORG. 385 (2014); José Alvarez, *Introducing the Themes*, 38 VICTORIA UNIV. WELLINGTON L. REV. 159 (2007); Robert O. Keohane, *Nominal Democracy? Prospects for Democratic Global Governance*, 13 INT'L J. CONST. L. 343 (2015); Grainne de Burca, *Nominal Democracy? A Reply to Robert Keohane*, 14 INT'L J. CONST. L. 925 (2016); Jonathan W. Kuyper & John S. Dryzek, *Real, Not Nominal Global Democracy: A reply to Robert Keohane*, 14 INT'L J. CONST. L. 930 (2016).

[37] *See generally* Steve Charnovitz, *The Emergence of Democratic Participation in Global Governance*, 10 IND. J. GLOB. LEGAL STUD. 45 (2003); STEVEN WHEATLEY, THE DEMOCRATIC LEGITIMACY OF INTERNATIONAL LAW (2010); Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. CONTEMP. PROBS. 15 (2005); Steven Wheatley, *A Democratic Rule of International Law*, 22 EUR. J INT'L L. 525 (2011); Anne Peters,

In 1958, a group of American Quakers activists sailed a yacht called *The Golden Rule* toward an American nuclear testing site near the Marshall Islands in the Pacific.[38] The United States enacted rules making it illegal to enter the testing zone and a conflict ensued. The activists had an incomplete understanding of the law of the sea as it stood at the time. They departed Hawaii believing that they were entitled to sail freely outside of the three-mile territorial sea but were arrested anyway because *The Golden Rule* was a US-flagged vessel, which the Coast Guard was entitled to board anywhere.[39]

While the activists were unsuccessful in stopping the tests, they inspired others. In 1971, a small group of environmental activists, concerned about underground nuclear tests conducted by the United States, sailed for the Aleutians in a boat they called the *Greenpeace*.[40] They had the foresight to use a Canadian flag so that the boat could not be apprehended by US officials. Although maintenance issues caused them to suspend their mission before they were able to get to the test site, an organization was born, which continues to this day as the embodiment of nonviolent direct action by civil society. And note that the disputants in these early cases were citizens challenging their own governments. This meant that the oceans were also a space for internal democratic contestation: in addition to trying to use national courts or legislation to challenge disfavored policies, activists could engage in direct action and protest outside of a country's borders.

Of course, the broader civil society campaign that followed soon became a transnational one. Greenpeace has, for example, demanded an end to nuclear testing by France and several times engaged in direct action to call attention to the issue. This demand was picked up by States such as Australia and New Zealand, which sued France over the issue in the International Court of Justice.[41] Among the claims were the rights of the applicant States to maintain their freedoms of navigation and fishing, and to ensure their territorial waters were free of pollution.[42] What began as an internal fight within democracies became a transnational conflict, with different democratic States taking different positions.

Dual Democracy, *in* THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 263 (Jan Klabbers, Anne Peters, and Geir Ulfstein, eds., 2009); KAROLINA M. MILEWICZ, CONSTITUTIONALIZING WORLD POLITICS: THE LOGIC OF DEMOCRATIC POWER AND THE UNINTENDED CONSEQUENCES OF INTERNATIONAL TREATY MAKING (2020); RULING THE WORLD?: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE (Jeffrey L. Dunoff & Joel P. Trachtman, eds., 2009).

[38] BOSCO, *supra* note 1, at 108.

[39] *Id.*

[40] *Id.*

[41] Nuclear Tests Case (N.Z. v. Fr.), Judgment, 1973 I.C.J. 457 (Dec. 20).

[42] *Id.* ¶ 36.

International courts have had to grapple with this conflict among democracies over policy, brought to the forefront by civil society movements that spanned borders.

Another issue Greenpeace has focused on is whaling.[43] Their protest originally took the form of using rubber dinghies to physically position themselves between Pacific Ocean whales and Russian hunters with harpoon cannons.[44] By doing so, Greenpeace prevented the whalers from shooting their harpoon cannons, lest they hit the protesters. About two years after their first direct action on whaling, Greenpeace began the tactic of boarding whaling ships and distributing anti-whaling leaflets to the crews.[45] Over many decades, these tactics were repeated by the organization to prevent whaling by boats affiliated with Australia, Spain, Iceland, Peru, Japan, and other States.[46] In 1982, Greenpeace escalated its direct action approach when activists chained themselves to the harpoon cannon of the *Victoria* 7, a ship owned by a Peruvian subsidiary of Japan's Taiyo Fisheries.[47] In conjunction with pressure on democratic governments, these actions helped lead to a policy change when, that same year, the International Whaling Commission (IWC) voted to enact a moratorium on commercial whaling to begin in 1986.[48] Greenpeace's direct actions continued when countries like Japan violated the moratorium.[49]

The Sea Shepherd Conservation Society, a later and more controversial group of protestors led by Paul Watson, confronted vessels engaged in illegal whaling and seal hunting.[50] The organization was deputized by the government of Ecuador to patrol waters around the Galapagos and illustrates the potential capacity of civil society groups to act in cooperation with national governments to enforce maritime law.[51] Civil society, based in democratic States, can supplement enforcement capacity of weaker countries, thus making the law of the sea more effective.

Though Greenpeace's direct actions at sea to prevent whaling have led to arrests and litigation, the organization's law of the sea-related litigation has

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[43] *Greenpeace Campaigns against Whaling, 1975-1982*, SWARTHMORE GLOBAL NONVIOLENT ACTION DATABASE (Oct. 23, 2010), https://nvdatabase.swarthmore.edu/content/greenpeace-campaigns-against-whaling-1975-1982.
[44] "Save the Whales! - CBC Archives." Accessed August 28, 2021. https://www.cbc.ca/archives/entry/greenpeace-save-the-whales.
[45] SWARTHMORE GLOBAL NONVIOLENT ACTION DATABASE, *supra* note 43.
[46] *See generally*, RICHARD ELLIS, MEN AND WHALES (1999).
[47] *Id*.
[48] Philip Shabecoff, *Commission Votes to Ban Hunting of Whales*, N.Y. TIMES, July 24, 1982, https://www.nytimes.com/1982/07/24/us/commission-votes-to-ban-hunting-of-whales.html.
[49] Rob Taylor, *IWC Draft Plan Sees End to Commercial Whaling Ban*, Reuters (Feb. 23, 2010), https://www.reuters.com/article/us-whaling-idUSTRE61M0RF20100223.
[50] BOSCO, *supra* note 1, at 198-99.
[51] *See generally* PAUL WATSON, EARTHFORCE! AN EARTH WARRIORS GUIDE TO STRATEGY (1st ed. 1993); PAUL WATSON, URGENT! SAVE OUR OCEAN TO SURVIVE CLIMATE CHANGE (2021).

been primarily centered around its other campaigns. The ice-breaking ship *Arctic Sunrise*, for example, was involved in several anti-whaling protests and collided with Japanese whaling vessels. But the ship is most famous for an incident in 2013, when protestors from the vessel were arrested while attempting to scale a Russian oil installation.

The saga of the *Arctic Sunrise* illustrates how citizens of democracies can make things difficult for their own governments.[52] The icebreaker had been used to harass whalers in the Antarctic, but became famous in 2013, when a group of Greenpeace activists sought to land on a Russian drilling rig in the Arctic. The Prirazlomnaya oil platform was located within Russia's exclusive economic zone (EEZ) but not its territorial waters. Greenpeace exploited this fact to claim that it was engaged in innocent passage. Apprehended by the Russians and charged with hooliganism, the crew and ship was initially held in custody.[53] This led to actions before the Law of the Sea Tribunal by the Dutch government, with political support from the United Kingdom, for prompt release.[54] The International Tribunal for the Law of the Sea ordered Russia to release the protesters,[55] which the Russian parliament concurrently granted.[56] A later arbitral tribunal, constituted in accordance with the 1982 United Nations Convention on the Law of the Sea, made a similar ruling regarding the ship and ordered Russia to pay damages.[57] The ship was released in 2014.

This is an instance of what Anne Marie Slaughter and David Bosco have called plaintiff's diplomacy.[58] Though we might think of international law and international relations as primarily involving States, private citizens can complicate foreign policy for a government. Slaughter called attention to how private claim-making and private actions that lead to court cases mean that governments no longer control the international legal docket.

While in this instance the ship was released in accordance with the law, the case did put strain on the ITLOS system because China and Russia now claim

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[52] Bosco, *supra* note 1, at 224-230.
[53] *Id.* at 225.
[54] The Arctic Sunrise Arbitration (Kingdom of the Netherlands v. Russian Federation), PCA Case No. 2014-02, Award on the Merits, ¶¶ 81-106 (Perm. Ct. Arb. 2015), https://pcacases.com/web/sendAttach/1438.
[55] The "Arctic Sunrise" Case (Kingdom of the Netherlands v. Russian Federation), No. 22, Provisional Measures, ¶ 105 (ITLOS 2013), https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/published/C22_Order_221113.pdf.
[56] Paula de Castro Silveira & Grace Ladeira Garbaccio, *Protest at Sea: The Arctic Sunrise Case and the Clarification of Coastal States Rights*, 40 Sequência 32, 32-46 (2019).
[57] The Arctic Sunrise Arbitration, *supra* note 54, ¶ 401.
[58] Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, 79 FOR. AFF. 102, 116 (2000).

the right to exclude outsiders from their EEZs.[59] In 2021, China passed a statute asserting the right to use force against any government vessel in waters over which it claims jurisdiction, in direct conflict with UNCLOS Articles 32, 95 and 96.[60] China has an expansive notion of waters under its jurisdiction, including not only the territorial sea but also the EEZ and the area of the South China Sea within China's "Nine-Dash Line."[61] While it is not clear if China will actually seek to exercise exclusive jurisdiction in these areas, the very proposal is an example of what my book calls "authoritarian international law."[62] In this approach to international law, internal security needs trump adherence to general rules of international law and even prompt an attempt to change them. Whether "innocent passage" survives in Chinese and Russian waters is an issue over which we are likely to see continued contestation.

Civil society groups will continue to shape the law of the sea in many other areas, particularly in the deep seabed mining regime as it comes closer to viability. Since the UNCLOS declared the deep seabed "the common heritage of mankind," scientists have learned a good deal about the environmental consequences of nodule mining, which may lead to regulations that restrict the activity by companies based in democratic States. Civil society groups have also contributed to the rise of Marine Protected Areas, including in Antarctica, which is one of the strategies being used to slow the environmental degradation of the oceans.

IV.

I now turn to the role of law and democracy in confronting one of the greatest challenges of our time. The migrant crisis of recent decades has involved mass movements of persons from poor and desperate situations to richer and more secure ones. Itamar Mann argues that the seas constitute a "legal black hole": a zone of rightlessness.[63] Migrants located outside a State's "search and rescue" zone are beyond its jurisdiction and therefore beyond its duty to protect. The nominal rights of migrants outrun the duties of States in the domain of the oceans, leading to severe deficits of enforcement.

The migrant crisis—on land and sea—has generated wildly vacillating responses. At sea, the Italian government ran a program called Mare Nostrum

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[59] BOSCO, *supra* note 1, at 226-27.
[60] Wataru Okada, *China's Coast Guard Law Challenges Rule-Based Order*, THE DIPLOMAT (April 28, 2021), https://thediplomat.com/2021/04/chinas-coast-guard-law-challenges-rule-based-order/.
[61] *Id.*
[62] Ginsburg, *supra* note 3, at 189.
[63] Itamar Mann, *Maritime Legal Black Holes: Migration and Rightlessness in International Law*, 29 EUR. J. INT'L L. 347, 348 (2018).

from October 2013 to November 2014, rescuing migrants well beyond its official "search and rescue" zone. Then, in 2014, the European Union (EU) shifted gears and instituted Operation Triton, whose orientation was not to reduce but control migration. Operation Triton was subsequently replaced by Operation Sophia, a military operation with more resources to interdict migrants. These operations have resulted in ever greater challenges for migrants seeking to reach Europe. Between January 1, 2014 and early October, 2019, 33,631 migrants are presumed to have died in the Mediterranean Sea.[64] Since 2016, the EU claims its actions at sea have helped save over 500,000 migrants.[65] But others argue that it operates as a highly racialized border regime on the high seas.[66]

In response to this situation, a number of civil society organizations[67] purchased ships to engage in rescue.[68] Thus far, twenty-nine ships have been involved in such rescue operations by organizations including Sea-Watch, Mediterranean Saving Humans, SOS Mediterranean, and Medicins Sans Frontieres.

However, European governments thought that the private rescue efforts were undermining the restrictive migration policy and initiated a set of civil and administrative proceedings beginning in 2018. These proceedings grounded, and in some cases seized, rescue boats. COVID-19 put a further damper on operations.[69] The pandemic has led to a rapid decrease in the number of rescues performed by non-governmental organizations (NGOs). In 2018, as many laws criminalizing third-party rescue efforts went into effect, the number of migrants rescued by NGOs fell from 2017's near-all-time high of 46,601 to only 5,204—a decrease of about 89%.[70] By June 2020, due to "ongoing criminal proceedings, vessel seizures, and other restrictive measures imposed in response to the outbreak of the COVID-19 pandemic," the majority of NGO ships involved in search and

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[64] *Mediterranean Migrant Arrivals Reach 76,558 in 2019; Deaths Reach 1,071*, INTERNATIONAL ORGANIZATION FOR MIGRATION (Oct. 11, 2019), https://www.iom.int/news/mediterranean-migrant-arrivals-reach-76558-2019-deaths-reach-1071.

[65] Anja Radjenovic, *Search and Rescue in the Mediterranean*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE (EPRS) (2021), https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/659442/EPRS_BRI(2021)659442_EN.pdf.

[66] *See generally* E. Tendayi Achiume, *Racial Borders*, 110 GEO. L. J., 445 (2022).

[67] For an overview of these groups and their tactics, *see generally* Eugenio Cusumano, *Humanitarians at Sea: Selective Emulation across Migrant Rescue NGOs in the Mediterranean Sea*, 40 CONTEMP. SEC. POL'Y 239 (2019).

[68] *June 2020 update - NGO ships involved in search and rescue in the Mediterranean and legal proceedings against them*, EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (June 19, 2020), https://fra.europa.eu/en/publication/2020/2020-update-ngos-sar-activities#publication-tab-1.

[69] *Id.*

[70] Daniela Irrera, *Non-Governmental Search and Rescue Operations in the Mediterranean: Challenge or Opportunity for the EU?*, 25 EUR. FOREIGN AFFS. REV. 265, 281 (2019).

rescue operations since 2016 were being held in ports, unable to resume operations.[71] Moreover, most of the ships have either been previously subjected to legal proceedings or are involved in ongoing legal proceedings.[72]

The European response is in some tension with the law of the sea. The UNCLOS requires rescue of those in danger at sea, even if not in the control or jurisdiction of a State.[73] This codifies a very old norm going back to the 17th century.[74] In relevant part, the UNCLOS requires captains "to render assistance to any person found at sea in danger of being lost" and requires coastal States to "promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea. . . ."[75] Various implications follow from these obligations. States cannot legally prohibit a vessel flying its flag from engaging in rescue at sea.[76] This obligation has been interpreted to apply not just to the high seas, but to exclusive economic zones as well as territorial waters.[77] In addition, the duty to render assistance at sea must be carried out in a non-discriminatory manner.[78] A separate obligation requires delivery to a safe place, presumably meaning that coastal States must accept rescuees.[79] Other agreements such as the International Convention for the Safety of Life at Sea (SOLAS) and the International Convention on Maritime Search and Rescue (SAR) also obligate States to coordinate search and rescue zones around their coasts.[80]

While these obligations primarily address States—both flag States and coastal States—they have implications for civil society actors who are caught between States. The so-called "*Tampa* affair" in 2001 is illustrative. When a Norwegian container ship, the *Tampa*, assisted in search and rescue operations for an Indonesian ship in the waters between Indonesia and Australia, it was subsequently denied permission to disembark in Australia.[81] This rejection

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[71] EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *supra* note 68.
[72] *Id.*
[73] UNCLOS, *supra* note 29, at Art. 98.
[74] Mann, *supra* note 63, at 367.
[75] UNCLOS, supra note 29, at Art. 98(1)(a) and (2).
[76] Erik Røsæg, *The Duty to Rescue Refugees and Migrants at Sea, Oxford L. Border Criminologies Blog* (Mar. 25, 2020),https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/03/duty-rescue.
[77] Martin Ratcovich, *The Concept of 'Place of Safety': Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at Sea*?, 33 AUST. Y.B. INT'L. L. 1, 84 (2015).
[78] *Id.* at 6; Cottone, *The Blurry Line between Smuggling and Rescuing Migrants According to the International Law of the Sea*, 49 QUADERNS DE RECERCA (BELLATERRA) MÀSTER UNIVERSITARI EN INTEGRACIÓ EUROPEA 1, 7–8 (2019).
[79] Seline Trevisanut, *The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection*, 12 MAX PLANCK Y.B. OF U.N. L. 205, 222-46 (2008).
[80] *Id.*
[81] Ben Doherty, *The Tampa Affair, 20 Years On: The Ship that Capsized Australia's Refugee Policy*, THE GUARDIAN (Aug 22, 2021), https://www.theguardian.com/australia-news/2021/aug/22/the-tampa-affair-20-years-on-the-ship-that-capsized-australias-refugee-policy.

sparked a reform to the SOLAS Convention and the SAR Convention. Amendments to these conventions adopted in 2004 supplemented the duty to rescue by defining rescue as "[a]n operation to retrieve persons in distress… and deliver them to a place of safety."[82] This means that coastal States risk breaching their duty to rescue when, as in the *Tampa* case, they interfere with the timely disembarkation of rescued persons, either by closing ports to ships carrying rescued persons or even denying those ships "innocent passage" through their territorial waters.

This element of the law of the sea becomes politically salient with respect to rescue operations of boat-borne refugees, economic migrants, or asylum-seekers, to whom States may wish to deny access to their territory. The 2004 version of SOLAS directed the IMO to develop guidelines for defining a "place of safety" in particular circumstances.[83] The IMO has issued guidelines noting, with respect to refugees and asylum-seekers in particular, "the need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear or persecution would be threatened…"[84] It has further held that a "place of safety" is a place "where the survivors' safety of life is no longer threatened… where their basic human needs (such as food, shelter and medical needs) can be met… and from which transportation arrangements can be made for the survivors' next or final destination."[85] Both of these mandates are commonly taken up by NGOs.

I take no position on whether the rescue of migrants is democratic or not. It certainly implicates human rights, which overlap with but are distinct from the majoritarian systems of democratic governance. European governments that have interfered with migrant rescue may be reflecting the majoritarian preferences of their publics. But it is also the case that the UNCLOS regime has facilitated contestation by civil society groups in the water. This can sometimes be achieved through strategic registration under the Flag of Convenience System, which has independently come under repeated criticism.[86] One unintended consequence of this system is that it allows civil society groups to challenge their own governments using international law, simply by changing their beneficial ownership to a third State. To be sure, the poor environmental and safety regulation practiced by the flag of convenience States is at odds with the preferences of most activists. But the rule does allow strategic behavior. One can

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[82] Ratcovich, *supra* note 77, at 9, 11.
[83] *Id*. at 11.
[84] *Guidelines on the Treatment of Persons Rescued at Sea Res.* MSC.167(78), INTERNAT'L MAR. ORG. (May 20, 2004).
[85] Quoted in Office of the United Nations High Commissioner for Human Rights, '*Lethal Disregard': Search and Rescue and the Protection of Migrants in the Central Mediterranean Sea,* 29, U.N. Doc. HR/PUB/18/4 (Sept. 2016). *See generally*, C. Heller & L. Pezzani, *Blaming the Rescuers*, available at https://blamingtherescuers.org.
[86] BOSCO, *supra* note 1, at 134-35.

think of this political contestation, drawing on Kim Lane Scheppele's metaphor of a two-level chessboard, in which moves to advance a policy position can be made at either level.[87] A national actor can, under some circumstances, internationalize themselves to take advantage of different and more beneficial rules.[88]

V.

When discussing the law of the sea, Harry Scheiber wrote that "we need to keep in mind that the heritage of ocean law has not been monolithic or without its own inconsistencies and contradictions."[89] The seas are increasingly a zone of civil society activism, in which groups exercise their rights to engage in expressive action, sometimes in defiance of their own governments. To the cases discussed in this lecture, one might add the group Women in Waves, which has sought to provide offshore access to abortion and contraception in countries that have limited access to those services. In *Women in Waves and Others v. Portugal*, the European Court of Human Rights ruled that norms of free expression found in the European Convention on Human Rights required member states to restrict this group only in ways that were proportional.[90] Another famous case involved the *Mavi Marmara* incident in 2010, in which a Turkish ship seeking to break Israel's blockade of Gaza was apprehended on the high seas, resulting in the loss of life of some activists.[91]

A space governed by no one means that global civil society can exercise voice as much as sovereign States can. Those States created the rules that now shape democratic contestation. This exposes a tension between the perspective that I have called "democracies *and* international law," which shows how democratic governments shaped much of international law, and the "democracy *of* international law" by which civil society groups use techniques from democratic contestation to challenge governments, including their own. I am not

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[87] Kim Lane Scheppele, *The Constitutional Role of Transnational Courts: Principled Legal Ideas in Three-Dimensional Political Space*, 28 PENN STATE INT'L L REV. 451, 451 (2010).

[88] This is not only true in the Law of the Sea. In a famous investment law dispute, *Tokios v. Ukraine*, a Ukrainian company set up a company in Lithuania. This allowed it to take advantage of a Bilateral Investment Treaty, which defined an investor as "*any entity* established under the laws." *See* Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 28 (April 29, 2004) 11 ICSID Rep. 305 (2007).

[89] Harry N. Scheiber, *Introduction*, to LAW OF THE SEA: THE COMMON HERITAGE AND EMERGING CHALLENGES XI, XIII (Harry N Scheiber ed., 2000).

[90] *See* Women on Waves and Others v. Portugal, No. 31276/05 Eur. Ct. H.R. (2009).

[91] U.N. Human Rights Council (UNHRC), *Report of the International Fact-Finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance*, U.N. Doc. A/HRC/15/21 (2010).

in a good position in the context of this short lecture to resolve this tension. But I have noted that both of these perspectives are distinct from the position being pushed by authoritarian regimes, which is to privilege state interests above all. Scheiber's comment about inconsistencies and contradictions will remain apt for some time to come.

APPENDIX I: ITLOS CASES

Name	**Claimant**	**Respondent**	**Filing Date**	**Topic**
M/V Saiga Case	Saint Vincent & the Grenadines	Guinea	11/11/1997	prompt release
M/V Saiga Case (No. 2)	Saint Vincent & the Grenadines	Guinea	2/20/1998	provisional measures
Southern Bluefin Tuna	New Zealand	Japan	7/30/1999	provisional measures
Southern Bluefin Tuna	Australia	Japan	7/30/1999	provisional measures
Camouco	Panama	France	1/17/2000	prompt release
Monte Confurco	Seychelles	France	11/24/2000	prompt release
Grand Prince	Belize	France	3/21/2001	prompt release
Chaisiri Reefer 2	Panama	Yemen	7/2/2001	prompt release
MOX Plant	Ireland	United Kingdom	11/9/2001	provisional measures & statement of the case
Volga	Russian Federation	Australia	12/29/2002	prompt release
Case concerning Land Reclamation by Singapore in and around the Straits of Johor	Malaysia	Singapore	9/4/2003	provisional measures
Juno Trader	Saint Vincent & the Grenadines	Guinea-Bissau	11/18/2004	prompt release
Hoshinmaru	Japan	Russian Federation	7/6/2007	prompt release
Tomimaru	Japan	Russian Federation	7/6/2007	prompt release
Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal	Bangladesh	Myanmar	12/13/2009	delimitation of maritime boundaries
M/V Louisa	Saint Vincent & the Grenadines	Spain	11/23/2010	provisional measures

M/V Virginia G	Panama	Guinea-Bissau	7/4/2011	case transferred from another court
ARA Libertad	Argentina	Ghana	9/11/2012	provisional measures
Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission	Sub-Regional Fisheries Commission (SRFC)		3/27/2013	request for advisory opinion
Arctic Sunrise	Netherlands	Russian Federation	10/21/2013	provisional measures
Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean	Ghana	Cote d'Ivoire	12/3/2014	delimitation of maritime boundaries
Enrica Lexie Incident	Italy	India	6/26/2015	provisional measures
M/V Norstar	Panama	Italy	11/16/2015	contravention of LOSC provisions
Case concerning the detention of three Ukrainian naval vessels	Ukraine	Russian Federation	4/16/2019	provisional measures
M/T San Padre Pio	Switzerland	Nigeria	5/21/2019	provisional measures
M/T San Padre Pio (No. 2)	Switzerland	Nigeria	12/17/2019	arrest and detention

APPENDIX II: PCA ARBITRATIONS UNDER THE UNCLOS

Name	Claimant	Respondent	Filing Date	Topic
Dispute concerning the detention of Ukrainian naval vessels and servicemen	Ukraine	Russian Federation	4/1/2019	arrest and detention
The Enrica Lexie Incident	Italy	India	6/26/2015	provisional measures
The Artic Sunrise Arbitration	Netherlands	Russian Federation	10/4/2013	seizure and detention
The South China Sea Arbitration	The Philippines	China	1/22/2013	the role of historic rights and the source of maritime entitlements
Chagos Marine Protected Area Arbitration	Mauritius	United Kingdom	12/20/2010	delimitation of maritime boundaries
Barbados v. Trinidad & Tobago	Barbados	Trinidad & Tobago	2/16/2004	delimitation of maritime boundaries
Land Reclamation by Singapore in and around the Straits of Johor	Malaysia	Singapore	7/4/2003	land reclamation
Dispute concerning coastal state rights in the Black Sea, Sea of Azov, and Kerch Strait	Ukraine	Russian Federation	9/16/2016	dispute concerning coastal state rights
The Duzgit Integrity Arbitration	Malta	São Tomé and Príncipe	10/22/2013	arrest and detention
The Atlanto-Scandian Herring Arbitration	Denmark (in respect of the Faroe Islands)	The European Union	8/16/2013	the interpretation and application of Article 63(1) of the UNCLOS in relation to the shared stock of Atlano-Scandian herring
The ARA Libertad Arbitration	Argentina	Ghana	10/29/2012	detention and court measures
Bay of Bengal Maritime Boundary Arbitration	Bangladesh	India	10/8/2009	delimitation of maritime boundaries
Guyana v. Suriname	Guyana	Suriname	2/24/2004	delimitation of maritime boundaries
The Mox Plant Case	Ireland	United Kingdom	10/25/2001	transboundary environmental impact

SHARED OBJECTIVES FOR FRAMING THE TECH ECONOMY

MARGRETHE VESTAGER*

Summary

The Berkeley Journal of International Law awarded the 2022 Stefan A. Riesenfeld Award to Margrethe Vestager, the European Commissioner for Competition and the Executive Vice President of the European Commission for A Europe Fit for the Digital Age. The Journal has reproduced the transcript of Commissioner Vestager's keynote address delivered on Feb. 22, 2022 as part of BJIL's annual symposium.

* European Commissioner for Competition and Executive Vice President of the European Commission for A Europe Fit for the Digital Age.

INTRODUCTION

Ladies and Gentlemen,

Chancellor Christ,

Good morning, and thank you. It is an honor to be with you today.

When I look at the list of those who have received the Riesenfeld Memorial Award in the past, I feel privileged to be in their company. To name but two: the great Algerian diplomat Lahkdar Brahimi; and the current President of the International Court of Justice, Joan Donoghue. And so many others. It's not an exaggeration to say these women and men have truly changed the world. To have my name added to that list—well, it's very humbling.

I am especially honored to be here with you, Chancellor Christ. As the first woman to occupy the post of chancellor of this great university, you have been a fearless advocate of that which is best in academia. Your brave defense of free speech on campus serves as an inspiration to all who seek to uphold the liberal foundations of our democracies.

I. A CHALLENGING TIME IN HISTORY

Because the world needs inspiration. To quote Mr. Brahimi, "we live in a world of disturbing global tensions and unpredictability."

Tensions and unpredictability are nothing new. Latest we have seen the Russian recognition of the non-government-controlled areas of Donetsk and Luhansk, which is a blatant violation of international law. From the European Union we will react with sanctions against those who are involved in this illegal act.

We see many symptoms of change.

Change coming in so many ways: the shifting geopolitical balance; the need for us to come together. Also over climate change.

Then there is the reality of the digital transition. I say 'reality' because the transition has been happening for some time. The pandemic has greatly accelerated the shift, and this adds urgency to the challenge of writing good digital policies.

II. ENFORCING COMPETITION POLICY

Of course, we are not starting from scratch. Our work on digital markets has been ongoing for years. Enforcing competition rules is one important part of that, because we know how important competition is for healthy markets. Not just because it keeps prices low for consumers, but also because it spurs innovation.

Competition is also about fairness—here in the US, a new study shows start-ups are often younger, more diverse, and more likely to be 'outsiders'.[1] By enforcing our competition rules, we are acknowledging the fact that they deserve the same chance to compete as the bigger, more established players in the market.

In 2017, our decision on the Amazon case focused on what is called Most Favored Nation clauses, which forced sellers to offer Amazon the best terms when using its platform to sell e-books.

That same year, we adopted the Google Shopping decision, fining Google nearly two and a half billion euros for using its search engine to give an illegal advantage to its own shopping comparison service. Consumers who searched with Google saw its own results before getting to see the results of competing services.

In 2018, we fined Google over 4 billion euros for abusing its dominant position with the Android mobile operating system and apps, by tying the supply of the app store with search and browser services. Now users see a choice screen, and can select alternatives to the default search engine.

In November, the EU's General Court upheld our decision in the Google Shopping Case. That's very good news, because it constitutes an important legal precedent on which we can build our future work.

That future work is already in the pipeline. This year, we proceed with a series of investigations into how large digital platforms might be harming competition. That includes cases for which we already issued Statements of Objection—for example the case concerning Amazon's use of third-party data and Apple's treatment of third-party music streaming services. And there are other investigations in the making, involving Google's behavior in the ad tech space and Meta's use of advertising data when competing with rivals.

Staying on top of things also means anticipating. That is why we are carrying out formal sector inquiries into areas of the economy where the transition is making big changes. One good example is the consumer Internet of Things. It's a fascinating market, with huge potential to make our lives better, and more fun.

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[1] New US data shows firm growth since the pandemic is concentrated in 'microbusinesses' with an increasing share of women, black Americans and people without college degrees. Simon Torkington, *How the Great Resignation is Driving a Boom in Startups from More Diverse Founders*, WORLD ECON. F., Feb. 16, 2022, https://www.weforum.org/agenda/2022/02/the-great-resignation-boom-in-startups-from-more-diverse-founders/.

But as our report on this shows, there are also competition concerns around things like interoperability, data accumulation and exclusivity. By shedding light on these issues, the sector inquiry can encourage firms to rethink their practices, avoiding the need for enforcement altogether.

When we started our Google investigations back in 2010—really it seems like a lifetime ago! Not very many others were concerned about competition issues in digital markets. What you heard mostly was that digital players were driving down prices, increasing choice, so what was the problem? Perhaps there was a reluctance to look down the road.

Now, digital markets are on everyone's agenda. In the United States, the FTC's investigation into Facebook is seeking a divestiture of Instagram and WhatsApp. The Department of Justice is looking at practices similar to the ones covered by our Android complaint.

And it's not just in America. There is also action happening in the UK, Australia, Japan, South Korea and India. The fact that today multiple competition authorities around the world are looking at competition issues in digital markets is a good thing. It means there is international consensus that action needs to be taken to protect consumers and businesses in these markets.

III. DIGITAL MARKETS ACT

Enforcement actions are vital—we are watching them closely. But they are not enough. The fact is, we need new ways of safeguarding competition. With our Digital Markets Act, the EU is on the frontier of a whole new approach to regulating tech platforms. We are recognizing the reality that a handful of key platforms now act as gatekeepers to a large part of the internet, including online markets. The Digital Markets Act will be there to remind them: with great power comes great responsibility.

The Act will set out a list of do's and don't's—things that apply only for the gatekeepers. While the details are being finalized, it will cover things like the use of business user's data by gatekeepers, interoperability, switching, default settings, and self-preferencing, amongst others. Whether online businesses succeed or fail must be based on how good their ideas are. And on hard they work to serve the consumer. Not on the decisions of the gatekeeper.

We are still involved in discussions with co-legislators around the final text—that means the European Union's Member States as well as the European Parliament. Progress is good, but there is still a lot of work to do. And we remain hopeful for an agreement very soon.

Speed is important—these markets are always moving quickly. At the same time, we know we have to get this right. If we want to see real changes on

the ground, the legislation must be clear and to the point. This is essential for its enforceability.

Effective enforcement, which includes the Commission having sufficient resources to do so, will be key to ensure compliance. Some gatekeepers may be tempted to play for time or try to circumvent the rules. Apple's conduct in the Netherlands these days may be an example. As we understand it, Apple essentially prefers paying periodic fines, rather than comply with a decision of the Dutch Competition Authority on the terms and conditions for third parties to access its app store. And that will also be one of the obligations included in the DMA.

Another important point is that these rules are objective and non-discriminatory. Both our credibility as an enforcer, as well as our commitment to free and open trade, demand that our actions apply equally, regardless of the origin of the companies concerned. Gatekeepers will be designated based on size and reach within the European market.

That is also why it is important that we think globally. The EU has already led the way in areas like privacy rights. Consider the impact our General Data Protection Regulation has had—including California's own Consumer Privacy Act.

We want our work on the gatekeepers to inspire other jurisdictions in the same way. And we're seeing it happen—for example in Japan, the UK, and Australia. In the US, several bills are progressing through Congress and Senate, and they share many features with our proposal. This is very encouraging because it means that there is a great degree of global consensus.

IV. THE WIDER DIGITAL AGENDA

Of course, competition policy doesn't exist in a vacuum. Everything I have spoken about is only one part of the EU's wider digital agenda, which covers everything from promoting trustworthy Artificial Intelligence to improving e-government services; from investing in digital skills, to laying optical fiber and developing 5G coverage. Too much to talk about in one speech!

But there is one aspect I would like to highlight, which is the Digital Services Act. While the Digital Markets Act deals with how markets work and focuses on how a small number of gatekeepers should behave in the marketplace, the Digital Services Act has a different focus. It is a horizontal law, setting the rules online to mirror offline rules. It aims to protect online consumers from unsafe and illegal products, and it protects our right to speak freely online.

V. INTERNATIONAL COOPERATION

The impact of our digital legislation will depend as much on what happens outside the EU's borders, as within. That is why we are so committed to the Trade and Technology Council, a renewed transatlantic partnership for finding common approaches to these issues. Specifically for competition policy, we have launched the new Technology Competition Policy Dialogue, which builds on our longstanding tradition of cooperation. The EU and the US may not end up with the exact same laws, but it is becoming increasingly clear that we share the same basic vision when it comes to developing digital policy to protect our citizens, and to keep our markets fair and open.

This is true not just for the transatlantic relationship. The EU's cooperation links are strong across the world—and they are paying dividends. For example, a few days ago, we launched the inaugural Africa-EU Competition Week, a platform for exchange and policy dialogue with our African partners. And we are keen to enhance our cooperation with other parts of the world too.

CONCLUSION

Before I finish, I would like to pay tribute to another winner of the Riesenfeld Memorial Award, the renowned human rights lawyer David Weissbrodt. Sadly, Professor Weissbrodt passed away a few months ago, but the legacy he left behind will last for generations.

One of his most important contributions to international law and cooperation was to bring to light the idea that without the right set of international standards, private corporations cannot fulfil their social obligations. This means, if the policy community expects corporations to be fair and ethical, it is up to us to set the right standards.

Of course, he was speaking in terms of fundamental human rights, where he served as a tireless advocate for many long decades, in the fight against child slavery, human trafficking and extraordinary rendition.

But I believe the logic holds in other policy areas too. Most immediately, tackling climate change comes to mind.

It also applies to the standards we choose to set for the new, digital economy, and to the principles to which we hold large platforms who act as gatekeepers for online marketplaces.

Indeed, the work of international law and policymaking has never been more important than it is today, precisely because we are so connected. And because change is coming so fast. And because we do live in a world of disturbing global tensions and unpredictability.

I hope that in my own way, I can continue to play a part in that work. Thank you.