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EQUALITY AND NON-DISCRIMINATION

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1. INTRODUCTION

Gloria Gaggioli and Pavle Kilibarda (eds)

A. A NEW COLLECTION ON EQUALITY AND NON-DISCRIMINATION

While discrimination and inequality have always been a subject of international concern, various indicators demonstrate a troubling increase in these phenomena in recent years. Discrimination takes many forms and targets groups and individuals according to a wide array of personal properties such as race, sex, gender, religion or disability. The shocking death of George Floyd at the hands of US law-enforcement officials in 2020 serves as a grim reminder that racial discrimination persists even in advanced democracies; also, gender-based discrimination continues to impact the lives of many women around the world – attested, most recently, by widescale protests in Iran over the suspicious death of Mahsa Amini following her arrest for not wearing the hijab. Many other groups remain at risk of discrimination, including ethnic and religious minorities, Indigenous peoples, sexual minorities and the elderly. Existing inequalities within and between different countries were further exposed and exacerbated by the COVID-19 pandemic, provoking additional social stigma, discriminatory behaviour and hate speech towards various communities blamed for spreading the virus.

The prohibition of discrimination is well entrenched in international human rights law and appears high on the agenda of the international community. Various universal and regional treaties guarantee freedom from discrimination and there exist also subject-matter-specific instruments crucial for combating specific forms of discrimination such as racial discrimination and discrimination against women. Since the end of the Second World War, the struggle against various forms of discrimination has become a key objective of the United Nations. Nevertheless, in spite of a strong normative framework, discrimination, prejudice and bigotry remain a leading contemporary challenge in the struggle to ensure respect for human rights globally.

To that end, an academic colloquium was held on 25 and 26 November 2021 at the University of Geneva as part of the 2021 Human Rights Week, dedicated to the topic of ‘Discriminations and Inequalities’. The colloquium was organized by the University of Geneva in partnership with the Geneva Academy of International Humanitarian Law and Human Rights; the Swiss Federal Department of Foreign Affairs; the Republic and Canton of Geneva and the Office of the UN High Commissioner for Human Rights. The call for papers was open to graduate and postgraduate researchers and to several established human rights experts. The finest submissions were kept for an edited publication that the Geneva Academy is pleased to present herewith.

B. FLIPPING THE COIN: EQUALITY AND NON-DISCRIMINATION

Few concepts are as widespread or enjoy such universal appeal as the notion of equality. A key term in the vocabulary of human rights, equality is inherent in the modern understanding of democracy and rule of law and is enshrined in one form or another in every legal system in the world. The equal enjoyment of rights was posited as a bedrock of the post-war international order and is enshrined in the Charter of the United Nations, the Universal Declaration of Human Rights and numerous general and thematic treaties at the universal and regional levels. Equality is of such fundamental importance to the human rights architecture that it may be said to permeate all specific rights and freedoms and even act as a pre-legal foundation upon which the whole system has been established.

Bearing in mind the very universality of the principle, it should perhaps come as no surprise that there exists no single notion of equality, no matter the numerous attempts of philosophers and lawyers to distil its true content for several millennia. Aristotle admitted that '[a]ll men think justice to be a sort of equality'[1] and is typically credited with defining it as the principle that 'likes must be treated alike'.[2] Today this is known as *formal equality*: any two human beings in a comparable situation must receive equal treatment regardless of the ultimate result of such treatment. If one of two or more applicants has been accepted for a job solely by better meeting the job requirements such as extant working experience or knowledge of a foreign language, then the requirements of equality have been met, and the process has been just.

Nevertheless, human society is complex, and a strict adherence to notions of formal equality may not be appropriate in all circumstances. In the above example, one of the applicants may be a woman with a career gap of several years due to pregnancy, childbirth, nursing and early childcare. A male candidate of the same age and qualifications may have a more extensive professional background and therefore land the job as the better candidate. This certainly meets the requirements of formal equality: but is it truly *just* not to acknowledge the fact that the female candidate was at a disadvantage for engaging in a natural and even societally encouraged activity such as childrearing?

Formal equality was thus juxtaposed with the more recent notion of *substantive equality*, which comes in two forms: *equality of opportunity* and *equality of results*. The former allows for merits-based distinction between individuals but requires that they first be brought to the same watermark. 'Like competitors in a race', writes Daniel Moeckli, 'everyone should be able to begin from the same starting point'.[3] Schools and universities may have been set up to cater to a linguistic majority, making it more difficult for immigrants and their children to participate and flourish in the system. To ensure equality among students, it may be necessary to reconceive the curriculum or provide additional training to disadvantaged individuals to allow them to participate on an equal footing with their peers. Equality of results takes things a step further and sacrifices individual merit to achieve a more equitable distribution of public goods such as representation, participation, healthcare or education between different societal groups, sometimes even through preferential treatment or 'positive action'. A female candidate may be hired over an equally or even better-qualified male candidate to achieve gender balance in a given field, and a university might reserve a quota of places for minority students. Depending on the circumstances, all of these various forms of equality may be compatible or mutually exclusive, the same abstract concept may be implemented in very different ways and a single idea or policy may be regarded as just by some and as unjust by others. To strike a fair balance and identify the most appropriate formula for ensuring equality in a given context therefore requires informed, empirically driven and considerate policymaking at various levels.

In all instances, if equality were the head of a coin, non-discrimination would be its tail: '[W]hereas the maxim of equality requires that equals be treated equally, the prohibition of discrimination precludes differential treatment on unreasonable grounds'.[4] Nevertheless, on a practical level, the fact that discrimination is *prohibited* while equality is *prescribed* gives the former greater visibility, especially through litigation. This reflects the operative provisions of key human rights treaties which are typically centred around the former. Thus, the International Covenant on Civil and Political Rights declares that '[a]ll persons . . . are entitled without any discrimination to the equal protection of the law' and that 'the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground',[5] while the European Convention on Human Rights (ECHR) foresees that '[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground'.[6]

To understand what conduct is prohibited as discriminatory, it is necessary to look beyond the human rights treaties themselves and to jurisprudence and the views of expert bodies. Thus, the Human Rights Committee understands discrimination as implying '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'.[7] Accordingly, discrimination involves adverse or unfavourable treatment of certain groups in comparison to others in similar situations without a reasonable and objective justification for such a distinction.

1 Aristotle, *Politics*, trans B. Jowett, Batoche Books, 1999, p 68.

2 See D. Moeckli, S. Shah and S. Sivakumaran (eds), *International Human Rights Law*, Oxford University Press, 2018, pp 149ff.

3 Ibid, p 150.

4 Ibid, p 149.

5 Art 26, International Covenant on Civil and Political Rights (ICCPR), 1966.

6 Art 14, European Convention on Human Rights (ECHR), 1950.

7 HRCttee, CCPR General Comment No. 18: Non-Discrimination, 10 November 1989, §7.

Thus defined, discrimination is prohibited by human rights treaties in various ways. First, non-discrimination, or the freedom from discrimination, exists both as an independent or standalone and ancillary or accessory rule – and sometimes within the same treaty. The 'independent' freedom from discrimination has a general scope, protecting individuals from discrimination in the activities of the state and private parties.[8] It is closely related, but not reducible, to the notion of equality before the law. Domestic legislation or policies creating an adverse distinction against protected groups come within the purview of the general freedom from discrimination. As an ancillary right, the freedom from discrimination is linked to other substantive rights contained in a human rights treaty.[9] The ancillary nature of such a right does not mean that contracting states are not required to respect it independently – they are! – but any *claim* of a violation must be linked to another convention right. For example, denying a father access to his child may be a reasonable decision congruent with the best interests of the child and thus a reasonable limitation of his right to family life, but at the same time discriminatory if a heavier burden of proof is placed on him because the child was born out of wedlock.[10] Furthermore, treaties devoted to the protection of certain groups or combating a specific type of discrimination – such as the International Convention on the Elimination of all Forms of Racial Discrimination or the Convention on the Elimination of All Forms of Discrimination against Women – contain detailed provisions for the protection of the persons they pertain to. Finally, non-discrimination acts as 'a standard for the realisation of all other human rights',[11] and is a necessary component of any lawful limitation of or derogation from human rights treaties. For example, measures derogating from human rights treaties in times of public emergency involving unjustifiable adverse treatment of foreigners compared to a contracting state's own nationals have been regarded as inherently disproportionate and therefore invalid by human rights bodies.[12] The various ways in which the freedom from discrimination has been incorporated by human rights bodies is unique and both symbolically and practically sets it apart from all other rights and freedoms, including absolute ones such as the freedom from torture or the principle *nullum crimen, nulla poena sine lege.*

And yet, the freedom from discrimination is not an absolute right in itself – at least, not insofar as unfavourable treatment is concerned. According to the Human Rights Committee, 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.[13] The differentiated treatment would have to be undertaken for the purposes of a legitimate aim, such as protecting the rights of others (for example, their freedom of religion) or the public order, and proportionate to the aim it seeks to achieve. This means, however, that the burden of proof required to justify unfavourable treatment as proportionate grows with its severity, with very severe measures unlikely to pass as justifiable.[14] Unfavourable treatment based on immutable characteristics such as age or disability will be especially hard to justify: the fact that a given right or freedom has not been formally conceived as absolute or non-derogable does not imply that restrictions are always possible in practice. Nevertheless, the limits built into the material scope of the freedom from discrimination should not be neglected, and the reader should bear in mind that so far only the prohibition of racial discrimination and apartheid has been recognized as unquestionably belonging to *jus cogens*, the peremptory norms of highest strength in the framework of international law.[15]

8 A 'standalone' freedom from discrimination may be found, amongst other treaty provisions, in Art 26, ICCPR; Art 24, American Convention on Human Rights; Art 1, Protocol No. 12 to the ECHR.

9 Examples of such provisions may be found in Art 2(1), ICCPR; Art 2(2), International Covenant on Economic, Social and Cultural Rights; Art 2, Convention on the Rights of the Child; Art 14, ECHR.

10 ECtHR, *Sommerfeld v Germany*, Grand Chamber, Judgment, App no 31871/96, 8 July 2003.

11 A. McBeth, J. Nolan and S. Rice, *The International Law of Human* Rights, Oxford University Press, 2017, p 107.

12 ECtHR, *A and Others v The United Kingdom*, Grand Chamber, Judgment, App no 3455/05, 19 February 2009.

13 HRCttee, CCPR General Comment No. 18, supra fn 7, §13.

14 G. Dvaladze, 'Non-Discrimination Under International Humanitarian and Human Rights Law', in Robert Kolb, Gloria Gaggioli and Pavle Kilibarda (eds), *Research Handbook on Human Rights and Humanitarian Law*, Edward Elgar Publishing, 2022, p 418.

15 Report of the International Law Commission, UN doc A/74/10, 2019, pp 146–147.

C. STRUCTURE

Although the basic framework regarding equality and non-discrimination always remains the same, it has become commonplace to discuss them in relation to specific groups or topics to more adequately address their specificities: the factors, stakeholders and operational environment may be very different when discussing the position of sexual and gender minorities than when discussing that of persons with disabilities. The different notions of equality, types of discrimination and principles and standards of law discussed above will thus assume a varying complexion and value in each case.

Accordingly, this collection consists of eight chapters (apart from this introduction) split into three parts, focusing on discrimination on the grounds of sexual orientation and gender identity, discrimination against other minority groups and discrimination in specific situations. The topics of individual chapters were decided by the contributors themselves and therefore reflect their prevailing concerns in this field at the time of the 2021 colloquium.

1. PART ONE: DISCRIMINATION ON THE GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY

The first part of this collection offers an in-depth reflection on several aspects of discrimination against sexual and gender minorities and sexual and gender-based violence, incorporating a transversal perspective both in disciplinary and geographic terms.

1. In Chapter 2, **Hannah Ji-Jia Liu** reviews the recent judgment by the European Court of Human Rights (ECtHR/the Court) in *Tërshana v Albania*.[16] The Court determined that the authorities failed to react with special diligence in their investigation of the attack, finding a violation of the procedural aspects of the right to life; this determination was made in light of the high prevalence of violence against women and the 'general climate' of leniency and impunity towards its perpetrators. The author analyses the judgment in detail, scrutinizing the importance of the ECtHR's reliance on a context of widespread gender-based violence to determine a violation of the right to life, but also criticizing the Court's decision to refrain from separately examining the applicant's allegations of gender-based discrimination.

2. The chapter by **Anderson Javiel Dirocie De León** draws attention to the deprivation of liberty of LGBTI+ individuals, evaluating practice in the Americas in light of international standards. With a strong inter-American perspective, the piece takes the request for an advisory opinion to the Inter-American Court of Human Rights on differentiated approaches to persons deprived of liberty to argue for an intersectional approach regarding the needs of LGBTI+ individuals in prison in light of the unintended and disproportionate impacts of imprisonment on this group.

3. **Giulio Fedele** focuses on the approach to discrimination against LGBTIQ individuals in the Council of Europe system, re-evaluating the ECtHR's jurisprudence in light of the fundamental theory of 'treating likes alike'. The author enquires whether sexual and gender minorities are actually afforded equality in the enjoyment of substantive rights under the ECHR and separately analyses the Court's approach to Article 14. Although the ECtHR has failed to fully extend substantive Convention rights to LGBTIQ individuals in comparison to the majority population, the chapter suggests that the discrimination test under Article 14 could potentially be used to remedy such unequal treatment. The author argues that the ECHR reflects a 'heteronormative bias' that needs to be addressed by states parties and the Court itself, suggesting several possible avenues in this regard.

4. In Chapter 5, **Wibke K. Timmerman** focuses on the prohibition of incitement to hatred and violence on the basis of sexual orientation and gender identity. Timmerman draws attention to the fact that acts of violence are commonly predated by hate speech, arguing that the human rights prohibition of hate speech and propaganda needs to adequately address the situation of sexual and gender minorities. The author presents a detailed analysis of human rights jurisprudence in this regard, examining its links with international criminal law and crimes against humanity, especially the crime of persecution.

2. PART TWO: DISCRIMINATION AGAINST OTHER MINORITY GROUPS

An important component of discrimination in contemporary societies consists in its *intersectionality*, namely, the fact that it is often based on two or more grounds. This is poignantly so with Indigenous peoples, with Indigenous women often facing discrimination both as women and as members of an Indigenous group. The roots of such discrimination may vary from one part of the world to another and efforts to combat it must consider the historical, ethnic, political and religious circumstances prevailing in each case. Part Two focuses on discrimination against Indigenous peoples in two very different contexts: Canada and the Philippines.

16 ECtHR, *Tërshana v Albania*, Judgment, App no 48756/14, 4 August 2020.

5. **Eloïse Décoste** presents a bleak portrait of what Canada's colonial legacy means for indigenous women today, focusing on their right to life, security of person and reproductive rights. The author argues that discrimination remains entrenched in Canadian legislation, explaining the historic evolution of domestic law on Indigenous peoples since the start of colonization. The chapter concludes that a stronger implementation of international standards will not suffice to tackle structural injustices in the Canadian system and that a new conceptual framework is needed to dispense with intergenerational harm and ensure adequate reparations for victims of violations.

6. In Chapter 7, **Lena Muhs** problematizes the lengthy conflict and subsequent peace process between the Philippine Government and the Moro Islamic Liberation Front that resulted in the creation of the Bangsamoro Autonomous Region in Muslim Mindanao. The creation of this multi-ethnic region raises complex questions of representation and equality between Islamized and non-Islamized ethnolinguistic groups and Indigenous peoples, as well as Christian settler groups in the territory. The chapter focuses on the position of non-Moro Indigenous peoples, drawing on interviews to present its conclusions regarding their position and status in Bangsamoro.

3. PART THREE: DISCRIMINATION IN SPECIFIC SITUATIONS

The final part of this collection brings to light issues that are either nascent or otherwise less commonly addressed in the study of equality and non-discrimination. These include the application of the principle in times of armed conflict, when human rights law applies together with international humanitarian law, and the role of human rights in algorithmic decision making.

7. **George Dvaladze** examines the guarantees of equality and non-discrimination provided under international humanitarian law and human rights law in situations of belligerent occupation. Acknowledging the role of nationality in determining the responsibilities of an occupying power towards various groups inhabiting an occupied territory, the chapter examines the content of the obligations created under both branches of law as well as their interplay. The author also addresses the questions of adequacy, utility and limitations of humanitarian law and human rights in protecting the inhabitants of an occupied territory from discrimination and inequality.

8. The chapter by **Dominika Iwan** enquires into the role of the prohibition of discrimination in algorithmic decision making. It argues that ensuring non-discrimination concerning race, gender, language and religion must be a starting point for reflection when developing and deploying technology that aims to be inclusive. Focusing on the practical impact of algorithmic decision making and the relationship between state human rights obligations and private enterprise, the author seeks to flesh out the legal ramifications of the sustainable development of this new technology.

The chapters presented herein all display the impeccable legal understanding and expertise of their authors and the Geneva Academy is proud to share them with our read-

ers. It should nevertheless be borne in mind that the views expressed in each chapter are the author's own and do not necessarily reflect the position of the Academy.

We would hereby like to thank all of our contributors for their outstanding work on the chapters contained within this collection, as well as everyone who took part in and contributed to the 2021 colloquium either orally or in writing. We would also like to thank our partners in organizing the Human Rights Week, namely, the University of Geneva; the Swiss Federal Department of Foreign Affairs; the Republic and Canton of Geneva and the Office of the UN High Commissioner for Human Rights. A product of such high quality would not have been possible without their support.

The Editors

PART ONE:

DISCRIMINATION ON THE GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY

2. DISCRIMINATION AND GENDER-BASED VIOLENCE 'BEYOND HOME': REVIEWING *TËRSHANA V ALBANIA*

Hannah Ji-Jia Liu[1]

A. INTRODUCTION

Article 14 of the European Convention on Human Rights (ECHR) has long been described as a 'parasitic',[2] 'insipid'[3] or 'Cinderella'[4] provision, partly because of its ancillary nature. That is, compared to its counterparts, such as Article 26 of the International Covenant on Civil and Political Rights, Article 14 of the ECHR is not freestanding but dependent on the engagement of a substantive ECHR right. For Article 14 to be successfully applicable, the facts of the case must fall within the ambit of one or more substantive provisions of the ECHR. However, as a substantive right can be invoked on its own and most differential treatment can be dealt with in this context, the European Court of Human Rights (ECtHR/the Court) has often found it unnecessary to examine the complaint under Article 14.

The ambit requirement, however, is particularly problematic when it comes to cases concerning gender-based violence (GBV) against women. According to the Committee on the Elimination of Discrimination against Women (CEDAW Committee), GBV is defined as violence 'directed against a woman because she is a woman or that affects women disproportionately'.[5] It further adds that GBV, as opposed

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2 J. Small, 'Structure and Substance: Developing a Practical and Effective Prohibition on Discrimination Under the European Convention on Human Rights', 6 *European Journal of Discrimination and the Law* 45 (2003) 47.

3 S. Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights', 16 *Human Rights Law Review* 2 (2016) 273.

4 Rory O'Connell describes Article 14 as 'Cinderella', a fairy-tale character mistreated by her stepmother and two stepsisters, to illustrate the phenomenon where the Court has not put equal emphasis on this provision compared to others, often choosing to decide cases on other provisions even when non-discrimination was central to the issue. R. O'Connell, 'Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR', 29 *Legal Studies* 2 (2009) 211.

5 Committee on the Elimination of Discrimination against Women (CEDAW Committee), General Recommendation No 19: Violence Against Women, UN Doc A/47/38, 1992, §6.

to other types of violent acts, is 'rooted in gender-related factors',[6] which further contribute to the social acceptance of GBV and widespread impunity granted to the perpetrator. In that sense, treating GBV as a normal, random violent incident fails to fundamentally solve the issue; yet, this flawed approach is observed in the ECtHR's early decisions regarding domestic violence, such as *Airey v Ireland*[7] and *Bevacqua and S. v Bulgaria*[8] (where the Court examined the facts under Article 8 – the right to private and family life).

To one's comfort, Cinderella did not always live in shadows but eventually went to the ball. The development of case law shows that the Court is moving towards substantive equality by expanding the scope of positive obligations under Article 14,[9] which reflects an increasing awareness of 'how some differences in status actually make a big difference in people's lives'.[10] Regarding GBV, one instance of positive progress can be traced to *Opuz v Turkey*,[11] in which the Court – for the first time – found a violation of Article 14 in domestic violence cases. Benefiting from cross-fertilization from international legal regimes,[12] the Court expanded the scope and definition of discrimination against women in its case law. It further relied on various international and domestic reports, which provided statistical information disclosing that female victims were disproportionately affected by domestic violence in Turkey, and in this regard, found that the Turkish authorities had created a climate 'conducive to domestic violence'.[13] Accordingly, the Court concluded that Article 14 entails an obligation to protect women against domestic violence – a form of GBV that has been frequently regarded as a family, i.e. private, matter – or states would otherwise breach women's right to equal protection under the law.[14] While, admittedly, the reference to Article 14 in the *Opuz* case is still 'parasitic' in the sense that it aims to deal with violations of Articles 2 and 3, it is important to note that, following this case, domestic cases resorting to Article 14 are increasingly being brought before the Court, which by degrees leads to the solid credence that domestic violence is a form of gender discrimination.[15] This case is thus hailed by scholarship as a landmark judgment on GBV against women.[16]

However, when we take a closer look, most GBV cases that violated Article 14 concern 'violence at home', in which there existed repeated violent episodes committed by the identified husband or partner which culminated in severe injuries or even death. When it comes to other forms of GBV, such as those committed 'beyond home' without a culminative, repeated nature, one may wonder if the same approach would still be applied.

The troublesome question is substantiated in the recent decision of *Tërshana v Albania*,[17] which concerns an acid attack allegedly committed by the applicant's former husband. In its examination, the Court recognized that an acid attack targeted at women constitutes a form of GBV. It further underlined the 'specific nature' of such violence, requiring states to act with special diligence in the course of relevant domestic proceedings. Taking a similar approach to that of *Opuz*, the Court, based on national and international reports, took note of the hostile environment towards women in Albania, e.g. a high prevalence of violence against women and systematic under-reporting and under-investigating. Nonetheless, unlike in *Opuz*, the Court in *Tërshana* chose not to substantively examine the complaints under Article 14. It was unclear why the Court found a breach of Article 14 in *Opuz* after assessing Articles 2 and 3 but declined to even assess Article 14 in *Tërshana*.

As the first case concerning an acid attack against women before the ECtHR, the *Tërshana* case undoubtedly injects new vigour into the Court's jurisprudence on GBV. Yet, it seemed to miss the opportunity to hold that an acid attack without effective investigations would amount to discrimination on the grounds of gender under Article 14. Against this background, this paper aims to organize different approaches to identify a violation of Article 14 in domestic violence cases and provide a comprehensive insight into how to apply the identified approaches in *Tërshana*. As the Court has created rather solid, clear jurisprudence on domestic violence, an analysis of relevant cases contributes to identifying the approach with which the Court established Article 14 violations and exploring the possibility for the Court to expand its application of Article 14 in cases of GBV 'beyond home'.

The paper proceeds as follows. First, considering that the ECtHR has established rather solid jurisprudence on domestic violence out of all forms of GBV, Section 2 analyses different approaches that the Court has adopted in domestic violence cases to hold a violation of Article 14. It identifies three particular approaches: (1)

6 These factors include the 'ideology of men's entitlement and privilege over women, social norms regarding masculinity, and the need to assert male control or power, enforce gender roles or prevent, discourage or punish what is considered to be unacceptable female behaviour'. CEDAW Committee, General Recommendation No 35: Violence Against Women, UN Doc CEDAW/C/GC/35, 26 July 2017, §19.

7 ECtHR, *Airey v Ireland*, Judgment, App no 6289/73, 9 October 1979.

8 ECtHR, *Bevacqua and S. v Bulgaria*, Judgment, App no 71127/01, 12 June 2008.

9 See generally, O'Connell, 'Cinderella Comes to the Ball', supra fn 4; Fredman, 'Emerging from the Shadows', supra fn 3.

10 O. M. Arnardóttir, 'Vulnerability Under Article 14 of the European Convention on Human Rights', 4 *Oslo Law Review* 3 (2017) 150, 152.

11 ECtHR, *Opuz v Turkey*, Judgment, App no 33401/02, 9 June 2009.

12 See ibid, §§186–190.

13 Ibid, §§192–198.

14 Ibid, §191.

15 S. Murphy, 'Domestic Violence as Sex Discrimination: Ten Years Since the Seminal European Court of Human Rights Decision in *Opuz v. Turkey*', 51 *NYU Journal of International Law and Politics* (2019) 1347, 1358.

16 See e.g., T. Abdel-Monem, 'Opuz v. Turkey: Europe's Landmark Judgment on Violence Against Women', 17 *Human Rights Brief* 1 (2009) 29; P. Londono, 'Developing Human Rights Principles in Cases of Gender-Based Violence: *Opuz v Turkey* in the European Court of Human Rights', 9 *Human Rights Law Review* 4 (2009) 657; Murphy, 'Domestic Violence as Sex Discrimination', supra fn 15.

17 ECtHR, *Tërshana v Albania*, Judgment, App no 48756/14, 4 August 2020.

the systemic approach, focusing on the overall situation of domestic violence in the state; (2) the specific approach, focusing on specific failures on the part of the domestic authorities; and (3) the new approach, a development in recent years that focuses on both the systemic and specific factors. Drawn upon the case-law analysis, Section 3 focuses on *Tërshana* and examines how the Court applied the systemic and specific approaches in this case. It particularly discusses two aspects – similar approaches resembling domestic violence cases and the obligation to conduct an effective investigation under Article 14. Finally, through an in-depth analysis of the *Tërshana* case and by cross-referencing relevant case law, the paper concludes that the Court should recognize the discriminatory nature of all forms of GBV in order to examine all GBV cases in a consistent manner, which may provide a more comprehensive insight into gender discrimination to protect women's rights.

B. THE ECTHR'S APPROACHES TO FINDING DISCRIMINATION: REVIEWING DOMESTIC VIOLENCE CASES

As mentioned above, given the ambit requirement, while the applicant has alleged difference in treatment, the ECtHR may consider it unnecessary to examine Article 14 after finding violations of other provisions. For instance, in *X and Y v the Netherlands*, the Court expressly stated that '[a]n examination of the case under Article 14 is not generally required when the Court finds a violation of one of the former Articles taken alone'.[18] Meanwhile, the Court also explicated that Article 14 should be included in the examination 'if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case'.[19] According to this formulation, it could be inferred that the 'inequality of treatment in the enjoyment of the right' was not recognized in previous case law of violence against women while in many cases the reason behind the violent acts was based on the everlasting discriminatory attitudes against them. However, this tendency saw the light in the *Opuz* case, in which the Court held that a failure by a state to protect women against domestic violence breaches women's right to equal protection under the law, and that this failure does not need to be intentional.

To better analyse the *Tërshana* case, this section attempts to identify different approaches that the Court has adopted to find a violation of Article 14. It is divided into three parts. The first part assesses cases in which the Court established a prima facie indication that domestic violence prevailed in the state and affected mainly women, based on statistical data and reports. The second part turns to another approach, in which the Court examined the particular context by assessing how the authorities responded to individual victims. Lastly, it points out a recent development in which the Court combined the above approaches by identifying both systemic and specific factors.

18 ECtHR, *X and Y v the Netherlands*, Judgment, App no 8978/80, 26 March 1985, §32.

19 Ibid.

Several cases regarding domestic violence are selected to analyse how the Court examined factual elements, statistics and reports of international organizations or NGOs to establish discrimination on the basis of gender. It should be noted that, as the focus of this paper is on the Court's recognition of discrimination in GBV cases, this section does not aim to examine all claims of the selected cases but only those under Article 14 read in conjunction with Articles 2 and/or 3.

1. THE SYSTEMIC APPROACH: A GENERAL CLIMATE CONDUCIVE TO DOMESTIC VIOLENCE

Opuz v Turkey is regarded as a 'landmark',[20] 'historic'[21] decision representing a significant change in the ECtHR towards taking a gender-sensitive approach in domestic violence cases. It is the first time the Court recognized that the failure of states to address domestic violence, even if unintentional, can amount to a form of discrimination. In *Opuz*, the applicant and her mother were repeatedly attacked and threatened with death by the applicant's husband. Although they had lodged complaints to the authorities several times, the husband was released either because they withdrew the case due to fear of retaliation or because the sentence was reduced to a fine. The abuse came to a climax when the applicant's mother attempted to move to another area, at which point the husband shot her dead. The applicant complained before the Court, alleging that, inter alia, there was a disproportionate impact of domestic violence on women in Turkey because of widespread impunity enjoyed by male perpetrators.

In examining the complaint under Article 14, the Court did not look into the specific facts of the case but focused on the comprehensive situation of women in Turkey. Relying on reports of international bodies and NGOs, the Court observed general and discriminatory judicial passivity in Turkey. As indicated by the CEDAW Committee's reports on Turkey, 'the alleged discrimination at issue was not based on the legislation *per se* but rather resulted from the general attitude of the local authorities'.[22] Furthermore, statistics and reports provided by 'two leading NGOs', i.e. the Diyarbakır Bar Association and Amnesty International, demonstrated the authorities' high tolerance of domestic violence and the ineffective remedies provided to victims.[23] For instance, reports revealed that the victims of domestic violence were 'all women', who were vulnerable due to the inadequacy of education and income.[24] Also, as a 'mediator', the police did not investigate the complaints but rather convinced the applicant to drop the complaint.[25]

20 Abdel-Monem, 'Opuz v. Turkey', supra fn 16.

21 L. Hasselbacher, 'State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, and International Legal Minimums of Protection', 8 *Northwestern Journal of International Human Rights* 2 (2010) 190.

22 *Opuz* judgment, supra fn 11, §192.

23 Ibid, §§193–197.

24 Ibid, §194.

25 Ibid, §195.

In light of the given statistics, along with reports providing substantive information, the Court derived prima facie evidence indicating that 'the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence' and such judicial passivity 'mainly affected women'.[26] Accordingly, the Court found that the violence suffered by the applicant and her mother should be characterized as GBV, a form of discrimination against women. It therefore concluded that the authorities' 'insufficient commitment to take appropriate action to address domestic violence' breached the applicant's right under Article 14.[27]

Narrowing in on the ECtHR's approach to establishing a violation of Article 14 in *Opuz*, it is worth noting that the Court seems to endorse 'unchallenged statistical information' documented in reports of international bodies, such as the CEDAW Committee, and 'leading' NGOs — although it has not defined what characteristics NGOs should have to be considered as such — to establish a 'prima facie indication' of discriminatory violence generally occurring in a state. Where the state does not or cannot provide any counterarguments, the Court could establish an existence of discrimination based on statistics and reports to support the factual elements of the specific case.

The discourse on the discriminatory climate also functions as a threshold in later domestic violence cases against the Turkish Government, including *M.G. v Turkey*[28] and *Halime Kılıç v Turkey*.[29] *M.G.* concerns the lacking protection measures against domestic violence for unmarried/divorced women before the relevant legislative reform in Turkey. The Court drew attention to reports from an NGO, Human Rights Watch, to support the applicant's statement regarding the legislative framework over the period in dispute.[30] By so doing, the Court noted that unmarried women did not benefit from protection measures against domestic violence set out in the previous legal framework but were left to the discretions of domestic authorities. As a divorced woman, the applicant therefore could not gain access to adequate protection measures against continual threats from her ex-husband but continued to live in fear. In this context, the Court held that the report sufficiently constituted prima facie evidence. It did not turn to statistical evidence documented in reports but drew conclusions from the finding the Court had reached in *Opuz* earlier — that 'the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence'— still remained valid in the circumstances of the present case. Accordingly, a violation of Article 14 in conjunction with Article 3 was found.

Soon after the *M.G.* case, the ECtHR rendered another decision — *Halime Kılıç* — addressing the persistent climate of impunity in matters of domestic violence in Turkey. The case concerns the death of the applicant's daughter, who, despite having lodged complaints four times, was repeatedly assaulted and finally killed by her husband. As submitted by the applicant, reports by Human Rights Watch and the CEDAW Committee indicated that state actors, including the police, judges and prosecutors, did not entirely seek to combat domestic violence but considered the task to be within the realm of family matters.[31] The applicant also provided figures regarding the number of women who lost their lives as a result of assaults.[32] These contents, according to the Court, sufficiently constituted prima facie evidence that women in Turkey at the time did not benefit from effective protection measures against domestic violence.[33] In light of the statistical data and reports, the Court made it clear that, in regularly 'turning a blind eye' to the repeated acts of violence and death threats against the applicant's daughter, the Turkish authorities had created a climate that was conducive to domestic violence.[34] The Court again adopted the yardstick of the general, discriminatory climate to establish a violation of Article 14.

To briefly conclude, in the above cases, the Court did not limit its scope to the applicants' individual circumstances but related their experiences to the general discriminatory climate in the state. More specifically, the Court utilized statistics and substantive information from reports of international bodies or NGOs in *Opuz* (reports from the CEDAW Committee; statistics and reports from NGOs Diyarbakır Bar Association and Amnesty International), *M.G.* (reports from the NGO Human Rights Watch), and *Halime Kılıç* (statistics and reports from Human Rights Watch and the CEDAW Committee). Accordingly, it is apparent that the Court relies heavily on these two types of evidentiary elements to establish prima facie evidence of a 'climate conducive to domestic violence', mainly targeting women. This approach is also commended to imply that a breach of Article 14 does not necessarily depend on 'active malfeasance' of state authorities but can arise from 'discrimination embedded in social institutions and practices'.[35] In other words, by adopting such an approach, the Court recognizes the state's failure to sufficiently respond to the widespread discriminatory attitudes against women (or female victims) among the public and particularly in the judicial and law-enforcement systems, which may indicate a need to prevent GBV in a more comprehensive and systematic way such as through human rights education. In the next part, the focus turns to another indicative factor constituting discrimination – the repeated condoning of domestic violence and/or discriminatory attitudes on the part of the authorities.

26 Ibid, §198.

27 Ibid.

28 ECtHR, *M.G. v Turkey*, Judgment, App no 646/10, 22 March 2016.

29 ECtHR, *Halime Kılıç v Turkey*, Judgment, App no 63034/11, 28 June 2016.

30 *M.G.* judgment, supra fn 28, §117.

31 *Halime Kılıç* judgment, supra fn 29, §105.

32 Ibid, §107.

33 Ibid, §117.

34 Ibid, §119.

35 Abdel-Monem, 'Opuz v. Turkey', supra fn 16, 29, 32.

2. THE SPECIFIC APPROACH REPEATED FAILURES AND/OR DISCRIMINATORY ATTITUDES OF THE AUTHORITIES

In addition to a climate that is conducive to domestic violence, the ECtHR has also placed significant focus on the authorities' repeated condoning of relevant cases and/or their discriminatory attitudes towards victims to establish discrimination against women. A series of domestic violence cases against Moldova is illustrative of such an approach.

In *Eremia v the Republic of Moldova*[36] the applicants, a mother and her two daughters, complained that the first applicant's husband, A., frequently abused the mother in the presence of the daughters, whose psychological well-being was adversely affected as a result. A protection order was issued but was not complied with by A. and was later partly revoked upon A.'s appeal. The first applicant filed a criminal complaint against A. and, meanwhile, claimed that she was being pressured to withdraw it by the police, who stated that it would negatively affect their daughters' educational and professional prospects if A. had a criminal record and lost his job. Moreover, the social workers also suggested reconciliation as the first applicant was 'not the first nor the last woman to be beaten up by her husband'.[37] The criminal proceeding was finally launched; however, despite finding substantive evidence of A.'s guilt through medical reports and witness statements, the prosecutor suspended the investigation for one year, subject to the condition that the investigation would be reopened if A. committed another offence during that time, given that he committed a 'less serious offence' and 'did not represent a danger to society'.[38]

In its examination, the Court, unlike its approach in *Opuz*, in which it focused on the general and discriminatory judicial passivity creating a climate that is conducive to domestic violence, put more emphasis on the first applicant's personal circumstances. By looking into how the first applicant was treated when seeking protection measures before the authorities, the Court noted that state agents, including the police, social workers and the prosecutor, performed a minimizing attitude towards the assaults that the applicants had experienced.[39] Based on the specific facts of the present case, the Court was of the view that 'the authorities' actions were not a simple failure or delay in dealing with violence against the applicant, but amounted to repeatedly condoning such violence and reflected a discriminatory attitude towards her as a woman'.[40] Moreover, referring to the report of the UN Special Rapporteur on violence against women, its causes and consequences (Special Rapporteur), the Court found that it helped 'support the impression' that the Moldovan authorities did not 'fully appreciate the seriousness and extent of the problem of domestic violence and its discriminatory effect on women'.[41] Accordingly, there was a violation of Article 14 taken in conjunction with Article 3. It is observed that while the Court in *Opuz* relied significantly on reports to depict the overall situation in Turkey, it focused on the specific facts of the *Eremia* case to establish the repeated failure of the authorities to respond to domestic violence and their discriminatory attitudes towards the applicants as women, while regarding reports *merely* as supporting evidence.

In the case of *T.M. and C.M. v the Republic of Moldova*,[42] the ECtHR similarly took stock of a series of the authorities' failures to respond to the domestic violence inflicted on the applicants (mother and daughter). The Court noted that, inter alia, the prosecutor refused to initiate a criminal investigation since the first applicant's injuries were not sufficiently severe to merit such an investigation. In this connection, the Court pointed out that at the core of the state's failure to commence a criminal investigation lay the misconception of the nature of domestic violence. It stated that the domestic authorities' inept attitude underlined 'the failure to realise, or to explain to the law-enforcement authorities, the specific nature of domestic violence, which does not always result in physical injury'.[43] Moreover, by pointing out the particular vulnerability of victims of domestic violence, the Court asserted that the Moldovan authorities failed to 'verify whether the situation warranted a more robust reaction of the State and to at least inform the first applicant of the existing protective measures'.[44] In addition to citing the same report of the Special Rapporteur that was referred to in *Eremia*, the Court also took heed of statistical data produced by the National Bureau of Statistics revealing that the abovementioned passivity was rooted in the failure to understand 'the seriousness and extent of the problem of domestic violence in Moldova and its discriminatory effect on women'.[45] By looking into the specific factual background of the case, along with reports and statistical data as supporting evidence, the Court reached the same conclusion as in *Eremia*, namely that the authorities' actions 'amounted to repeatedly condoning such violence and reflected a discriminatory attitude towards her as a woman'.[46]

The Court's approach appears slightly different in *Mudric v the Republic of Moldova*.[47] In analysing the specific facts of the case, the Court identified persistent failures/delays on the part of the authorities in enforcing protection orders and initiating criminal proceedings, reaching a conclusion that precisely replicated *Eremia* and *T.M. and C.M.* However, contrary to findings in those two cases, the Court did not highlight any negative attitude of state agents (like, for example, their pressuring the applicant to withdraw criminal proceedings in *Eremia* or undermining the non-physical consequences of domestic violence in *T.M. and C.M.*). In this regard,

36 ECtHR, *Eremia v the Republic of Moldova*, Judgment, App no 3564/11, 28 May 2013.

37 Ibid, §25.

38 Ibid, §27.

39 Ibid, §§86–88.

40 Ibid, §89.

41 Ibid.

42 ECtHR, *T.M. and C.M. v the Republic of Moldova*, Judgment, App no 26608/11, 28 January 2014.

43 Ibid, §59.

44 Ibid, §60.

45 Ibid, §62.

46 Ibid.

47 ECtHR, *Mudric v the Republic of Moldova*, Judgment, App no 74839/10, 16 July 2013.

it is suggested that concrete instances of discriminatory attitudes may not be necessary to establish discrimination under the Court's case law.[48]

Based on the above analysis, it is observed that the ECtHR has adopted two evidentiary standards on discrimination in domestic violence cases. On the one hand, it established a general and discriminatory climate conducive to domestic violence based upon statistical data and reports, as in *Opuz*-line cases (the systemic approach). On the other hand, it found repeated failures and/or discriminatory attitudes that domestic authorities explicitly imposed on the individuals in question in *Eremia*-line cases, using reports that provide general information about GBV merely as supporting evidence (the specific approach). As regards the second approach, concerns have been raised that the Court may ignore systemic discrimination towards a specific group of disadvantaged persons.[49] Nonetheless, the appraisal of different approaches to establishing discrimination is beyond the remit of this article.

3. THE RECENT COMBINATION OF THE TWO APPROACHES

After identifying two major approaches that the ECtHR has adopted to establish discrimination faced by female victims of domestic violence, this part focuses on the case law of the Court in recent years. It is observed that the Court is developing a new approach that identifies both the general situation of discriminatory domestic violence in a state and the repeated failures and discriminatory attitudes on the part of the state authorities. Four cases are illustrative of this new approach.

a. Talpis v Italy

This new approach can be first seen in *Talpis v Italy*,[50] concerning the domestic violence suffered by the applicant (a mother of two), which resulted in the murder of her son and attempted murder of herself. In its Article 14 analysis, the Court first reiterated the two major approaches to establishing discrimination regarding domestic violence, citing *Opuz* and *Eremia* as references.[51] The following presents how the Court applied each of the approaches. Firstly, it started with the specific approach by looking into the very facts of the present case. It listed several failures of the authorities in dealing with the case, including: (1) absent any protection measures, the criminal investigation was initiated seven months after the applicant's first complaint;[52] (2) the husband was convicted of causing grievous bodily harm three years after killing his son;[53] and (3) the police remained inactive for six

48 L. Peroni, 'Talpis v. Italy: Elements to Show an Article 14 Violation in Domestic Violence Cases', *Strasbourg Observers*, 19 April 2017, https://strasbourgobservers.com/2017/04/19/talpis-v-italy-elements-to-show-an-article-14-violation-in-domestic-violence-cases/ (last accessed 1 February 2023).

49 J. Mačkić, *Proving Discriminatory Violence at the European Court of Human Rights*, Brill, 2018, p 80.

50 ECtHR, *Talpis v Italy*, Judgment, App no 41237/14, 2 March 2017.

51 Ibid, §141.

52 Ibid, §143.

53 Ibid.

months after the prosecutor's request to take immediate action on the applicant's request for protective measures.[54] The Court concluded that 'by underestimating, through their complacency, the seriousness of the violent acts in question, the Italian authorities in effect condoned them', and therefore, the applicant, as a woman, was a victim of discrimination.[55] In this context, the ECtHR identified the authorities' continual failures in dealing with domestic violence cases, which amounted to condoning such acts and undermining the seriousness of domestic violence.

Subsequently, the Court referred to various statistics and reports, including those produced by the Special Rapporteur, the CEDAW Committee and National Statistics Institute. Here, the reports were not used merely as supporting evidence as in the *Eremia*-line cases. Instead, the Court applied the systemic approach, as in the *Opuz*-line cases, to note the magnitude of domestic violence in the state and the discrimination facing women in this regard. Accordingly, the Court considered that the applicant provided 'prima facie evidence', as backed up by the above 'undisputed statistical data' to illustrate the overall situation of domestic violence in Italy, including that (1) domestic violence primarily affects women; (2) despite legal reforms, many female victims have been murdered by their partners; and (3) the 'socio-cultural attitudes of tolerance of domestic violence' persist.[56] Although the Court, as in *Opuz*, did not clarify the criteria for establishing 'undisputed statistical data' or 'unchallenged statistical information',[57] this approach shows that it considers those reports and statistical data as prima facie evidence that can demonstrate the discriminatory nature of domestic violence and the society's persistent tolerance thereof.

b. Bălşan v Romania

In the same year, the ECtHR rendered another decision regarding domestic violence – *Bălşan v Romania*[58]– applying a similar approach. What makes this case unique is that while the applicant did not complain about a breach of Article 14, the Court considered Article 14 of its own motion, which is seen as a recognition that domestic violence is frequently delinked from gender discrimination, especially where the female victim and the lawyers lack access to training in gender equality issues.[59] Regarding its examination, the Court first pointed out that, inter alia, the Romanian authorities found that the applicant had 'provoked' the domestic violence against her and considered that it was not serious enough to invoke criminal law.[60] By listing failures on the part of the authorities – through the spe-

54 Ibid, §144.

55 Ibid, §145.

56 Ibid.

57 In *Opuz*, the Court used 'unchallenged statistical information'.

58 ECtHR, *Bălşan v Romania*, Judgment, App no 49645/09, 23 May 2017.

59 E. Brodeala, 'Gender Discrimination in Romania Through the Case Law of the ECtHR: Searching for the Roots of the Systemic Failure to Protect Women's Rights in Romania', in B. Havelková and M. Möschel (eds), *Anti-Discrimination Law in Civil Law Jurisdictions*, Oxford University Press, 2019, pp 226–227.

60 *Bălşan* judgment, supra fn 58, §81.

cific approach – the Court condemned their passivity and ignorance of the heightened vulnerability of domestic violence victims.

Furthermore, the Court also deployed the systemic approach – by referring to a large number of official statistics and reports of the CEDAW Committee – to show that domestic violence prevailed in Romania and overwhelmingly affected women.[61] From those materials, the Court particularly noted that domestic violence was widely accepted and perceived as normal. In addition, the public – even women themselves – were not adequately aware of relevant legislative frameworks and rights, not to mention the insufficient implementation of the legislation and other measures.

Again, statistical data was used to demonstrate the prevalence of the problem, leading the Court to criticize the Romanian authorities' passivity and unresponsiveness, which created a climate that was conducive to domestic violence.[62] By identifying both systemic and specific factors relating to domestic violence, the Court concluded with a violation of Article 14 in conjunction with Article 3.

c. Volodina v Russia

The case of *Volodina v Russia*[63] also provides a good illustration of the new combined approach. In this case, the ECtHR for the first time clarified the nexus between the two approaches, stating that where systemic factors – 'large-scale structural bias' – are lacking, proven bias on the part of officials dealing with a specific victim's case is needed.[64] In this connection, the Court has implied that the systemic approach may surpass the specific approach, as it seems to adopt the former approach first and only adopt the latter when insufficient systemic factors are found.

In its examination of Article 14, the Court identified two issues directly –whether women are disproportionately affected by domestic violence in Russia and whether the Russian authorities had put in place policy measures geared towards achieving substantive gender equality. Regarding the first issue, the Court applied the systemic approach to examine the overall situation of female victims of domestic violence in Russia. It called attention to the abundant statistics and information produced by international bodies (the Special Rapporteur, CEDAW Committee, Committee against Torture and the World Health Organization), NGOs (Human Rights Watch and ANNA Centre for the Prevention of Violence) and official institutions (Ministry of the Interior, Ministry of Health, Russian Federal Statistics Service, Russian Academy of Sciences, the Russian Ombudsman and the Russian Supreme Court). These sources indicated that women constituted the majority of victims of 'crimes committed within the family and household', violence against women remained severely under-reported and under-recorded across Russia and female victims lacked secured access to justice as the crime was classified as private matters under Russian law. Accordingly, the Court confirmed the existence of prima facie evidence showing that women in Russia were disproportionately and adversely affected by domestic violence.

As for the second issue, the Court at the outset stressed that 'substantive gender equality' requires 'a gender-sensitive interpretation and application' of the ECHR.[65] Under this rationale, the failure of legislative frameworks to address domestic violence – particularly given the fact the domestic violence was not even defined in Russian law – breached states' obligations under Article 14. Here, the Court again deployed the systemic approach, in which various reports from the CEDAW Committee, the Special Rapporteur and the Russian Ombudsman attested the ineffective legislation and inadequate protection measures for women generally in Russia.[66] Subsequently, the Court switched to the specific approach. It noted the persistent passive attitudes of the police against the applicant, despite their being aware that the applicant was repeatedly assaulted, threatened with death and located with tracking devices.[67] However, the Court concluded its analysis with the systemic approach by noting that the above failures 'flowed from their reluctance to acknowledge the seriousness and extent of the problem of domestic violence in Russia and its discriminatory effect on women'.[68] The Court added, '[b]y tolerating for many years a climate which was conducive to domestic violence', the Russian authorities failed to achieve substantive gender equality and therefore violated Article 14 taken in conjunction with Article 3.[69]

As observed, firstly, pivotal to finding a violation of Article 14 in the *Volodina* case was the considerable number of sources showing that domestic violence is a widely accepted practice in Russia that disproportionately affects women. It is also noteworthy that, in his concurring opinion, Judge Pinto de Albuquerque underlined the twofold importance of statistics: (1) available statistics provide a helpful context to apply a gender-sensitive approach to the issue at stake, and (2) the absence of specific statistics highlights the lacking awareness of domestic violence. Secondly, the Court's approach demonstrates the importance it attaches to systemic factors. In other words, when it starts to examine whether there is discrimination in domestic violence cases, it first tries to look for systemic factors, and specific factors are only needed if systemic factors are lacking. On the other hand, however, when the systemic factors exist, the specific factors are still valued as helping to highlight the concrete instances of the passivity and failures on the part of the domestic authorities, particularly when the Court has devoted its attention to scrutinizing specific legislations or policies in the state.

61 Ibid, §83.

62 Ibid, §§86–88.

63 ECtHR, *Volodina v Russia*, Judgment, App no 41261/17, 9 July 2019.

64 Ibid, §114.

65 Ibid, §111.

66 Ibid, §§126–128.

67 Ibid, §129.

68 Ibid, §132.

69 Ibid.

d. Tkhelidze v Georgia

Lastly and most recently, the ECtHR's verdict in *Tkhelidze v Georgia*[70] adds to the ever-expanding jurisprudence on domestic violence. Compared to all of the cases mentioned above, it is surprising that the Court examined the merits under Article 2 in conjunction with Article 14. So far there is no category of Article 2+14 on the HUDOC database, a website providing access to the Court's case law, and *Tkhelidze* is sorted under Article 14+2.[71] This is indeed a very novel approach, and the different consequences of (and whether there is any difference between) a violation of Article 14 in conjunction with Article 2 and vice versa requires further examination.

Tkhelidze concerns another tragic incidence of domestic violence that led to the death of a woman, the applicant's daughter. Despite various complaints that the applicant's daughter had reported to the police, the latter's only response was to keep documenting new reports, as they considered the assaults and threats of the husband to be insufficient to initiate a criminal investigation or provide protective measures for the wife. As the Court examined the present case under Article 2, taken in conjunction with Article 14, it first examined whether there was a breach in fulfilling substantive and procedural positive obligations, respectively, under Article 2, and then analysed whether such a breach was based on gender discrimination. Similar to the previous case studies considered in this paper, only assessment regarding discrimination issues is discussed here.

Regarding the substantive positive obligations, the Court began with the specific approach, noting that the law-enforcement authorities persistently failed to take any steps – aside from continuing to draft reports – that could have mitigated the harm or altered the tragic outcome. In particular, despite various protection measures available to them, the authorities failed to display special diligence to prevent GBV and remained reluctant to resort to issuing protection orders, which the Court considered to be 'deplorable'.[72] Meanwhile, the report of the Special Rapporteur was used to support the above findings, further identifying that these failures were 'systemic'.[73] Next, in light of the report demonstrating that all the specific failures of the authorities were in fact a systemic issue, the Court tactfully turned to the systemic approach by noting that domestic violence mainly affects women. It referred to various reports of 'authoritative' international bodies – the CEDAW Committee, the Human Rights Committee and the Special Rapporteur – and the Georgian Ombudsman, pointing out that the causes of violence against women were linked to systemic factors including 'discriminatory gender stereotypes', 'patriarchal attitudes' and 'a lack of special diligence' of the authorities.[74] Relying on these findings, the Court concluded that the general and discriminatory passivity of the law-enforcement authorities created 'a climate conducive to *a further proliferation of violence committed against women*'.[75] Here, the Court changed its previous discourse on a climate conducive to 'domestic violence' to 'a further proliferation of violence committed against women', which expands its apprehension to all forms of GBV. Such recognition will be further discussed in the next section.

With respect to the procedural positive obligations, the ECtHR chose to deploy the specific approach, noting several failings that demonstrated the inactivity of the law-enforcement authorities.[76] For instance, the prosecution authority disregarded the applicant's numerous criminal complaints and made no attempt to establish the identity of the police officers, who failed to properly respond to the multiple incidents of GBV that culminated in the death of the applicant's daughter. In addition, the prosecutor acknowledged receiving the applicant's correspondence two years after her repeated complaints, with no further actions taken. There was also no training for the police officers on how to respond properly to future instances of alleged domestic violence. The Court accordingly concluded that there existed 'discriminatory overtones associated with violence committed against women' and required the state to 'conduct a meaningful inquiry into the possibility that gender-based discrimination and bias had also been a motivating factor behind the alleged police inaction'.[77] The case of *Tkhelidze* therefore solidified a line of Article 14 jurisprudence, in which it is written that states have positive obligations to respond to the complaint in a gender-sensitive manner, as well as to investigate specific state agents who might act passively due to gender-based discrimination and bias.

On a final note, the new approach – which combines the systemic and specific approaches – makes up for the defect that the specific approach may omit the widespread GBV against women in the state. With systemic factors identified, the domestic authorities could realize the severity of discrimination generally occurring and understand that such acts of violence are not isolated incidents. Moreover, the new approach also specifies the suffering inflicted on individual women, acknowledging the tragedies faced by these victims and highlighting specific behaviours of state agents, which may provide clearer hints at what circumstances might amount to repeated condoning of GBV and discriminatory attitudes against women. This may also serve as a guideline for other states to avoid the same failures.

However, all the cases analysed so far are pertinent to domestic violence, in which the perpetrator was identified as the victim's (then-)partner or husband, and the violent episodes appeared to be cumulative, which resulted in severe injuries or even death. In cases relating to other forms of GBV, the Court has appeared to adopt an inconsistent approach and has rarely recognized their discriminatory nature. Taking the *Tërshana* case to illustrate this legal loophole, the next section will compare the approaches in this case with other domestic violence cases discussed above.

70 ECtHR, *Tkhelidze v Georgia*, Judgment, App no 33056/17, 8 July 2021.

71 This was last checked on the HUDOC database on 27 September 2021, https://hudoc.echr.coe.int/.

72 *Tkhelidze* judgment, supra fn 70, §55.

73 Ibid, §§54–55.

74 Ibid, §56.

75 Ibid. Emphasis added.

76 ibid, §60.

77 ibid.

C. DISCRIMINATION AND OTHER FORMS OF GENDER-BASED VIOLENCE: REVISITING *TËRSHANA V ALBANIA*

In 2020, the ECtHR was presented with a good opportunity to address acid attacks against women for the first time, in the case of *Tërshana v Albania*. In this case, the Court recognized that an acid attack is a form of GBV and imposed a higher standard for states to investigate such cases. However, the Court only assessed the case under Article 2. Without even assessing Article 14, it seemed to miss the opportunity to further recognize that the failure to effectively investigate the acid attack constituted gender discrimination. In particular, it adopted similar approaches in domestic violence cases in which it also identified several systemic and specific factors. Therefore, by analysing the *Tërshana* case, the present section is dedicated to discussing a better form of assessment in light of the similar approaches.

1. FACTS AND HOLDINGS

On 29 July 2009, while walking on the street, the applicant was severely injured in an acid attack by an unidentified assailant and suffered bodily and consequent psychological harm. In the subsequent criminal investigations, she expressed her suspicion that the attack might have been organized by her former husband, E.A., who had used violence towards her and threatened to kill her in the past. She added that the attack might be revenge for their divorce. In addition, several family members from both the applicant's and E.A.'s sides confirmed that the applicant had been subjected to violence and insults by E.A.

Several investigative steps were subsequently performed. In particular, the prosecution authorities questioned all persons who might know anything about the incident, examined a forensic medical report, a fingerprint report and other expert reports, confiscated video footage of nearby cameras, intercepted E.A.'s telephone and obtained his telephone records. Nonetheless, despite the investigations undertaken, the authorities were still unable to identify the perpetrator. Moreover, due to the lack of specialist equipment and issues of competence,[78] no expert report was finalized to identify the substance used for the attack. As a result of the non-identification, on 2 February 2010, the prosecutor decided to suspend the investigation.

However, the applicant did not receive any information from the prosecution authorities after that, nor were her inquiries about the progress of her case answered. It was not until 17 April 2012 that the prosecutor informed the Albanian Centre for the Rehabilitation of Trauma and Torture (the Centre), an organization authorized by the applicant to follow the case, of the decision to suspend the investigation and the reason why. Despite requests of the Centre for detailed documents, the prosecutor only informed it in January 2014 that all relevant documents were entirely in the police's hands.

78 The Faculty of Natural Sciences informed the judicial officer that it could not analyse the clothes of the applicant as such an action fell outside the sphere of its competence.

Furthermore, on 3 September 2012, the applicant lodged a claim against the government for damages before domestic courts to seek compensation as a result of the acid attack. However, on 30 May 2013, the proceeding was discontinued due to the absence of the applicant and her lawyer at the hearing.

On 30 June 2014, the applicant brought her case before the ECtHR. She argued that the authorities' failure to protect her right to life and to conduct a prompt and effective investigation had amounted to violations of Articles 2, 3 and 8. She also complained about her inability to challenge the prosecutor's decision to suspend the investigation and her failure to obtain compensation from either the perpetrator or the government under Article 13 in conjunction with Article 2. Lastly, she complained under Article 14 that the authorities had acted passively on her case because of her gender, which amounted to GBV.

In its judgment, the Court decided to examine the first complaint from the standpoint of Article 2 under its substantive and procedural aspects, as they related to the applicant's right to life.[79] Regarding the substantive limb of Article 2, the Court first reiterated that Article 2 entails not only negative obligations to refrain from intentional and unlawful taking of life but also positive obligations to take appropriate steps to safeguard individuals' lives. The positive obligations include: (1) to put in place effective criminal legal frameworks, and (2) to take preventive operational measures to protect individuals whose life is at risk. The Court added that the scope of the second positive obligation must not impose an impossible or disproportionate burden on the authorities. Only where the authorities knew or ought to have known a real and immediate risk to an individual's life did the positive obligation arise. In this regard, the Court held that the Albanian authorities could not be held responsible for failing to protect the applicant from the acid attack. Firstly, the Court observed an effective legislative framework concerning crimes against life and health in Albania. In particular, the acid attack was covered by Albanian criminal law, according to which the prosecutors could open an investigation of their own motion.[80] Secondly, the applicant notified the authorities about her domestic violence after the incident. In the Court's view, the authorities could not have been aware of any real or immediate risk to the life or physical integrity of the applicant beforehand and taken preventive measures accordingly.[81] Therefore, there was no violation of Article 2 under its substantive limb.

Under the procedural limb of Article 2, the Court established that when a person sustains life-threatening injuries, states are required to conduct an effective official investigation to establish the cause of the injuries and identify the person responsible. This obligation also implies a requirement of promptness and reasonable expedition; and, when difficulties occur in the course of investigations, a prompt response by the investigation authorities is required. Moreover, the Court further established stricter obligations when GBV is involved, namely that states are re-

79 *Tërshana* judgment, supra fn 17, §§125–126.

80 Ibid, §150.

81 Ibid, §151.

quired to fulfil this obligation with special diligence 'whenever there were doubts about the occurrence of domestic violence or violence against women'.[82] The Court also added that when an attack that has 'the hallmarks of a form of [GBV]' happens in a climate of leniency towards perpetrators, an effective investigation pursued 'with vigour' is of particular importance.[83] Accordingly, in its assessment, the Court first applied the systemic approach to identify whether the Albanian authorities were under the strict obligation to investigate with special diligence – i.e. whether there existed a climate of leniency towards perpetrators of violence against women – and then used the specific approach to examine if the authorities fulfilled their obligation in the present case.

Concerning the general situation of violence against women in Albania, the Court referred to various international and national reports and concluded that there existed prima facie a general climate in Albania that was conducive to violence against women and lenient towards the perpetrators thereof.[84] In light of those reports, the Court also recognized that an acid attack was a form of GBV, which required the authorities to conduct a thorough investigation with more diligence.[85] Turning back to the present case, the Court then took note of a series of the authorities' failures in the course of the criminal investigation, which had been suspended since 2010 by the prosecutor, and held that the authorities had failed to investigate the applicant's case with special diligence.[86] Accordingly, the Court concluded that the authorities did not effectively respond to the acid attack and violated Article 2 in the procedural aspect.

Judging from the Court's review of the procedural obligation, it adopted a gender-sensitive approach, acknowledging that the acid attack is a form of GBV, and it imposed on the country a stricter obligation to investigate. Moreover, it used the new approach to identify the systemic and specific factors that have been (and should be) used to establish a violation of Article 14, as discussed previously. However, after finding a breach of Article 2, the Court considered it unnecessary to examine the Article 14 complaint, which, in essence, ignores the fact that the ineffective investigation originated from the authorities' discrimination against women. A detailed discussion of how the Court applied the two approaches now follows.

2. A GENDER-SENSITIVE ANALYSIS WITH DISCRIMINATION NOT FOUND?

It is evident from the ECtHR's jurisprudence that an acid attack is a form of GBV, which constitutes gender discrimination. However, the Court in *Tërshana* appeared reluctant to address the discriminatory nature of the violent act. In an attempt to demonstrate that the Court could easily have found a violation of Article 14 in *Tërshana* in light of its previous case law, the following analysis is divided

82 Ibid, §153.

83 Ibid, §§156, 160.

84 Ibid, §156.

85 Ibid, §157.

86 Ibid, §159.

into two parts: (1) the systemic and specific approaches as in the abovementioned domestic violence cases, and (2) the obligation to conduct an effective investigation under Article 14.

a. Approaches in Domestic Violence Cases

In the assessment of the procedural obligation under Article 2, the Court used both the systemic and specific approaches in line with the new development of domestic violence case law analysed in section 2C above. Regarding the systemic approach, it is observed that the Court referred to several national and international reports to depict the overall situation of violence against women in Albania. The national reports, produced by the Institute of Statistics, the Centre for Legal Civic Initiatives and the Commissioner for the Protection from Discrimination, provided concrete statistical data disclosing that violence against women was widespread in Albania and that this figure was increasing.[87] As for the international reports presented before the Court, they were made by 'authoritative'[88] international monitoring bodies – GREVIO,[89] the CEDAW Committee and the European Commission[90] – and a 'leading'[91] NGO, Amnesty International. The Court particularly highlighted that the reports revealed that violence against women in Albania was not only highly prevalent but also 'under-reported, under-investigated, under-prosecuted and under-sentenced'.[92] The reports further suggested that the passivity of ineffective approaches of the policing and prosecution authorities resulted from 'social attitude and cultural values' and the fact that 'a climate of leniency or impunity prevailed towards perpetrators of violence against women'.[93] As a result, the circumstances of the acid attack on the applicant – which was likely to have been gender-motivated – should have incited the authorities to react with special diligence and with vigour in carrying out the investigative measures.[94]

As regards whether the Albanian authorities conducted an effective investigation, the Court used the specific approach and listed a series of failures. First, it noted that the investigations were unable to identify the perpetrator.[95] They were likewise unable to identify the substance used in the attack, as no expert report – 'an investigative measure of crucial importance for the case' –had even been finalized

87 Ibid, §§100–107.

88 In *Tkhelidze* the Court recognized several UN bodies as 'authoritative'. See section 2C4 above.

89 Although the Court did not include GREVIO as an authoritative body in *Tkhelidze*, as the monitoring body of the Istanbul Convention – a legal instrument of the Council of Europe – GREVIO's authority should not be questioned by the Court.

90 As an organ of the European Union, the authority of the European Commission should be recognized by the Court.

91 In *Opuz* the Court recognized Amnesty International as a 'leading' NGO. See section 2A above.

92 *Tërshana* , supra fn 17, §156.

93 Ibid, §156.

94 Ibid, §160.

95 Ibid, §158.

due to the lack of specialist equipment and issues of competence.[96]More significantly, the applicant could not challenge the prosecutor's decision to suspend the investigation under domestic law or claim damages in the absence of an identified perpetrator, nor did the applicant receive any notification about the progress of her case.[97] In light of the above failures, the Court held that the investigations were ineffective within the meaning of Article 2.

Comparing the approaches in *Tërshana* with other cases discussed in Section 2, it can be observed that, firstly, the Court applied the systemic approach in a similar way but for different purposes. In *Tërshana* – as in other domestic violence cases – it referred to statistical information documented in reports of the 'authoritative' international bodies and the 'leading' NGO, concluding an existence of a climate conducive to GBV. However, in other domestic violence cases, the Court applied the systemic approach in an attempt to substantiate that the consequences of judicial passivity in addressing domestic violence, the socio-cultural attitudes of tolerating domestic violence and the lack of the authorities' commitment to substantive gender equality disproportionately affected women. To put it differently, the above acts have led female victims to suffer from re-victimization and continue living in fear, with a high possibility of experiencing severe injuries and death. The perpetrators of domestic violence, in this regard, can enjoy impunity or receive lenient punishment. In contrast, the systemic approach in *Tërshana* is only used to establish a stricter obligation to investigate. The Court, by noting the fact that violence against women in Albania was 'under-investigated, under-prosecuted, and under-sentenced', demonstrated the urgency for the criminal justice system to adopt a particular approach to tackle GBV cases.[98] Although it identified a climate conducive to GBV, the Court in *Tërshana* did not (or did not intend to) underline that GBV mainly affected women in its assessment, which is the major difference from other domestic violence cases. As the method to identify the climate conducive to GBV in *Tërshana* is almost identical to that of domestic violence cases, the Court could, if willing, simply have added the following paragraph to establish a violation of Article 14: 'Bearing in mind its finding above that the general and discriminatory judicial passivity in Albania, albeit unintentional, mainly affected women, the Court considers that the acid attack suffered by the applicant may be regarded as gender-based violence, which is a form of discrimination against women.'[99]

Secondly, comparing the specific approach with other domestic violence cases, the Court in *Tërshana* did not find that the authorities' failures had amounted to 'repeatedly condoning' the perpetrator or that they responded with discriminatory attitudes against women. In *Tërshana*, the acid attack was a single incident, meaning that the Albanian authorities could not be blamed for repeated failures in addressing the issue. Besides, the Court noted that the failure to identify the

96 Ibid, §159.

97 Ibid, §161.

98 R. Erbaş, 'Effective Criminal Investigations for Women Victims of Domestic Violence: The Approach of the ECtHR', 86 *Women's Studies International Forum* (2021).

99 Adapted from the *Opuz* judgment, supra fn 11, §200.

substance used in the attack was due to the absence of necessary equipment and competence, without pointing out any discriminatory attitudes of the authorities towards the applicant. However, this contrast in no way means that the specific approach could not have contributed to establishing gender discrimination in *Tërshana.* For instance, the prosecution authorities' decision to suspend the criminal investigation may have been due to the fact that they did not recognize the severity of acid attacks against women, therefore disregarding the importance of identifying the assailant or the substance used. Their continued non-response and non-notification may also have resulted from their inattention to the severe pain suffered by female victims of acid attacks. Accordingly, it was still possible for the Court to apply the specific approach to find gender discrimination in *Tërshana.*

To briefly conclude, the way in which the Court considered the systemic and specific factors in *Tërshana* was not completely different from previous cases; rather, the difference lies in the purpose of applying the approaches and the conclusion that the Court wanted to reach. With almost identical assessment, the Court could easily have found a violation of Article 14 by adding one to two paragraphs highlighting the discriminatory nature of the acid attack, and yet it chose not to do so. Therefore, it is important for the Court to assess all forms of GBV cases in a coherent and consistent manner – i.e. to apply the systemic and specific approaches in a similar way – particularly given that its judgments serve as the main guidelines for states to properly fulfil their obligations under the ECHR.[100]

b. The Obligation to Conduct an Effective Investigation Under Article 14

As already shown, all domestic cases analysed in Section 2 concerned states' positive obligation to protect female victims from repeated acts of domestic violence that are highly likely to cause tragic consequences, i.e. severe injuries or death. The inaction of the policing or prosecution authorities has stemmed from the lack of attention to the plight of female victims in series of violent acts, which, as emphasized by various international and national human rights bodies, is rooted in gender discrimination.

This context is slightly different in the *Tërshana* case. In this case, the ECtHR did not impose an obligation on the state to protect the applicant from the acid attack, as the authorities could not have had prior knowledge of the domestic violence suffered by the applicant or the occurrence of the acid attack. Instead, the Court focused on the failure to conduct a thorough, prompt and effective investigation into the attack that should have identified the substance used and the perpetrator.

In addition to the application of the systemic and specific approaches, it is worth noting that Article 14 does not only entail a positive obligation to take preventive measures against discriminatory violence but also covers a positive obligation to effectively investigate discriminatory violence and to identify and punish those

100 J. Ristik, 'Protection from Gender-Based Violence Before the European Court of Human Rights', 6 *Journal of Liberty and International Affairs* 2 (2020) 71, 83.

responsible.[101] Accordingly, the Court may find a violation of Article 14 in the lack of an effective investigation into a violent incident that was carried out in a discriminatory way. This approach can be seen, for example, in *Nachova and Others v Bulgaria*.[102] In this case, the Court found a violation of Article 14 taken in conjunction with Article 2 in the procedural aspect of the Bulgarian authorities' failure to take all possible steps to investigate whether discrimination played a role in the killing of two Roma youths, who escaped from their military duties and were shot by a Bulgarian military police officer, Major M., in the course of the arrest. The applicants, relatives of the two deceased, particularly alleged that the authorities failed to investigate whether the deaths of the two had been motivated by racial prejudice, as Major M. knew that they were Roma, having expressed the racially offensive remark 'You damn Gypsies!' towards a bystander, and having used grossly disproportionate firepower in the Roma-populated neighbourhood. In its assessment, firstly, the Court established that the positive obligation to investigate the causal link between alleged racist attitudes and the killing of the two men was not only covered under the procedural limb of Article 2 but may also arise under Article 14 'to secure to the enjoyment of the right to life without discrimination'.[103] Indeed, as noted by the Court, whether to assess the case solely under the substantive provision or require examination under both provisions was left to the Court's discretion based on the facts of each case and the nature of the allegations made.[104] However, if applying the same standard to the *Tërshana* case, the examination of Article 14 may have contributed to constructing the link between discriminatory attitudes towards women and the acid attack so that female victims could be granted the protection of their life without discrimination. Secondly, by underlining an existence of 'prejudice and hostility against Roma' in Bulgaria, the Court, by adopting the specific approach, took note of several failings of the Bulgarian authorities to conduct a thorough investigation. It noted that, inter alia, if there exists evidence demonstrating racist verbal abuse in connection with force against persons from an ethnic or other community, the authorities must – through a thorough investigation –verify any possible racist motives. Moreover, the Court considered that the fact that Major M. used grossly disproportionate force against two unarmed individuals also sufficiently required the police and prosecutors to carefully conduct the investigation, which they failed to do. If applying relevant standards to the *Tërshana* case, the fact that the applicant was subjected to domestic violence, although the authorities had not been informed beforehand, should have been sufficient to make the domestic authorities aware of investigating the acid attack in a more gender-sensitive manner.

Another example is the case of *Abdu v Bulgaria*,[105] which concerns two Sudanese nationals involved in an altercation with two Bulgarian youths. The applicant

101 See Mačkić, *Proving Discriminatory Violence*, supra fn 49, pp 66–82.

102 ECtHR, *Nachova and others v Bulgaria*, Judgment, App nos 43577/98 and 43579/98, 6 July 2005.

103 Ibid, §161.

104 Ibid.

105 ECtHR, *Abdu v Bulgaria*, Judgment, App no 26827/08, 11 March 2014.

claimed that the attackers had assaulted him for racist reasons, alleging that the attackers called him and his friend 'dirty Negros'.[106] A preliminary investigation was promptly initiated after the incident; however, neither how and by whom the fight had been started nor whether it had been racially motivated was ascertained. The public prosecutor therefore decided not to institute a criminal prosecution. In its assessment, the Court reiterated the obligation to seek a possible link between racist attitudes and the given violent act under Article 14. It took note of several failings of the authorities, including that the prosecutor's investigation focused only on who initiated the fight, not whether the fight involved racial discrimination. Moreover, by way of supporting evidence, the Court referred to various national and international reports that depicted the overall failure of the Bulgarian authorities to adequately respond to racist violence. If we again apply the relevant standards to *Tërshana*, it is not difficult to see that the prosecution authorities' treatment of GBV as having equal footing to other types of violent acts, together with their general leniency toward GBV perpetrators, may amount to discrimination.

In short, the two cases against Bulgaria demonstrate that Article 14 indeed entails a positive obligation for the state to conduct an effective, thorough investigation – in particular, to seek a potential link between the given act of violence and its discriminatory nature. Indeed, the Court has also emphasized that this obligation can be solely examined under the substantive provision (e.g. Article 2 or Article 3), and it is the Court, based on the given facts and the nature of the complaint, that decides whether to initiate an examination under Article 14. However, it is shown that the same standard of the two racial discrimination cases can be applied in *Tërshana*, despite all of them being a single incident. In doing so, the Court could move towards a more solid and consistent standard for examining GBV cases, recognizing that (1) an acid attack is a form of GBV; (2) GBV, which mainly affects women, occurs on a wider scale in Albania; and (3) the inaction of the authorities may stem from their inattention to the seriousness of GBV issues.

D. CONCLUSION

As stressed by the Committee of Ministers of the Council of Europe, gender equality is 'central to the protection of human rights'.[107] The ECtHR has also underlined that 'the advancement of gender equality is today a major goal in the member States of the Council of Europe'.[108] Paramount to this spirit is not to treat GBV on an equal footing with cases lacking discriminatory overtones.

Indeed, the Court's decision to address the discrimination aspect solely under a substantive provision makes sense insofar as it is related to the interplay between Article 14 and the substantive provision, and further depends on the facts of the

106 Ibid, §7.

107 Committee of Ministers, 'Recommendation on Preventing and Combating Sexism', CM/Rec(2019)1, 2019.

108 *Volodina*, supra fn 63, §111

case and the nature of the allegations made.[109] On the other hand, it is also crucial for the Court to examine, in particular, GBV cases in a consistent and coherent manner. In section 2, this paper identified that the Court has adopted either the systemic approach or specific approach in domestic violence cases, with a recent development that combines the two. However, concerning other forms of GBV, there are so far only two cases – *B.S. v Spain*[110] and *Sabalić v Croatia*[111]– in which the Court examined the complaints under Article 14.[112] Moreover, in light of the solid jurisprudence on domestic violence, Section 3 further explored the possibility for the Court to have examined the *Tërshana* case under Article 14 by adopting the systemic and specific approaches or resorting to the positive obligation to conduct an effective investigation arising from Article 14.

As the first case regarding an acid attack against women brought before the Court, *Tërshana v Albania* could have been a golden opportunity for the Court to establish that another form of GBV – in addition to domestic violence –constitutes gender discrimination. This paper hopes to provide insights for the Court so it can provide a more comprehensive protection of women's rights by recognizing the discriminatory nature of not only 'violence at home' but also 'violence beyond home'.

109 Mačkić, *Proving Discriminatory Violence*, supra fn 49, p 39.

110 *B.S. v Spain*, Judgment, App no 47159/08, 24 July 2012.

111 ECtHR, *Sabalić v Croatia*, Judgment, App no 50231/13, 14 January 2021.

112 The figure was taken from the Violence Against Women factsheet produced by the Press Service of the Court, updated in November 2022.

3. A DISPROPORTIONATE IMPACT REQUIRES A DIFFERENTIATED APPROACH: AN ASSESSMENT OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM'S EFFORT TO PROMOTE EQUALITY AND NON-DISCRIMINATION OF LGBTI+ PERSONS IN THE PRISONS OF THE AMERICAS

Anderson Javiel Dirocie De León[113]

A. INTRODUCTION

On 25 November 2019, the Inter-American Commission on Human Rights (IACHR/the Commission) submitted an advisory opinion request to the Inter-American Court of Human Rights (IACtHR/the Court) on 'differentiated approaches to persons deprived of liberty'. With its request, the IACHR sought an interpretation of 'the differentiated obligations that the principle of equality and non-discrimination imposes on the States in the context of deprivation of liberty, in order to address the situation of real inequality of groups that are in a special situation of

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risk'.[114] In particular, the Commission inquired about women who are pregnant, or postpartum and breastfeeding, LGBT persons, indigenous people, older persons and children living in prison with their mothers.

Although the request included specific questions for each of the different groups mentioned above, in essence, the IACHR formulated two general questions. First, whether it is possible to justify under Articles 24 and 1(1) of the American Convention on Human Rights (ACHR/the Convention) the need to adopt differentiated approaches or measures to guarantee that the specific circumstances of these groups do not affect the equality of their conditions vis-à-vis the other persons deprived of liberty. Second, it queried the specific implications of the content of those provisions for the scope of the correlative obligations of the state in this matter.

In this context, this paper presents an overview of the advisory opinion request, particularly in relation to LGBT persons. It analyses the general questions raised by the Commission and the plausible answers in the Inter-American Human Rights System (IAHRS). In particular, it elaborates on the specific questions concerning LBGT persons in prison. The paper addresses the potential of the IACtHR to develop relevant standards to address the disproportionate impact on LGBTI+ persons of the dire imprisonment conditions in the region and the lack of differentiated protection. It also shows the shortcomings of the request in terms of the lack of an intersectional approach as it engages with each of the groups. Lastly, the paper focuses on the issue of the effectiveness of a potential decision from the Court by discussing some of the challenges that could affect its impact on the situation of LGBTI+ persons in prisons in the Americas.

B. THE ADVISORY OPINION REQUEST IN CONTEXT: INTERNATIONAL STANDARDS ON DEPRIVATION OF LIBERTY AND THE SITUATION OF LGBTI+ PERSONS IN THE PRISONS OF THE AMERICAS

Understanding the importance of the IACHR's advisory opinion request and the potential decision from the IACtHR requires discussing the context in which such a request takes place. To address this context and with it the practical relevance of the request, this section contrasts the existing international standards concerning deprivation of liberty in international law, with special emphasis on those deriving from the IAHRS, and the actual situation of the prisons in the American continent. Special attention is given to LGBTI+ persons and the disproportionate impact they face when deprived of their liberty in these prisons.

114 Inter-American Commission on Human Rights (IACHR), Request for an Advisory Opinion Submitted to the Inter-American Court of Human Rights on Differentiated Approaches to Persons Deprived of Liberty, 2019, §2.

1. GUIDING PRINCIPLES ON DEPRIVATION OF LIBERTY

The ACHR expressly refers to the essential aim pursued by the imposition of sanctions restricting the right to personal liberty. Article 5(6) establishes that 'punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners'.[115] This aim is consistent with the purpose attributed to the deprivation of liberty in other international human rights instruments. For instance, the International Covenant on Civil and Political Rights provides that '[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.'[116] In the same vein, the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) provide that the purposes of imprisonment and similar measures 'can be achieved only if the period of imprisonment is used to ensure, so far as possible, the reintegration of such persons into society upon release so that they can lead a law-abiding and self-supporting life'.[117]

The IACHR has referred to Article 5(6) ACHR as a provision with 'its own scope and content, whose effective enforcement implies that the States must adopt all measures necessary to achieve these purposes'.[118] In addition, it has identified 'the reintegration into society and family life, as well as the protection of both the victims and society' as essential aims of punishments consisting of deprivation of liberty.[119] It is this understanding of the essential purpose of the deprivation of liberty that has given rise to the development of three principles within the IAHRS for the protection of human rights in the context of prisons: (i) the principle of humane treatment; (ii) the principle of the state's special position of guarantor; and (iii) the principle of compatibility between respect for the fundamental rights of persons deprived of liberty and the attainment of the aims of citizen security.[120]

The principle of humane treatment has been recognized in several international instruments.[121] In the Inter-American context, it finds its basis in Article 5(2) ACHR, which, in addition to prohibiting the subjection of persons to torture, cruel, inhuman, or degrading punishment or treatment, imposes the positive obligation to treat all persons deprived of liberty with due respect for their inherent dignity. For its part, the IACtHR has recognized that, by virtue of the aforementioned article, persons deprived of liberty have the right to 'live in prison conditions that are

115 Art 5(6), American Convention on Human Rights (ACHR), 1961.

116 Art 10(3) International Covenant on Civil and Political Rights, 1976.

117 Rule 4, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), 2015.

118 IACHR, Report on the Human Rights of Persons Deprived of Liberty in the Americas, 2011, §605.

119 IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, 2008, Preamble.

120 IACHR, Report on the Use of Pretrial Detention in the Americas, 2013, §17.

121 UNGA Res 43/1973, 9 December 1988, Principle 1; UNGA Res 45/111, 14 December 1990; IACHR, Principles and Best Practices, supra fn 7, Preamble.

compatible with [their] personal dignity'.[122] In the same vein, the Court has indicated that in accordance with Article 27(2) of the Convention this right cannot be suspended under any circumstances. In other words, this right is part of the non-derogable core and states cannot allege economic hardship, war, public danger or other public threats 'to justify imprisonment conditions that do not respect the inherent dignity of human beings'.[123]

In relation to the principle of the state's special position of guarantor, the IACtHR's jurisprudence has been consistent, holding that '[t]he State has a special role to play as guarantor of the rights of those deprived of their freedom, as the prison authorities exercise heavy control or command over the persons in their custody'.[124] This special subjection between persons deprived of liberty and the state implies enhanced responsibilities to guarantee, in accordance with the principle of humane treatment, the conditions necessary to develop a dignified life and to effectively exercise those rights that cannot be derogated or whose restriction is not a natural implication of the deprivation of liberty permissible under international law. In that sense, the Court has indicated that 'otherwise, deprivation of liberty would effectively strip the inmate of all his rights, which is unacceptable'.[125]

The third guiding principle concerns the compatibility between respect for the fundamental rights of persons deprived of liberty and the attainment of the aims of public safety. In short, this principle means that respect for and protection of the human rights of persons deprived of liberty 'is not at odds with the aims of citizen security, but is instead an essential element for the realization thereof'.[126] In the same sense, the Court has recognized that deprivation of liberty often brings, as an unavoidable consequence, the impairment of the enjoyment of other human rights in addition to the right to personal liberty, such as, for example, the restriction of the rights to privacy and to the privacy of family life. Nonetheless, it has emphasized that such restrictions must be strictly limited 'since, under international law, no restriction of a human right is justifiable in a democratic society unless necessary for the general welfare'.[127]

Considering these three principles, read together with the Inter-American *corpus juris*, it can be affirmed that a positive obligation is clearly imposed on states to take appropriate measures to ensure that the conditions of detention observe due respect

122 IACtHR, *Raxcacó Reyes v Guatemala*, Judgment (Merits, Reparations and Costs), 15 September 2005, §95; See also IACtHR, *Bulacio v Argentina*, Judgment (Merits, Reparations and Costs), 18 September 2003, §126.

123 IACtHR, *Montero-Aranguren et al (Detention Center of Catia) v Venezuela*, Judgment (Preliminary Objection, Merits, Reparations and Costs), 5 July 2006, §85.

124 IACtHR, *'Juvenile Reeducation Institute' v Paraguay*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 2 September 2004, §152; See also IACtHR, *Caesar v Trinidad and Tobago*, Judgment (Merits, Reparations and Costs), 11 March 2005, §97; IACtHR, *Tibi v Ecuador,* Judgment (Preliminary Objections, Merits, Reparations and Costs), 7 September 2004, §129.

125 *'Juvenile Reeducation Institute'* judgment, supra fn 12, §153.

126 IACHR, Report on the Use of Pretrial Detention in the Americas, supra fn 8, §17.

127 *'Juvenile Reeducation Institute'* judgment, supra fn 12, §154.

for the dignity of the person deprived of liberty. All this in view of the special relationship of subjection between the state and that person. Likewise, the deprivation of liberty cannot restrict rights beyond those strictly affected by the natural implication of the imposition of the sentence, which, as has been discussed, has as its essential purpose the reform and social readaptation of the convicted persons. On the contrary, the situation of special vulnerability of the person deprived of liberty, due to the intensity in which the state can regulate their rights and obligations, requires the latter to assume enhanced responsibilities, as well as special measures with a view to ensuring respect and protection of the effective exercise of human rights.

2. THE SITUATION IN THE PRISONS OF THE AMERICAN CONTINENT AND ITS DISPROPORTIONATE IMPACT ON LGBTI+ PERSONS

In light of the above standards, it is now appropriate to address succinctly the main challenges in respecting and guaranteeing the human rights of persons deprived of liberty in the real context of prisons in the Americas and, more broadly, its impact on LGBTI+ persons. Regarding the actual context of prisons, the IACHR itself has identified the following problems as the most serious and widespread in the region:

(a) Overcrowding and overpopulation

(b) The deficient conditions of confinement – both physical conditions and the lack of basic services

(c) The high incidence of prison violence and the lack of effective control by the authorities

(d) The use of torture in the context of criminal investigations

(e) The excessive use of force by those in charge of security at prisons

(f) The excessive use of preventive detention, which has direct repercussions on overpopulation of the prisons

(g) The lack of effective means for protecting vulnerable groups

(h) The lack of labour and educational programmes, and the lack of transparency in the mechanisms of access to these programmes

(i) Corruption and the lack of transparency in prison management[128]

Similarly, the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders has identified the following five essential issues of concern regarding prison systems in Latin America:

(a) Lack of integral policies (criminological, of human rights, penitentiary, of rehabilitation, of gender, of criminal justice)

(b) Overcrowding, originated by budget reductions and lack of adequate infrastructure

128 IACHR, Report on the Human Rights of Persons Deprived of Liberty, supra fn 6, §2.

(c) Poor quality of life in detention centers

(d) Insufficient penitentiary personnel, without adequate training

(e) Lack of labour and education programmes for imprisoned persons.[129]

In this context of structural deficiencies in the prison systems of the American region, LGBTI+ persons deprived of liberty comprise a particularly vulnerable group in the criminal justice system.[130] Incarcerated LGBTI+ individuals are particularly vulnerable, not only suffering the consequences of the prejudicial views existing in their societies more broadly, but also being subjected to human rights violations in the penitentiary centres, both by officers and other inmates, which are enabled due to their deprivation of liberty.[131] The most common forms of violence stemming from identifying or being perceived as LGBTI+ are based on precepts regarding non-conformity with the heteronormative system: women who are perceived as 'masculine' are subjected to harassment, physical abuse and 'forced feminization', while gay men or trans women are constantly subjected to sexual servitude, which amounts to a form of torture or sexual slavery. [132] In the case of trans persons, who experience a higher incidence of violence and discrimination, the situation becomes particularly harmful when they are placed in centres that do not correspond to the gender with which they identify. This action not only constitutes a clear disrespect toward their identity, but also puts them in a situation of greater risk depending on their case.[133]

Generally, prison systems are governed by the principle of separation according to the sex assigned to the person at birth, which in practice constitutes a true binary cisgender system. Consequently, intersex, trans and non-binary people face challenges when trying to be placed in spaces that respect their gender diversity. Normally these people are taken to sex-determined centres based on the genitalia they possess at the time of their arrest, without taking into consideration their self-perceived gender or their gender expression. The discrepancy between the sex-determined placement and the actual gender identity and expression of the person exposes them to a greater wave of verbal, physical and sexual aggression as part of the stigmatization suffered by LGBTI+ people in general.[134]

129 E. Carranza (ed), *Cárcel y Justicia Penal en América Latina y el Caribe*, Siglo XXI, 2009, p 29 (my translation).

130 United Nations Office on Drugs and Crime, *Handbook on Prisoners With Special Needs*, 2009, p 105, https://www.unodc.org/pdf/criminal_justice/Handbook_on_Prisoners_with_Special_Needs.pdf (last accessed 4 February 2023).

131 Association for the Prevention of Torture (APT), *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: A Monitoring Guide*, 2019, pp 40–41, https://www.apt.ch/sites/default/files/publications/apt_20181204_towards-the-effective-protection-of-lgbti-persons-deprived-of-liberty-a-monitoring-guide-final.pdf (last accessed 4 February 2023).

132 IACHR, Report on Violence Against Lesbian, Gay, Trans, Bisexual and Intersex Persons in the Americas, 2015, §148.

133 Consejo Latinoamericano de Estudiosos del Derecho Internacional y Comparado, Capítulo República Dominicana (COLADIC-RD), Escrito de observaciones relativo a la solicitud de opinión consultiva sobre enfoques diferenciados en materia de personas privadas de libertad presentada por la Comisión Interamericana de Derechos Humanos el 25 de Noviembre de 2019, 25 November 2019, §52.

134 Ibid, §53.

Similarly, due to fear of harassment, discrimination and isolation, LGBTI+ people are forced to hide their sexual orientation or gender identity (when possible), which deprives them of living and expressing their identity as they see fit; this, in turn, can have a negative impact on their future life. In this sense, the IACtHR has indicated that whoever decides to assume their self-perceived gender identity is the holder of legally protected interests connected to the right to privacy, free development of personality and sexual self-determination in accordance with their gender self-identity.[135] Consequently, under no circumstances can they be subjected to restrictions simply as a result of fear, stereotypes or social and moral prejudice lacking reasonable grounds.[136] The fact that a person cannot express their gender identity or sexual orientation without coercion or unjustified controls and without limits, other than those imposed by the rights of others and the legal order, implies a clear violation of their life project, which is a key element of the right to free development of personality and, therefore, of the right to privacy.[137] Additionally, such interference would violate the right to freedom of expression as it would limit the expression of an essential element of the person's identity.[138]

Due to the multiple problems generated by the heteronormative, cisgender and binary vision prevailing in prisons, some centres have resorted to isolation and segregation of LGBTI+ persons. Indeed, prison authorities resort to individual cells for the LGBTI+ individual's alleged protection, sometimes for weeks, months or even years. This practice of solitary confinement can cause severe mental and physical pain or suffering to the extent that it has been considered that it can amount to cruel, inhuman, or degrading treatment or punishment and even torture.[139] In some cases, it can also be the result of informed discussions between prison authorities and inmates who prefer to be in isolation rather than exposed to permanent abuses.[140] Such facts show that traditional prisons certainly do not represent a safe place for LGBTI+ persons and the few protection measures implemented in these cases can be detrimental to the rights of this group.

135 IACtHR, *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, Advisory Opinion OC-24/17, 24 November 2017, §95.

136 Ibid.

137 See IACtHR, *Artavia Murillo et al ('In Vitro Fertilization') v Costa Rica*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 28 November 2012, §143.

138 IACtHR, *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, supra fn 23,§96; See also IACtHR, *López Álvarez v Honduras*, Judgment (Merits, Reparations and Costs), 1 February 2006, §§164, 169.

139 Interim Report of the Special Rapporteur of the Human Rights Council on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, UN doc A/66/268, 5 August 2011.

140 APT, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty*, supra fn 19, p 74.

C. DIFFERENTIATED APPROACHES TO LGBTI+ PERSONS DEPRIVED OF LIBERTY

As indicated in the introduction above, the IACHR's request raises two general questions. First, whether it is possible to justify under Articles 1(1) and 24 ACHR, the need for states to adopt differentiated measures or approaches to ensure that equality is observed in the conditions of vulnerable groups in prisons vis-à-vis other inmates. In case of an affirmative answer to this question, the Commission queries the scope of these articles with respect to the obligations that states must have in providing differentiated treatment to these groups in order to guarantee the protection of the rights of these persons. The following subsections address these two issues with the aim of providing an overview of how the Inter-American framework could respond to the situation of inequality in prisons and its differentiated impact on LGBTI+ persons. First to be discussed are the state obligations deriving from the principle of equality in the context of prisons and, second, the state's obligations concerning differentiated treatment or special measures required to ensure equality of LGBTI+ persons deprived of liberty.

1. THE PRINCIPLE OF EQUALITY AND NON-DISCRIMINATION AND ITS IMPLICATIONS FOR STATE OBLIGATIONS IN THE CONTEXT OF DEPRIVATION OF LIBERTY OF VULNERABLE GROUPS

To address the question on the possibility of justifying under Articles 1(1) and 24 the adoption of differentiated approaches in favour of vulnerable groups in prisons, we must study in a broad sense the principle of equality and non-discrimination and, more specifically, the provisions that enshrine it in the ACHR. The principle of equality and non-discrimination entails the recognition of an essential idea in the international protection of human rights: that all human beings are equal. The IACtHR has referred to this notion of equality, affirming that it 'springs directly from the oneness of the human family and is linked to the essential dignity of the individual'.[141] The Court has also established that 'the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*. The juridical framework of national and international public order rests on this principle and permeates the entire legal system.'[142]

The ACHR contains two specific provisions that give practical meaning to this principle. The first is Article 1, which enshrines the obligation to respect the rights in the Convention itself without discrimination of any kind. The second provision is Article 24 on equality before the law, which establishes that all persons are equal before the law and, consequently, are entitled, without discrimination, to equal protection. It can be noted that, according to the doctrine, we are faced with what has been called a subordinate clause with respect to Article 1, and an autonomous clause with respect to Article 24. The IACtHR has referred to the distinction between these two provisions and has explained:

> The difference between the two articles lies in that the general obligation contained in Article 1(1) refers to the State's duty to respect and guarantee 'non-discrimination' in the enjoyment of the rights enshrined in the American Convention, while Article 24 protects the right to 'equal treatment before the law.' In other words, if the State discriminates upon the enforcement of conventional rights containing no separate non-discrimination clause a violation of Article 1(1) and the substantial right involved would arise. If, on the contrary, discrimination refers to unequal protection by domestic law, a violation of Article 24 would occur.[143]

It should also be noted that the principle of equality is not limited to formal equality, which defines this principle as a neutral imposition of consistent treatment. On the contrary, in its substantive or material conception, this principle involves considering the actual impact of such treatment.[144] Consequently, the principle of equality may require states to treat certain persons differently in order to overcome historical patterns of disadvantage.[145] It is these two conceptions of the principle of equality that, in its negative formulation as non-discrimination, underpin both the prohibition of direct and indirect discrimination.

In this sense, the Court has previously referred to the fact that international human rights law not only prohibits deliberately discriminatory policies and practices, but also those with a discriminatory impact on certain categories of persons[146] and that, consequently, states must not only 'abstain from taking any action that is directly or indirectly addressed, in any way, at creating situations of discrimination *de jure* or *de facto*',[147] but also 'are obliged to "take positive steps to reverse or to change discriminatory situations that exist in their societies to the detriment of a specific group of people"'.[148]

In effect, the jurisprudence of the Court acknowledges the specific situation of certain vulnerable groups and, consequently, the particular protection that the state must adopt in their favour. For instance, with regards to children, it has emphasized that not only do they have the same rights as all human beings (adults or otherwise), but they also have 'special rights derived from their condition, and

141 IACtHR, *Proposed Amendments to the Naturalization Provision of The Constitution of Costa Rica*, Advisory Opinion OC-4/84, 19 January 1984, §55.

142 IACtHR, *Atala Riffo and Daughters v Chile*, Judgment (Merits, Reparations and Costs), 24 February 2012, §79.

143 IACtHR, *Apitz Barbera et al ('First Court of Administrative Disputes') v Venezuela*, Judgment (Preliminary Objection, Merits, Reparations and Costs), 5 August 2008, §209.

144 D. Moeckli, 'Equality and Non-Discrimination', in D. Moeckli, S. Shah and S. Sivakumaran (eds), *International Human Rights Law*, Oxford University Press, 2010, pp 191–192.

145 Ibid, p 189.

146 IACtHR, *Nadege Dorzema et al v Dominican Republic*, Judgment (Merits, Reparations and Costs), 24 October 2012, §234.

147 Ibid, §236.

148 Ibid.

these are accompanied by specific duties of the family, society, and the State'.[149] Similarly, based on the actual situation of foreigners subject to criminal proceedings, the Court has highlighted the importance of providing a translator to those who do not know the language in which the proceedings are conducted, as well as, in the cases of foreigners, the right to be informed in a timely manner that they can count on consular assistance.[150] In relation to indigenous peoples, the Court adopted a similar approach in determining that 'it is essential for the States to grant effective protection that takes into account their specificities, their economic and social characteristics, as well as their situation of special vulnerability, their customary law, values, and customs'.[151]

With regards to women, the IACtHR has referred to the need to adopt positive measures to guarantee effective and equal access to justice in the case of rape as a manifestation of discrimination against women.[152] In the particular context of prisons, the Court has indicated, for example, 'that female detainees must be supervised and checked by female officer and pregnant and nursing women must be offered special conditions during their detention'.[153] In the same sense, in an order for provisional measure, the Court has emphasized 'the State's duty to offer special attention to pregnant and nursing women during their detention. Moreover, it is the duty of the State to protect women against all forms of discrimination and violence, even more when they are held in custody of the State, which is why they must be separated from men and be supervised and checked by female officer'.[154]

Another relevant example can be noted in the context of juvenile detention. In this connection, the Court has considered that, for example, in addition to the state's obligations deriving from the right to life of all persons, it finds an additional obligation in Article 19 ACHR: 'On the one hand, it must be all the more diligent and responsible in its role as guarantor and must take special measures based on the principles of the best interests of the child. On the other hand, to protect a child's life, the State must be particularly attentive to that child's living conditions while deprived of his or her liberty, as the child's detention or imprisonment does not deny the child his or her right to life or restrict that right.'[155]

149 IACtHR, *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02, 28 August 2002, §54.

150 IACtHR, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law,* Advisory Opinion OC-16/19, 1 October 1999, §120.

151 IACtHR, *Yakye Axa Indigenous Community v Paraguay*, Judgment (Merits, Repartions and Costs), 17 June 2005, §63.

152 IACtHR, *V.R.P., V.P.C. et al. v Nicaragua*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 8 March 2018, §293.

153 IACtHR, *Miguel Castro-Castro Prison v Peru*, Judgment (Merits, Reparations and Costs), 25 November 2006, §303.

154 IACtHR, Matter of the Andean Region Penitentiary Center With Regard to Venezuela, Precautionary Measures, Order, 6 September 2012, §14.

155 *'Juvenile Reeducation Institute'* judgment, supra fn 12, §160.

The above decisions of the Court show that pursuant to Articles 1 and 24 ACHR, differentiated approaches or special measures are not only permitted, but states have an obligation to adopt them in order to guarantee the equality of groups subjected to situations of structural inequality. In turn, this jurisprudence is consistent with state practices in the region. In this sense, Article 342 of the Code of Criminal Procedure of the Dominican Republic, as well as the Single Regulatory Decree of the Administrative Sector of the Interior of the Republic of Colombia, are two key examples to consider in this respect. For instance, Article 342 of the Dominican Code of Criminal Procedure adopts a differentiated approach regarding the special conditions for serving the sentence in favour of persons over 70 years of age, persons with a terminal illness or supervening dementia, pregnant or nursing mothers and persons addicted to drugs or alcohol. In the case of the Colombian Single Regulatory Decree, state authorities must adopt measures that recognize the particularities of the population that due to different grounds are in circumstances of vulnerability and required differentiated protection and affirmative-action policies.[156]

In light of the above, in the framework of the IACHR's advisory opinion request, it will be possible for the Court to conclude, without any doubt, that in matters of deprivation of liberty and pursuant to the principle of equality and non-discrimination, special measures or differentiated approaches are valid, admissible and justifiable in accordance with the ACHR. In this sense, the following subsection discusses the scope and content of this obligation vis-à-vis LGBTI+ persons deprived of liberty.

2. EQUALITY AND NON-DISCRIMINATION OF LGBTI+ PERSONS IN THE PRISONS: STATE OBLIGATIONS AND SPECIAL MEASURES

LGBTI+ persons have historically been discriminated against and, as such, face disproportionate human rights violations in relation to other persons who do not belong to a vulnerable group, both inside and outside of prisons. Both the Court and the Commission have identified the special situation of vulnerability of this group given the frequent human rights violations they experience in American societies, and which are exacerbated in the context of prisons.[157] In these circumstances, principles such as non-discrimination, equality before the law and the right to humane treatment are of particular importance for LGBTI+ persons. Considering the principle of equality and non-discrimination, it is imperative for states to take positive action to guarantee their rights in accordance with the framework of equal treatment in the terms of the international *corpus juris*. In this sense, the IACtHR has indicated that 'States are obliged to adopt positive measures to reverse or to change discrimi-

156 Art 2.2.2.1.3.4, Presidencia de la República de Colombia, Decreto1066 de 2015, 26 de mayo de 2015 (my translation).

157 See IACtHR, *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, supra fn 23; IACtHR, *Azul Rojas Marín v Peru*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 12 March 2020; IACHR, Report on Violence Against Lesbian, Gay, Trans, Bisexual and Intersex Persons, supra fn 20, §32; IACtHR, *Vicky Hernández et al v Honduras*, Judgment (Merits, Reparations and Costs), 26 March 2021.

natory situations existing within their society that prejudice a specific group of persons. This entails the special obligation of protection that the State must exercise with regard to the actions and practices of third parties, who with its acquiescence or tolerance, create, maintain or facilitate discriminatory situations.'[158]

It is in this context that the Commission, in its request for an advisory opinion, puts forward the following questions to the Court regarding the obligations of states to ensure adequate conditions of detention for LGBTI+ persons:

1. How should States take into account the gender identity with which a person identifies himself or herself when determining the unit where they should be placed?
2. What specific obligations do States have to prevent any act of violence against LGBT persons deprived of liberty that do not involve segregation from the rest of the prison population?
3. What are the special obligations that States have with regard to the particular medical needs of transgender persons deprived of liberty and, in particular, if applicable, with regard to those who wish to begin or continue their transition process?
4. What special measures should States adopt to ensure the right to intimate visits of LGBT persons?
5. What particular obligations have States with regard to recording different types of violence against LGBT persons deprived of liberty?[159]

This paper does not propose to supplant the Court in its exercise of providing a definitive answer to these questions. On the contrary, the objective of this subsection is to provide a glimpse of some of the possible answers to these questions based on the sources of law relevant to the Court. Thus, in order to address the differentiated approaches imposed by the principle of equality in the case of LGBTI+ persons deprived of liberty, a series of specific obligations and special measures that states must observe to guarantee the rights of such persons in prisons are identified.

a. Gender Identity, Gender Expression and Intimate Visits

With respect to the questions that are particularly related to gender identity, gender expression and intimate visits, three aspects of special importance are identified regarding the state's obligations towards LGBTI+ persons deprived of liberty. First, states must adopt differentiated approaches centred on the principle of self-identification and respect for gender identity and expression. It is the obligation of states to provide adequate medical care to LGBTI+ persons, including for the specific needs of transgender persons. Similarly, states must guarantee intimate visits in conditions that respect personal and family privacy, sexual and reproductive rights, as well as the free development of personality.

With respect to the principle of self-identification, the IACtHR has established that sexual orientation, gender identity and gender expression are protected categories under Article 1(1) ACHR.[160] In this regard, it has reiterated on several occasions that discrimination based on any of these protected categories constitutes a violation of the Convention.[161] In the case of persons deprived of liberty, the question arises as to how the gender identity with which the person identifies should be considered when determining the penitentiary unit to which they should be admitted. The answer is in the principle of self-identification as assumed by both the IACHR and the IACtHR.[162] In other words, in order to respect a person's gender identity, it is essential to consider how that person self-identifies.

In this vein, the Court has indicated that gender identity is linked to freedom and the possibility of every human being to self-determine and freely choose what gives meaning to his or her existence.[163] This means that the possibility to express someone's gender must also be understood as a protected component of a person's identity. Therefore, non-recognition of gender identity may constitute censorship of those gender expressions that do not correspond to cis and heteronormative standards.[164] Consequently, the principle of self-determination of the individual should serve as the basis for determining which facilities they should be placed in. In practical terms, the observance of this principle implies that the gender identity of persons held in detention centres should be recognized and that this recognition should not entail abusive and pathologizing requirements such as surgical operations.[165] By the same token, the failure to consider the gender identity of a person when placing them in a penitentiary centre amounts to discriminatory treatment, which in turn constitutes a violation of the ACHR.[166]

It should also be noted that in states that do not allow changes to gender markers in official documents, it is even more difficult to place the person in a centre corresponding to the gender with which they identify. In this situation, states are obliged to respect and guarantee to all persons the possibility of registering or adapting the components of name, gender and image in their official identity documents. This would make it easier for people to be recognized in detention centres according to their gender identity. The Court itself has previously referred to the right of every person to define their gender identity and to have it recorded in official documents.[167]

158 IACtHR, *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, supra fn 23, §65.

159 IACHR, Request for an Advisory Opinion, supra fn 2, §2.

160 IACtHR, *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, supra fn 23, §68.

161 *Atala Riffo and Daughters* judgment, supra fn 30, §105; IACtHR, *Flor Freire v Ecuador*, Judgment (Preliminary Objection, Merits, Reparations and Costs), 31 August 2016, §118.

162 IACtHR, *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, supra fn 23, §93; La Comisión Interamericana de Derechos Humanos (CIDH), *Violencia contra personas LGBTI*, 2015, http://www.oas.org/es/cidh/informes/pdfs/ViolenciaPersonasLGBTI.pdf (last accessed 4 February 2023); IACHR, Report on Violence Against Lesbian, Gay, Trans, Bisexual and Intersex Persons, supra fn 20, §11.

163 IACtHR, *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, supra fn 23, §93.

164 Ibid, §97.

165 United Nations, *Living Free & Equal: What States are Doing to Tackle Violence and Discrimination Against Lesbian, Gay, Bisexual, Transgender and Intersex People*, 2016, p 44, https://www.ohchr.org/sites/default/files/Documents/Publications/LivingFreeAndEqual.pdf (last accessed 4 February 2023).

166 COLADIC-RD, Escrito de observaciones, supra fn 21, §65.

167 IACtHR, *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, supra fn 23, §115.

Concerning the state's obligation to provide adequate medical care for LGBTI+ persons, this is closely related to the right to humane treatment under Article 5 ACHR.[168] Article 5 includes within its broad spectrum the sphere of the right to health[169] as it guarantees the right to physical, mental and moral integrity which in turn implies guaranteeing access to adequate medical care.[170] Consequently, states must protect the physical, mental and moral integrity of persons deprived of liberty by guaranteeing them a regular medical checkup.[171] Similarly, ensuring effective medical assistance for persons deprived of liberty safeguards the right to health, contained within the scope of the right to life and the right to humane treatment enshrined in the Convention.

Other instruments of the IAHRS expressly recognize the right to health. For instance, the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights (Protocol of San Salvador) in its Article 10 or the American Declaration of Human Rights in its Article XI. Precisely, in the Protocol of San Salvador, as in the ACHR, there are provisions indicating that the rights contained therein, such as the right to health, must be guaranteed without any discrimination whatsoever. [172] Therefore, in the case of LGBTI+ persons deprived of liberty, their right to health must be guaranteed and free of charge, since the provision of free medical services to persons deprived of liberty is the responsibility of the state.[173] Consequently, every prison must have a healthcare service that can evaluate and protect the physical and mental health of inmates, particularly those who have special health needs, as indeed many trans persons may have.[174]

In the case of transgender persons deprived of liberty, medical attention has a special relevance. Discrimination that affects LGBTI+ persons places them in a cycle of exclusion that often includes lack of access to services and social benefits inside and outside prisons.[175] Transgender persons not only have the right to be guaranteed adequate medical attention by the state, but this medical attention should also include any special need such as gender-affirming treatment. This is supported in the Yogyakarta Principles Plus 10 where it is indicated that states

168 IACHR, Report on the Human Rights of Persons Deprived of Liberty, supra fn 6, §13.

169 IACtHR, *I.V. v Bolivia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 30 November 2016, §154.

170 IACHR, Application to the Inter-American Court of Human Rights in the case of Pedro Miguel Vera Vera Et Al Against the Republic of Ecuador (Case No. 11.535), 24 February 2010, §42.

171 *Montero-Aranguren et al* judgment, supra fn 11, §102.

172 Art 3, Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 'Protocol of San Salvador'.

173 Rule 24, the Nelson Mandela Rules, supra fn 5.

174 Rule 25, ibid.

175 IACHR, Preliminary Report on Poverty, Extreme Poverty, and Human Rights in the Americas, 2016, §366.

have to provide access to and continuation of gender-affirming treatment.[176] In this regard, the failure to consider the human rights situation and special health needs of trans persons deprived of their liberty may result in cruel, inhuman and degrading treatment.[177]

The third aspect concerns the state's obligations with respect to intimate visits. The right to receive intimate visits in detention centres must be guaranteed to all persons without discrimination. Undoubtedly, these visits are part of the private sphere of the person, and in that sense, denying an intimate visit based on sexual orientation or gender identity is a clear violation of the right to privacy and family life.[178] In addition, such a restriction, depending on the particularities, could also raise a case for a violation of Article 11(2) ACHR, which deals with the protection of honour and dignity. The specific situation of LGBT+ persons deprived of liberty implies that states must not only guarantee intimate visits but must do so in a manner that does not force the inmate or the visitor to reveal private information such as their orientation or any aspect of their identity beyond what is strictly necessary to safeguard security in the prison. The information handled in this regard shall be safeguarded in such a way that neither the inmate nor their intimate visitor is exposed on the premises to other inmates, prison staff or other visitors. The intimate visit to the LGBTI+ person may not expose them to greater risks, nor may it involve revealing private information about themselves or their visit that may make them susceptible to further stigmatization.

b. Violence Against LGBTI+ Persons

With respect to the questions concerning violence committed against LGBTI+ persons deprived of liberty, it is necessary to note some special obligations and measures related to the prevention, investigation and punishment of violence against LGBTI+ persons. In the context of prevention, states must ensure that prisons have supervision mechanisms that allow security agents to quickly and effectively identify any type of aggression against vulnerable persons within the centre. This supervision should include a prevention scheme in which officers are fully aware of the special risk situation of LGBTI+ persons and the constant aggressions to which they may be subjected as a result of social stigmas. Such a prevention scheme requires providing training to security personnel on issues such as equality and non-discrimination, sexual orientation, gender identity and gender expression.

Another key element to support the prevention of future cases is adopting a special registry of complaints related to violence against LGBTI+ persons deprived of liberty. Such information could contribute to reducing the invisibility of violence against

176 Principle 9(H), The Yogyakarta Principles Plus 10: 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, 10 November 2017, https://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf (last accessed February 2023).

177 UN, *Living Free & Equal*, supra fn 53, p 44.

178 See ECtHR, *Kungurov v Russia*, Judgment (Merits and Just Satisfaction), 18 February 2020, §§16–20.

these persons and would make it possible to address this problem with public policies and adequate resources. Similarly, states must ensure that adequate procedures are in place to ensure the efficient reception and processing of complaints so that the relevant authorities can act upon them. This should be a simple procedure, with as little bureaucracy as possible in order to efficiently meet the needs of the victim.

In turn, regarding the investigation and administration of justice for cases of violence against LGBTI+ persons in prisons, states must observe Inter-American standards of due diligence. The IACtHR has already referred to protocols of this nature in cases of violence against LGBTI+ persons. In addition, due to the particular gravity of sexual violence, which could also be classified as sexual torture under the relatively broader definition of torture of the Inter-American Convention to Prevent and Punish Torture, the enhanced duty to investigate implies the adoption of special measures that allow for expeditious, impartial and effective investigations. Similarly, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women imposes enhanced due diligence obligations upon states in cases relating to violence against lesbian, bisexual and trans women.[179]

To that end, states must ensure that situations of violence are reported without delay to a judicial or other competent authority that is independent of the authority responsible for the detention and that has the powers and means to conduct such an investigation. States should also implement, *mutatis mutandis*, the relevant standards of the Istanbul Protocol[180] and the Minnesota Protocol[181] that may be applicable to investigations of sexual violence in prisons. Although these two protocols constitute soft-law instruments, the Inter-American Court has previously resorted to them in its decisions as a guide to somehow operationalize the obligations derived from the ACHR and other Inter-American instruments.[182]

States not only have the obligation to investigate and punish but also offer victims reparations with the aim of transforming discriminatory patterns. Likewise, states must guarantee through their domestic law that the real conditions faced by LGBTI+ people in prisons are considered by domestic courts when imposing a sentence so that it does not disproportionately affect the person beyond what is strictly necessary to achieve its essential purpose. A concrete example that can be cited as good practice is a case in Argentina where a judge recognized the special vulnerability of a transgender woman and placed her under house arrest after she had originally been detained in a men's prison where she was subjected to insults, threats and beatings by prison guards.[183]

179 See *Vicky Hernández et al* judgment, supra fn 45, §§135–136.

180 Office of the UN High Commissioner for Human Rights (OHCHR), Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('Istanbul Protocol'), 9 August 1999.

181 OHCHR, The Minnesota Protocol on the Investigation of Potentially Unlawful Death, 2016, 2017.

182 See IACtHR, *Vargas Areco v Paraguay*, Judgment (Merits, Reparations and Costs), 26 September 2006, §§93–136; IACtHR, *'Street Children' (Villagrán Morales and Others) v Guatemala*, Sentence Enforcement Supervision, Resolution, 27 January 2009, §23.

183 APT, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty*, supra fn 19, p 79.

These special measures and differentiated approaches are not exhaustive but rather illustrative of the multiple avenues that could be pursued by states to comply with their international obligations regarding the principle of equality and non-discrimination in the context of the deprivation of liberty of LGBTI+ persons.

D. AN ADVISORY OPINION REQUEST ON LGBTI+ PERSONS DEPRIVED OF LIBERTY: SHORTCOMINGS AND LIMITATIONS

The Commission's resort to the advisory jurisdiction of the IACtHR in this matter does not come without its shortcomings, both in general terms with respect to the limitations resulting from the advisory function of the Court and more specifically in terms of the formulation of this specific request. In this regard, the following subsections discuss two aspects of particular relevance: first, the need for an intersectional approach neglected in the formulation of the request and, second, some of the challenges that would be faced by effective compliance with an eventual decision of the Court.

1. THE NEED FOR AN INTERSECTIONAL APPROACH

In addition to the already discussed state obligations deriving from the principle of equality and non-discrimination with respect to LGBTI+ persons deprived of liberty, the differentiated approaches or special measures to be adopted in this regard must necessarily have an intersectional approach. This intersectional approach to the issues raised with respect to each of the groups referred to in the Commission's request is of utmost importance, not only for the Court's decision but also for the states applying the standards and adopting the measures established in that decision. However, the IACHR's request itself seems to neglect this aspect by engaging with each of the groups separately and consequently losing sight of the intersectional discrimination to which LGBTI+ persons who also belong to other vulnerable groups are subjected to.

Intersectional discrimination means that 'some victims of discrimination are discriminated against because of several traits associated with negative stereotypes deeply rooted in society, which, on the one hand, amplifies the severity of the injury to their dignity and, on the other hand, somehow transforms the type of injury'.[184] This discrimination is not simply additive, that is, it involves more than discrimination on two or more grounds. It is, on the contrary, discrimination resulting from different grounds that cannot be separated from each other and due to their connection create unique forms of disadvantage.[185]

In order to address this type of discrimination, an intersectional approach plays a key role by making it possible to recognize the heterogeneity of different his-

184 F. R. Martínez, 'La discriminación múltiple, una realidad antigua, un concepto nuevo', *Revista Española de Derecho Constitucional* 84 (2008) 254 (my translation).

185 G. de Beco, 'Protecting the Invisible: An Intersectional Approach to International Human Rights Law', 17 *Human Rights Law Review* 4 (2017) 634.

torically marginalized persons and the risk factors deriving from their particular situation as members of vulnerable groups. This approach also allows aspects of the discrimination suffered by these people that would otherwise be invisible to be addressed, which is essential for combating discrimination and promoting conditions of equality in the context of deprivation of liberty. In other words, only with this approach can standards for special measures truly encompass the different experiences of people belonging to more than one group at special risk in prisons.

While the Commission does not apply this approach in the formulation of the request, nor refers to it in its subsequent submissions, both the Court and the states can still adopt this intersectional approach. A clear example of how this approach was neglected in the formulation of the request can be noted in the questions regarding special measures for children living with their mothers in prisons. In this case, an intersectional approach would imply reframing the issue to focus any special measure on the protection of the family bond between the person who plays the role of main caregiver of the child regardless of their gender or reproductive capabilities. Instead, the way in which the question is formulated seems to highlight the importance of protecting an implicit child-mother bond which in fact entails an eminently patriarchal perspective.

In practical terms, with respect to LGBTI+ persons deprived of liberty, intersectionality within the differentiated approaches or special measures regarding persons deprived of liberty will serve as the framework for the recognition of the special needs of those LGBTI+ persons who are themselves members of other groups referred to in the request such as indigenous people, pregnant persons or elderly persons. Therefore, it would ensure that these persons are not excluded from other special measures as a result of belonging to more than one group. The cross-cutting nature of this approach will allow for a much more comprehensive approach to the content and scope of the obligations of states in terms of equality and non-discrimination in the context of deprivation of liberty pursuant to Articles 1(1) and 24 of the Convention.

2. CHALLENGES TO THE EFFECTIVENESS OF THE DECISION

There are multiple challenges that come to mind with respect to how a decision from the Court can effectively impact the situation of LGBTI+ persons in prisons. These range from common arguments reflecting the de-prioritization of human rights in prisons such as the often-cited lack of resources to improve the conditions in the correctional facilities, to the lack of political will and social prejudice when it comes to LGBTI+ persons, including those in prison. However, addressing such challenges in detail is not the objective of this subsection. Instead, it discusses the issue of effectiveness from a broader perspective by focusing on the advisory function of the Court and its limitations.

The issue of compliance (or lack thereof) with the contentious decisions of the IACtHR has always been a topic of concern in the IAHRS. Regarding advisory opinions, the issue is even more complicated as it revolves around the question of whether these decisions are binding.[186] Undoubtedly, the debate on the legal effect of advisory opinions is a wide-ranging issue in international human rights law to the point that the Court's own position has evolved over time. In its firsts advisory opinions, the Court affirmed both that advisory opinions 'lack the same binding force that attaches to decisions in contentious cases'[187] and that its advisory jurisdiction fulfills a 'consultative function'.[188] Years later, the Court revised its position and held that these decisions have 'undeniable legal effects'[189] without providing much detail on these effects.

Regardless of the position that this author adheres to, what is undeniable is that the discussion reveals a lack of clarity that widens the margin of discretion of states in interpreting the effects of these decisions. In turn, this implies that progressive advisory opinions on issues of high social and political polarization, such as the rights of LGBTI+ persons, end up being ignored by states where advanced criteria are often more necessary. A clear example of this is Advisory Opinion OC-24. Although this includes innovative standards in favour of same-sex couples and respect for gender identity, its reception is far from being generalized among the states subject to the jurisdiction of the Court.

Another practical implication of the lack of clarity as to the legal effects of advisory opinions is that the value attached to the standards developed therein will ultimately be subject to the determination of state authorities with special emphasis on domestic courts. This means that a victory in favour of the human rights of LGBTI+ persons deprived of their liberty within the Court would be no more than the starting point for multiple battles at the domestic level in each of the states with constant risks of less favourable outcomes.

Lastly, it should be noted that as the Court increases its advisory jurisprudence, it is also increasing the fear of instrumentalizing this advisory function to address complex political issues or resolve matters that could very well be encompassed in a contentious case.[190] It would be far-fetched to conclude that this advisory request falls into one of these two scenarios. However, this issue is relevant to the extent that it essentially underscores a criticism that at the very least attempts to

186 See Separate Opinion of Judge Eduardo Vio Grossi in IACtHR, *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, supra fn 23, p 88; J. C. Hitters, '¿Son vinculantes los pronunciamientos de la Comisión y de la Corte Interamericana de Derechos Humanos?', 10 *Revista Iberoamericana de Derecho Procesal Constituciona* 19 (2008) 149; H. F. Ledesma, *El Sistema Interamericano de Protección de los Derechos Humanos: Aspectos Institucionales y procesales*, Instituto Interamericano de Derechos Humanos, 2004, p 990.

187 IACtHR, *'Other Treaties' Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, Advisory Opinion OC-1/82, 24 September 1982, §51.

188 IACtHR, *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion OC-3/83, 8 September 1983, §32.

189 IACtHR, *Reports of the Inter-American Commission on Human Rights (Art. 51 of the American Convention on Human Rights)*, Advisory Opinion OC-15/97, 1 November 1997, §26.

190 M.-C. Fuchs and M. B. López, '¿Quo vadis, opiniones consultivas?', *Aportes: Revista de la Fundación para el Debido Proceso* 23 (August 2021) 34, https://www.dplf.org/sites/default/files/aportes_23_esp_0.pdf (last accessed February 2023).

undermine the legitimacy of the Court's advisory jurisdiction. In any case, it should be clearly stated that these challenges in no way mean that the advisory opinion request or the eventual decision of the Court could not constitute a milestone in favor of the rights of these vulnerable groups. On the contrary, it has already served as an opportunity for states, international organizations, academic institutions and members of civil societies to discuss the issue and provide their views to the Court.

E. CONCLUSIONS

Correctional facilities in the Americas are challenging spaces for the protection and exercise of human rights in general. In addition to the already dire detention conditions, the specific circumstances of each of the groups referred in the IACHR's request leave no doubt regarding the need for the states to adopt differentiated approaches and special measures to ensure that such circumstances do not affect the equality of conditions of these persons vis-à-vis other persons deprived of liberty. This conclusion would be the only course of action through which states could ensure their full compliance with their obligations under Articles 24 and 1(1) ACHR.

Regarding LGBTI+ persons deprived of their liberty, an interpretation of the Inter-American *corpus juris* and other relevant sources pursuant to the principle of equality and non-discrimination would lead the Court to identify special measures in favour of this group. Similarly, when dealing with the scope of the obligations, the legal framework makes it plausible for the Court to address the differentiated approaches regarding gender identity, intimate visits and the prevention, investigation and punishment of violence against LGBTI+ persons in prison.

Nonetheless, this effort to improve respect for human rights of vulnerable groups in prisons by both the Commission with its request and eventually the Court with its decision, could still be hampered by the inherent limitations of the Court's advisory or non-contentious jurisdiction. Not only will there be criticism of the legitimacy of any forward-thinking measures or standard identified by the Court, but it will also face questioning as per the binding effect of advisory decisions. Be that as it may, the direct or indirect value of an advisory opinion on this matter cannot be undermined, especially as it has the potential of shedding light on a long-neglected issue such as the disproportionate effect of detention conditions on those most vulnerable.

Lastly, the long path towards the full realization of effective conditions of equality and non-discrimination in the Americas must be traversed with an intersectional approach that, in a cross-cutting manner, allows the adoption of relevant measures to address discrimination and overcome the stigma and prejudices that are widely rooted in our societies. The Court has a unique opportunity to highlight the important role of this approach to ensure that states adequately consider the reality of these groups when discharging their obligations under the Convention.

4. GAYS' ANATOMY: DISSECTING DISCRIMINATION AGAINST LGBTIQ IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Giulio Fedele[191]

A. INTRODUCTION: EQUALITY IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Since Aristotle and Plato, there is a common understanding that equality embodies a basic principle whereby 'likes should be treated alike'.[192] Some think that this proposition is in fact so self-evident and logical that if we look closer we will find the concept to be 'empty'.[193] Nevertheless, the principle encompasses several meanings, this being only one of them.[194]

Equality represents the principle underlying most/all human rights instruments. Amongst them, the European Convention on Human Rights (ECHR/the Convention) plays a key role in the protection of rights in the regional context of Europe. Although the Convention does not include any explicit provision establishing a 'right to equality', this fundamental value is protected by way of the principle of non-discrimination, which is enshrined in Article 14: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

Since Article 14 is of an ancillary nature, meaning that it applies in conjunction with other Convention rights, a more general provision against discrimination is also included in Article 1 of Protocol No. 12, adopted in 2000. The provision ex-

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192 Reference to equality in Plato can be found in *Gorgias*, 507E–508A; *Laws*, VI.757; *Phaedo*, 74; *The Republic*, VIII.558. For Aristotle see *Ethica Nicomachea*, V3.1131a–1131b; *Metaphysica*, I.5.1055b–1056b.

193 I am referring to the seminal article, P. Westen, 'The Empty Idea of Equality', 95 *Harvard Law Review* (1983).

194 On the various significances of the concept of equality see S. Fredman, *Discrimination Law*, Oxford University Press, 2011, especially pp 1–33.

pands the scope of application of the principle from the Convention rights to 'any right set forth by law'. Thus, in contrast to Article 14, Article 1 of Protocol No. 12 has an autonomous standing, in the sense that it can be invoked before domestic authorities to claim equal treatment beyond the scope of the rights guaranteed by the ECHR.

Article 14 (and Protocol No. 12, albeit more limitedly, since it has been ratified by less than half of the contracting parties[195]) represents a fundamental provision for the protection of sexual minorities. It ensures, in principle, that LGBTIQ persons are not discriminated against in the enjoyment of Convention rights because of their sexual or gender orientation. However, in practice, LGBTIQ persons suffer major disadvantages and prejudices compared to the heterosexual majority, both in their national legal systems and in the system of the Convention.

This chapter aims to break down the equal treatment of sexual minorities in the system of the ECHR, dissecting the implementation of the non-discrimination principle in regard to LGBTIQ rights. In other words, it aims to analyse whether heterosexuals and LGBTIQ persons are *likes that are treated alike* under the Convention. In order to achieve this, it proceeds as follows: firstly, it will explore whether sexual minorities and heterosexuals currently enjoy equal treatment under the ECHR in terms of specific substantive rights such as Article 12 and Article 8; it will then focus on the application of Article 14 in principle and in practice by the European Court of Human Rights (ECtHR/the Court); to conclude, it will address existing bias in the logic of the Court and then examine appropriate solutions to improve the protection of LGBTIQ persons in the Convention from the standpoint of equality.

At the outset, it should be underlined that the term 'sexual minorities' comprises the LGBTIQ community at large, including, inter alia, homosexual (lesbian, gay), bisexual, transgender, intersex and queer persons. However, for practical purposes, this paper concentrates on discrimination against homosexuals – the most mainstreamed sexual minority in the case law of the ECtHR, especially in terms of the equal treatment of same-sex couples – providing a useful case study to understand the implementation of non-discrimination law in the system of the Convention.

B. EQUAL TREATMENT OF HOMOSEXUALS AND HETEROSEXUALS IN THE ENJOYMENT OF CONVENTION RIGHTS

To establish whether the relationship between homosexuals and heterosexuals is one where 'likes are [effectively] treated alike', it is first necessary to elaborate the position each group enjoys under the Convention, particularly in light of the specific rights they have been recognized to possess. Thus, this section will focus on the application of specific Convention rights to the situation of homosexual couples, without considering the impact of Article 14, which will be analysed in subsequent sections. The aim is to establish whether, in terms of protection, homosexuals and heterosexuals are practically and substantively equal under the Convention, and to then consider whether Article 14 could be applied to remedy the gap between the two groups. After a brief analysis, it will be apparent at first glance that the position of the homosexual group is significantly underprivileged compared to that of the heterosexual group.

195 Protocol No. 12 entered into force in 2005. However, its impact is currently limited, as only 20 states have ratified it. The analysis will thus focus only on the case law regarding Article 14.

1. THE RIGHT TO MARRY

As a first point, homosexuals do not currently enjoy the right to marry enshrined in Article 12 of the ECHR. As per the Court's case-law guide on LGBT rights,[196] first issued in September 2021, '[u]nder the Court's case-law as it currently stands, Article 12 applies to ... same-sex couples wishing to marry or ... already married. However, ... a total ban on [same-sex marriage] is to date Convention compliant'.[197]

The history of Article 12 is well known. Traditionally, it was interpreted as a fixed reference to the union of a man and a woman.[198] According to the ECtHR, States Parties to the ECHR were thus allowed to prevent same-sex couples from getting married without infringing Convention rights. This jurisprudence seemed to change in the pivotal case of *Schalk and Kopf v Austria*, where the ECtHR considered that changes in society made it possible to 'no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex'.[199] The case thus encouraged the belief that same-sex couples would eventually be included in the scope of application of Article 12. Notwithstanding this important judgment, in the course of time the Court repeatedly failed to find a violation of Article 12 in favour of a same-sex couples.[200] Some commentators have advanced the idea that, even after *Schalk and Kopf*, the ECtHR considers Article 12 to be effectively inapplicable to the case of homosexual unions.[201] These scholars rely on a number of factors – namely the special circumstances surrounding *Schalk and Kopf*, the length of time without a positive outcome on same-sex marriage and the existence of conspicuous inconsis-

196 The guides on the case law of the European Court of Human Rights (ECtHR/the Court) are prepared by the Registry and are non-binding for the Court. Nevertheless, they contain relevant information about the fundamental judgments and decisions delivered by the Court.

197 ECtHR, Guide on the Case-Law of the European Convention on Human Rights: Rights of LGBTI Persons, updated 31 August 2022, §74, https://echr.coe.int/Documents/Guide_LGBTI_rights_ENG.pdf (last accessed February 2023).

198 See, e.g., ECtHR, *Rees v United Kingdom*, Judgment, App no 9532/81, 17 October 1986.

199 ECtHR, *Schalk and Kopf v Austria*, Judgment, App no 30141/04, 24 June 2010, §61.

200 The applicants in *Schalk and Kopf* argued that the right to marry could be also inferred from Art 8 (respect for family life) as applied together with the principle of non-discrimination. However, the Court considered that '[h]aving regard to the conclusion ... that Article 12 does not impose an obligation on Contracting States to grant same-sex couples access to marriage, Article 14 taken in conjunction with Article 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either'. Ibid, §101.

201 P. Johnson and S. Falcetta, 'Same-Sex Marriage and Article 12 of the European Convention on Human Rights', in C. Ashford and A. Maine (eds), *Research Handbook on Gender, Sexuality and the Law*, Edward Elgar, 2020, pp 91–103.

tencies in the Court's case law – to argue that at present it is virtually impossible for homosexuals to stake a valid claim under Article 12.

On the other hand, transgender persons can marry, as long as it is to a person of the opposite biological sex. States parties are allowed, however, to prevent transgender persons from marrying someone of the same biological sex, since forbidding gay marriage is still conventionally possible. In *Hämäläinen v Finland*, for example, a transgender person (who transitioned from male to female) was forced to downgrade her marriage with her wife to a civil union following the completion of the transitioning process, without the Court acknowledging any violation of Article 12.[202]

Homosexual couples do not enjoy married status even if they were lawfully married abroad. In *Orlandi v Italy*, the ECtHR held that it was legitimate to downgrade the marriage contracted by the applicants in the Netherlands to a civil union once the couple came back to Italy.[203]

2. THE RIGHT OF COUPLES TO AN ALTERNATIVE MEANS OF LEGAL RECOGNITION (CIVIL UNIONS OR PARTNERSHIPS)

In one respect, heterosexual and homosexual couples seem to be treated alike, namely in their need for legal recognition and protection by the state. While in many countries same-sex couples are left in a legal vacuum, since they can neither marry nor enter into civil partnerships, the ECtHR has affirmed a general obligation, deriving from Article 8 ECHR, to recognize same-sex couples. After dubious flirtation with this possibility in previous case law,[204] the Court found in the recent *Fedotova v Russia* case that states must provide homosexual relationships with a form of legal recognition, be it marriage or a lesser form (civil unions, registered partnerships, etc.).[205]

However, this does not mean that heterosexuals and homosexuals are fully alike in this respect, since some differences still remain between marriage and civil unions, especially since in many countries one institution is reserved for opposite-sex couples and the other for same-sex couples. For example, civil unions do not provide the same rights as marriage (the differences vary from country to country, the most common being the exclusion of adoption rights, but other differences are present, such as formal changes and the exclusion of conjugal duties such as fidelity, etc.)[206].

202 ECtHR, *Hämäläinen v Finland*, Grand Chamber, Judgment, App no 37359/09, 16 July 2014.

203 ECtHR, *Orlandi and others v Italy*, Judgment, App nos 26431/12, 26742/12, 44057/12, 60088/12, 14 December 2017.

204 See ECtHR, *Oliari and others v Italy*, Judgment, App nos 18766/11, 36030/11, 21 July 2015. In particular see the concurring opinion of Judge Mahoney joined by Judges Tsotsoria and Vehabović.

205 ECtHR, Grande Chamber, *Fedotova v Russia*, Judgment, App nos 40792/10, 30538/14, 43439/14, 17 January 2023.

206 In this respect the European Court of Human Rights has highlighted that states are free to decide the exact content of the form of legal recognition, in terms of rights and duties, as long as they guarantee a minimum of "adequate" (see *Fedotova v Russia* judgment, *supra*, §189-190).

3. THE RIGHT TO ADOPTION

The most visible difference lies in adoption rights. In many countries, adoption is exclusive to couples formed by a man and a woman united by marriage. Where adoption is open to single individuals, the Court has held that homosexuals should enjoy this right, too.[207] Occasionally, stepchild adoption (i.e. the adoption of the child of the partner) is limited as well, even though the ECtHR ruled in *X. and others v Austria* that states cannot open stepchild adoption to unmarried couples without including same-sex couples.[208] It seems, however, that any limitation of these rights is possible as long as adoption is exclusively allowed to married couples, since marriage retains, in the Court's opinion, a 'special status'.[209]

As it is clear that homosexuals and heterosexuals do not enjoy the same substantive treatment, the question arises of whether they *should* enjoy it or, in other words, whether they are eligible *in abstracto* for the non-discrimination principle to apply and extend this protection.

C. EQUAL TREATMENT IN THE APPLICATION OF THE NON-DISCRIMINATION TEST IN THEORY

To answer whether homosexuals and heterosexuals qualify for equal treatment under the Convention, one should consider whether it is possible to successfully apply the 'discrimination test' developed by the ECtHR to identify discriminations that are contrary to Article 14. If the relationship homosexuals–heterosexuals is eligible for the application of the discrimination test, this means that the two groups *should*, at least in theory, be treated alike, when the conditions of the test are met.

The test consists of three elements: first, the Court evaluates whether two situations are similar and thus comparable (whether they are 'likes'); secondly, the Court assesses whether the difference in treatment (the fact that the situations are not 'treated alike') is justified by a legitimate aim of public interest; thirdly, the Court analyses whether the alleged discriminatory measure introduced by the state was necessary and proportionate to the aim pursued.

As regard to the first element, one may argue that the situation of homosexual couples and that of heterosexual couples are not generally comparable.[210] Nevertheless, the ECtHR has frequently accepted this assertion. In particular, it has repeatedly highlighted that same-sex couples have the same dignity as opposite-sex couples and hence they 'are in a relevantly similar situation ... as regards their need for legal

207 ECtHR, *E.B. v France*, Grand Chamber, Judgment, App no 43546/02, 22 January 2008, §49.

208 ECtHR, *X. and others v Austria*, Grand Chamber, Judgment, App no 19010/07, 19 February 2013, §139.

209 ECtHR, *Burden v United Kingdom*, Grand Chamber, Judgment, App no 13378/05, 29 April 2008, §63.

210 This was, for example, the original stance taken by the Court in early judgments, such as in *Mata Estevez v Spain*, Decision, App no 56501/00, 10 May 2001, where the Court held that homosexual couples, differently from heterosexual couples, could not constitute 'family life' for the purpose of Art 8 of the European Convention on Human Rights (ECHR).

recognition and protection of their relationship'.[211] Accordingly, heterosexual couples who enjoy particular Convention rights are, in principle, comparable to homosexual couples in similar circumstances who do not enjoy the same rights.

As regard to the second element of the test, one may also argue that, even though opposite-sex couples and same-sex couples are comparable, there is often a legitimate aim to justify a difference in treatment between the two groups. If this could be said to be true in theory, in practice it seems difficult to identify a legitimate aim that can justify broad and general differences in treatment based only on sexual orientation, such as the exclusion of homosexuals from certain rights that heterosexuals enjoy. The Court has in fact clarified that justifications for differential treatment need not only to be legitimate but also reasonable. The protection of the 'traditional family', which is the main legitimate aim put forward by states, has often been rejected as a too general and abstract a justification.[212] Moreover, in particular contexts, such as the right to marry, this justification seems inconsistent, since the Court has long since established that the right to marry is not conditional on the ability of the couple to procreate.[213] Thus, the exclusion of same-sex couples from the right to marry could not serve the alleged purpose of strengthening the 'traditional unity of a man and a woman aiming at procreation'. Other justifications, such as the need to protect minors, have been dismissed promptly by the Court numerous times.[214]

As for the third step, it could be noted that states enjoy a certain margin of appreciation in deciding what is best for the society and, thus, whether to introduce difference in treatment between social groups. According to the Court's principles, these measures should nevertheless be necessary and proportionate in a democratic society. However, if a fundamental aspect of the individual's identity is at stake, such as sexual orientation, this margin narrows. Additionally, when the difference in treatment is based *exclusively* on sexual orientation and amounts to a 'blanket exclusion', the margin annuls.[215] Accordingly, any difference based exclusively on sexual orientation could hardly be justified on account of the margin of appreciation, or on the grounds of necessity and proportionality.

Therefore, it seems that, in principle, nothing prevents the application of the discrimination test to the situation of homosexuals compared to that of heterosexuals. In any case, one may additionally argue that the principle of non-discrimination

211 *Schalk and Kopf* judgment, supra fn 9, §99.

212 *X. and others* judgment, supra fn 17, §139. See also *Vallianatos and others v Grecia*, Grand Chamber, Judgment, App nos 29381/09, 32684/09, 7 November 2013 §89.

213 *Christine Goodwin v United Kingdom*, Grand Chamber, Judgment, App no 28957/95, 11 July 2002, §98: 'Reviewing the situation in 2002, the Court observes that Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as per se removing their right to enjoy the first limb of this provision.'

214 For example, *Bayev and others v Russia*, Judgment, App nos 67667/09, 44092/12, 56717/12, 20 June 2017, §§68–69.

215 *X. and others* judgment, supra fn 17, §99.

cannot be used to achieve what the interpretation of positive law as it currently stands does not allow, for example access to some substantive rights traditionally linked with heterosexual couples, such as marriage under Article 12.[216] The task of the Court is not, in fact, to amend and create new law, but rather to interpret existing law. Nevertheless, it has to be noted that the interpretation of the Convention is constantly changing and adapting to present conditions and social progress.[217] What was ECHR compliant in the 1950s could be now be deemed to be inconsistent with the modern values of the Convention. The case law of the Court is no longer fixed on the idea that certain rights pertain only to heterosexuals, as the Court itself has affirmed that Article 12 could also be applicable to same-sex couples.[218] Moreover, other regional human rights courts have followed the approach of applying the strict scrutiny of the discrimination test to reach the conclusion that homosexual couples and heterosexual couples should have the same treatment and rights, including access to marriage.[219] Therefore, the idea that Article 14 could be used to argue in favour of the extension of the whole range of Convention rights' protection to homosexuals should not be rejected in principle.

D. EQUAL TREATMENT IN THE APPROACH OF THE ECTHR IN PRACTICE

In order for heterosexual and homosexual couples to be 'treated alike', the application of the discrimination test should be guaranteed not only in theory but also in practice. Nevertheless, if one looks closer at its practical implementation, the case law of the ECtHR shows various inconsistencies. To get a glimpse of the different functioning of the discrimination test, it is useful to consider the implicit distinction in the case law that one could infer between 'core rights' and 'additional rights'.

Core rights are rights and liberties that form part of the essential content of the ECHR's provisions. They are reflected in the wording of the articles themselves. For example, two types of core rights can be drawn from the text of Article 12: the right to marry and the right to found a family.

Additional rights can be understood as supplementary entitlements that form part of the scope of the Convention but do not represent the core content of its pro-

216 A similar approach was adopted by the Human Rights Committee in *Joslin v New Zealand*, Comm no 902/1999, UN doc CCPR/C/75/D/902/1999, 17 July 2002, §§8.2–9. The Committee denied that the restriction of marriage for same-sex couples runs contrary to non-discrimination, based on the fact that Art 23 of the International Covenant on Civil and Political Rights refers to heterosexual couples, stating that the right to marry pertains to 'men and women' rather than 'everyone'.

217 A detailed account of the changing case law of the Court towards LGBT rights can be found in P. Johnson, 'LGBT Rights at the Council of Europe and the European Court of Human Rights', in J. Marshall (ed), *Personal Identity and the European Court of Human Rights*, Routledge, 2022, pp 103–108.

218 *Schalk and Kopf* judgment, supra fn 9, §61.

219 See the advisory opinion of the Inter-American Court of Human Rights (IACtHR) requested by the Republic of Costa Rica, which is discussed in further detail below. IACtHR, *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, Advisory Opinion OC-24/17, 24 November 2017, especially §220.

visions.[220] They could also be understood as domestic-law rights, autonomously guaranteed by the states beyond the scope of the Convention obligations, pursuant to Article 53: 'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any high contracting party or under any other agreement to which it is a party'. Thus, additional rights are not required by the Convention but come into the scope of application of its principles once they are guaranteed.[221] An example of an additional right is the right to single-parent adoption that, if granted by domestic law, falls within Article 8.[222]

Regarding additional rights, one can observe a coherent and successful application of the discrimination test. The Court employs the test to find whether differences in treatment are adequately justified in terms of public interest or proportionality. For example, in the case of *E.B. v France*, the ECtHR held that the respondent state had breached Article 14 in conjunction with Article 8, as it had rejected the applicant's request to adopt a child as a single parent on the ground of her sexual orientation. Adoption by single parents was autonomously introduced by the French state beyond what is mandated by the Convention.[223] In the relevant part of the reasoning, the Court considered that the French state was not under a duty to introduce such an additional right; nevertheless, once it had done it, it could not differentiate between heterosexuals and homosexuals. Since the state authorities refused the request of the applicant on the ground of the absence of a paternal figure in the household, the Court found this justification to be inconsistent with the purpose of introducing single-parent adoptions, and thus held that the state was actually concealing a discriminatory intent and had failed the second step of the discrimination test.[224]

Instances where the test was applied can also be found in other areas such as the additional rights linked to relationship status. The test was, for example, implemented to hold that homosexual couples should equally enjoy certain rights granted to heterosexual persons in a stable unmarried couple: the right of the cohabitant *more uxorio* to succeed to their partner's tenancy after their death;[225] the right to access stepchild adoptions;[226] the right to enter newly introduced civil partnerships;[227] the right to family reunification.[228]

The use of the discrimination test is most evident in *Pajic v Croatia*. The case was about a gay couple trying to obtain a residence permit on the ground of family reunification. The Court first recalled that the right to family reunification for unmarried couples was not a core right: 'the right of an alien to enter or to settle in a particular country is not guaranteed by the Convention. Where immigration is concerned, Article 8 or any other Convention provision cannot be considered to impose on a State a general obligation to, for instance, authorise family reunion in its territory'.[229] At a later stage, once it had found that the Croatian state had voluntarily extended this right to unmarried couples, the Court ruled that it could not limit the enjoyment of the right in a discretionary manner, such as solely due to sexual orientation: 'Even in cases in which the State that has gone beyond its obligations under Article 8 in creating a right … it cannot, in the application of that right, take discriminatory measures within the meaning of Article 14'.[230]

With regard to core rights, instead, the Court does not seem to employ the discrimination test at all. To illustrate this assumption, a first example could be drawn from the core right of Article 12, namely the right to marry. In relation to this provision, the Court has repeatedly neglected to consider whether the prohibition of same-sex marriage by certain states parties could be tested against Article 14. In *Schalk and Kopf*, and subsequently in *Oliari v Italy*, the Court held that Article 14 could not apply, as reasons of harmonic and consistent interpretation of the Convention prevented this result: 'the Convention is to be read as a whole and its Articles should therefore be construed in harmony with one another. Having regard to the conclusion … that Article 12 does not impose an obligation on Contracting States to grant same-sex couples access to marriage, Article 14 … cannot be interpreted as imposing such an obligation either'.[231]

Instead of applying the discrimination test, the ECtHR referred to the concept of a 'European consensus' to underline that favour towards homosexual marriage was not at the time overwhelmingly present in European countries and thus an

220 Additional rights are described as 'falling within the general scope of any Article of the Convention, for which the State has voluntarily decided to provide'. See *E.B.* judgment, supra fn 16, §48.

221 This essentially means that states cannot discriminate in guaranteeing additional rights based on domestic law that fall within the scope of Convention rights.

222 See *E.B.* judgment, supra fn 16.

223 Art 343-1, French Civil Code.

224 *E.B.* judgment supra fn 16, §§94–96.

225 *Kozak v Poland*, Judgment, App no 13102/02, 2 March 2010.

226 *X. and others* judgment, supra fn 17.

227 *Vallianatos and others*, supra fn 21. As argued below, the right to access civil unions is a core right. Nevertheless, in this case the Court carefully rephrased it as an additional right. In fact, it deemed it important to delimit the scope of the case in §75, affirming that '[t]he applicants' complaint does not relate in the abstract to a general obligation on the Greek State to provide for a form of legal recognition in domestic law for same-sex relationships', which would have amounted to a core right deriving from Art 8. Instead, the Court highlighted that the substance of the complaint was whether 'the Greek State was entitled, from the standpoint of Articles 14 and 8 of the Convention, to enact a law … that was limited to different-sex couples and thus excluded same-sex couples', thus apparently rephrasing the issue in terms of the autonomous introduction by the Greek state of a supplementary domestic law right.

228 ECtHR, *Pajic v Croatia*, Judgment, App no 68453/13, 23 February 2016.

229 Ibid, §79.

230 Ibid, §80.

231 *Schalk and Kopf* judgment, supra fn 9, §101.

obligation to grant same-sex marriage could not be deduced from Article 12. Consensus can be understood as 'a presumption that favors the solution to a human rights issue which is adopted by the majority of the Contracting Parties'.[232] If the Court found that a consensus existed among states parties, it would modify its interpretation of the Convention accordingly. Otherwise, it will leave to the state authorities a wider margin of appreciation in deciding the matter. From *Schalk and Kopf* onwards, consensus has always been the cornerstone of Article 12. In several other cases, the Court decided it was not necessary to use the discrimination test, as no consensus could be found among states parties, even if acceptance of homosexual couples, in terms of legal and social recognition, steadily continued to grow.[233]

The same approach could be observed with regard to another core right, this time deriving from Article 8, namely the right of the couple to obtain an alternative means of recognition in order to obtain legal acknowledgment. This right was first pointed out by the Court in *Oliari v Italy*, where the respondent state was held liable for not providing any form of protection to same-sex unions, be it marriage or a lesser form, thus leaving them in a legal vacuum. More recently, as the judgment in *Oliari* had been crafted in a particular way so as to limit the impact of its conclusions to the specific situation of the Italian state,[234] the Court reaffirmed the existence of such right in *Fedotova v Russia*. In neither of those judgments, however, did the Court use the discrimination test. Rather, it held that it was not necessary to examine a separate complaint under Article 14 in conjunction with Article 8, since it had found a violation of Article 8 alone. This conclusion rested on the fundamental principle of the Court's case law whereby alleged discrimination needs to be a fundamental aspect of the case in order to be examined.[235] Nevertheless, scholars have complained of the absence of a separate examination of Article 14 in terms of the consequences that such an assessment would have had for future cases.[236] Nor did the Court use the discrimination test in *Schalk and Kopf* to determine whether Austria should have adopted civil unions sooner that it did. The Court briefly explained once again that since consensus was lacking, Austria was free to decide when to introduce alternative forms of protection for same-sex couples.[237] Consensus was thus again the fundamental factor. In *Oliari*, for example, the Court could find an obligation on behalf of Italy as a thin majority of states parties, 24 out of 47, had legislated in favour of legal recognition for same-sex unions, thus proving at least, if not a consensus in the strictest definition, the existence of an emerging majoritarian trend.[238] The importance of consensus was further reiterated in Fedotova, where the Court spent 11 paragraphs discussing the "degree of consensus to be found at national and international level" before confirming the existence of the right to legal recognition[239].

Regarding the two fundamental core rights for homosexual couples, namely the right to marry and the right to have an alternative means of recognition, the ECtHR has not employed the discrimination test and instead relied largely on consensus to ascertain the plausibility of the claim. Moreover, in regard to one core right in particular, the right to marry, resort to consensus has prevented the affirmation of the obligation to grant same-sex marriage, thus reinforcing a gap of protection that separates heterosexual from homosexual couples.

E. EQUAL TREATMENT AND HETERONORMATIVE BIAS IN THE ECHR

As we have briefly seen, in the system of the ECHR there is a protection gap between heterosexuals and homosexuals. The gap could be bridged if one were to apply the principle of non-discrimination, since it ensures that likes should be treated alike or, in other words, that individuals obtain what they are entitled to, based on a comparative assessment with the situation of other individuals in an analogous or rather, the same position. The principle of non-discrimination is included in the Convention through Article 14, and the ECtHR has developed an efficient test to examine whether differences in treatment should be maintained or abolished that it has used convincingly in regard to additional rights. One could then legitimately wonder why the Court does not apply the test also in regard to core rights which are, as the name suggests, even more fundamental.

It may be submitted that the test is intrinsically inapplicable in this cases, but we have seen that the Court finds the situation of opposite-sex and same-sex couples to be generally comparable and that nothing prevents the application of the test in principle. Moreover, a brief overview of the case law demonstrates the successful applicability of the test outside core rights.

232 See K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, Cambridge University Press, 2015, p 9.

233 *Oliari* judgment, supra fn 14; see also *Chapin and Charpentier v France*, Judgment, App no 40183/07, 9 June 2016. More recently, in the *Fedotova* judgment, supra fn 15, the Section President decided on these basis to strike out the complaint under art. 12 as manifestly ill-founded.

234 As was noted by concurring Judges Mahoney, Tsotsoria and Vehabović in their concurring opinion in *Oliari* judgment, supra fn 14.

235 See *Dudgeon v United Kingdom*, Judgment, App no 7525/76, 22 October 1981, §67.

236 See the earliest comments on the Chamber judgment by E.M. Bedler, 'Article 14 in the Closet: What the European Court of Human Rights Missed in Fedotova and Others v. Russia', *Völkerrechtsblog*, 21 August 2021, https://voelkerrechtsblog.org/article-14-echr-in-the-closet/ (last accessed 7 February 2023); G. Fedele, 'The (Gay) Elephant in the Room: Is there a Positive Obligation to Legally Recognise Same-Sex Unions after Fedotova v. Russia?', *EJIL: Talk!*, 2 July 2021, https://www.ejiltalk.org/the-gay-elephant-in-the-room-is-there-a-positive-obligation-to-legally-recognise-same-sex-unions-after-fedotova-v-russia/ (last accessed 7 February 2023); and also on the Grand Chamber judgment see G. Fedele, 'Milestone or missed opportunity? The ECtHR Grand Chamber judgment in Fedotova v. Russia on the legal recognition of same-sex couples', *EJIL: Talk!*, 31 January 2023, https://www.ejiltalk.org/milestone-or-missed-opportunity-the-ecthr-grand-chamber-judgment-in-fedotova-v-russia-on-the-legal-recognition-of-same-sex-couples/ (last accessed 7 February 2023). On this regard confront also the partly dissenting opinion in the *Fedotova* judgment, fn 15, by Judge Pavli joined by judge Motoc.

237 *Schalk and Kopf judgment*, supra fn 9, §105.

238 *Oliari* judgment, supra fn 14, §178.

239 *Fedotova* judgment, supra fn 15, §166-177.

Some arguments might be drawn from outside the realm of the law. If one looks to sociological theories, and in particular to queer studies, it is possible to frame the issue in more complex terms. These theories, drawing from feminist and gender studies,[240] coined the term 'heteronormativity' to highlight the phenomenon of the predisposition of social, political and, moreover, legal structures that create a position of power and privilege in favour of the group considered 'normal' – heterosexuals – and nourish this advantage by continuous marginalization of other sexual orientations non-ascribable to the traditional norm.[241] Applied to the field of law, these theories postulate that legal institutions actually help the normalization of heterosexuality, by creating positive law that enhances the perspective of the heterosexual orientation as the primary and standard characteristic of the individual: the norm, precisely.[242] This modus operandi is often so rooted and established in most legal systems that it goes unnoticed. For example, queer theories point out that the reference to an apparent neutral legal term actually implicitly refers to the heterosexual perception of that term and crystallizes that perception as universally valid.[243] If a legal text uses the word 'family' without specifying the sexes of its components, it is common to think that the term refers to the union of a 'man and a woman', even though numerous types of families could be witnessed in daily life.[244]

Applying queer theories and their heteronormativity critique to the system of the ECHR could explain why the ECtHR does not apply the discrimination test consistently. It could in fact demonstrate that the current state of positive law under the Convention that the Court interprets and applies reflects the view that homosexual couples cannot stake a valid claim for core rights as they pertain to heterosexuals and are, in this sense, 'heterosexual rights'. Accordingly, homosexuals are not entitled to the same treatment as heterosexuals, as most of the rights contained in the Convention were not thought out for them. This would explain why Article 14 is so scarcely applied when it comes to core rights. It applies differently for additional rights, as they do not form part of the content of the Convention provisions and could thus be excluded from heteronormative implications.

This might sound bold to assume; nevertheless, the analysis of the ECHR through the lens of queer studies and heteronormativity helps to underline that the Convention, although construed as a treaty on human rights, does not embody freedoms and rights that refer to the 'universal human being', as one would expect,[245] but actually expresses freedoms and rights pertaining to the interests of the one particular category of human being that originally drafted and adopted the ECHR as an expression of their set of values, namely, the heterosexual human being.

For example, one could demonstrate these assumptions by reference to the early judgments relating to the right to marry, in which the court heavily relied on the interpretation of the institution as essentially heterosexual, highlighting the wording and will of the parties: 'In the Court's opinion, the right to marry guaranteed by Article 12 (art. 12) refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 (art. 12) is mainly concerned to protect marriage as the basis of the family'.[246] This vision eventually changed in *Schalk and Kopf*, but the fact that the Court has not yet found a violation of Article 12 in favour of a same-sex couple could reinforce the idea that this interpretation still holds true, albeit in practice and not in principle.

Further proof relies on the use of consensus. Consensus represents, in other words, the previous acceptance of a certain human rights result by a sufficient number of the states parties.[247] However, in the majority of the states parties heterosexuals will be the social group in power, thus rendering consensus in practice a request of previous acceptance by the heterosexual majority. This dynamic represents the distinctive feature of heteronormativity, since heteronormativity creates a privilege for the dominant group (the 'norm') that can only be overcome if the dominant group so decides. In heteronormative terms, the heterosexual group determines which rights should be granted to the homosexual minority, as much as it determines, for example, what kind of homosexual behaviour can be considered socially acceptable. Accordingly, as noted, it could be maintained that the Court's use of consensus 'has ultimately functioned to uphold and sustain the heteronor-

240 See, amongst many, M. Foucault, *The History of Sexuality Vol 1: An Introduction*, trans. Robert Hurley, Pantheon Books, 1980; M. Warner, 'Introduction: Fear of a Queer Planet', *Social Text* 29 (1991); J. Butler, *Gender Trouble: Feminism and the Subversion of Identity*, Routledge, 1990.

241 S. Falcetta, 'L'eteronormatività nell'operato della Corte europea dei diritti umani: luci e ombre in materia di riconoscimento giuridico delle coppie formate da persone dello stesso sesso', 4 *AG About Gender – International Journal of Gender Studies* 7 (2015); P. Johnson, 'Marriage, Heteronormativity and the European Court of Human Rights: A Reappraisal', 29 *International Journal of Law, Policy and the Family* 1 (2015). See further D. A. Gonzalez-Salberg, *Sexuality and Transsexuality Under the European Convention on Human Rights: A Queer Reading of Human Rights Law*, Hart Publishing, 2019.

242 On the heterosexual subject of law see M. Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject', 14 *European Journal of International Law* 5 (2003).

243 In this regard, queer theories adopt a deconstructivist approach aimed at demonstrating that 'those seemingly neutral aspects of everyday life are underpinned by *heteronormative* assumptions'. Gonzalez-Salberg, *Sexuality and Transsexuality*, supra fn 49, p 20.

244 This was the perspective adopted by the ECtHR in the *Mata Estevez* decision, supra fn 19, where the Court denied that homosexual couples constituted 'family life' according to Art 8 ECHR on the account of a lack of consensus among the contracting states. For a national perspective, see judgment no 138/2010 of the Italian Constitutional Court, excluding homosexual couples from the protection of Art 29 of the Italian Constitution, which states in neutral terms: 'The Republic recognizes the rights of the family as a natural society based on marriage'.

245 Human rights instruments, be it constitutions, international treaties or declarations, tend to *universality*, although some of them might be regional in character, like the ECHR. The ECHR itself seeks to 'take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration [of Human Rights]', as stated in the Preamble, and underlines that the Declaration 'aims at securing the *universal* and effective recognition and observance of the Rights therein declared'.

246 *Rees* judgment, supra fn 8, §49.

247 The concept of 'European consensus' is widely debated, especially in relation the 'quantum' of states that is necessary to establish it. If 'consensus' is understood literally, it requires total unanimity among the contracting parties. Nevertheless, the Court has demonstrated various ambiguities in this respect, as it has also relied on the emergence of a 'trend' to establish the existence of consensus. See more in this regard in Dzehtsiarou, *European Consensus*, supra fn 41, pp 12 ff. In its case law on LGBT rights, sometimes the Court refers to the 'majority of States' as an indication of consensus. See *Schalk and Kopf* judgment, supra fn 9, §105.

mative order that underpins both the European Convention on Human Rights and European society more generally'.[248]

Another red flag is the fact that the extension of the Convention rights to homosexuals is often framed by the ECtHR as 'sensitive moral or ethical issues'.[249] This approach bears out that the Court accepts the view of states parties that these issues raise questions of morals, thus leaving space for policy arguments, rather than questions of (formal) equal treatment, and thus of law.[250]

Moreover, one should point out that the provision of Article 14 does not explicitly include 'sexual orientation' among its protected characteristics, while encompassing eleven grounds for discrimination (including 'property'). This is testimony to the fact that the drafters of the Convention did not see sexual orientation as an autonomous characteristic deserving of protection, since the standard sexual orientation was heterosexuality.[251] If it is true that we should have some historic understanding and awareness of the different conception of sexuality in 1950s, it nonetheless has to be pointed out that when drafting Protocol No. 12, nearly 50 years later, states parties did not find it necessary to include 'sexual orientation' in the wording of Article 1, and adopted instead the same formulation of Article 14.[252] On the other hand, it has to be noted that discrimination on grounds of sexual orientation has been included in the scope of these provisions by judicial interpretation of the residual notion of 'other status',[253] which is a sign that the Court can also adjust the Convention to overcome the heteronormative boundaries of positive law.

Once the concept of heteronormativity is acknowledged, it will be possible to understand the reasons for the perduring existence of inequalities between heterosexuals and homosexuals in the system of the Convention. The Convention has been drafted as an international treaty that, although with the intention of protecting universal rights, expresses the human rights perspective of a particular category of social groups, namely heterosexuals. In particular, it will be possible to observe that the ECtHR is endorsing, albeit implicitly, this perspective, resorting to the interpretation of positive law instead of using the tools provided by the

248 C. O'Hara, 'Consensus, Difference and Sexuality: Que(e)rying the European Court of Human Rights' Concept of "European Consensus"', 32 *Law and Critique* 1 (2021) 91.

249 As it was phrased, for example, in the *Oliari* judgment, supra fn 14, §177.

250 To what extent the rights of minorities can be restricted on the sole ground of the moral views of the majority is an argument validly raised by M. Milanovic in 'Living Instruments, Judicial Impotence, and the Trajectories of Gay Rights in Europe and in the United States', *EJIL: Talk!*, 23 July 2015, https://www.ejiltalk.org/living-instruments-judicial-impotence-and-the-trajectories-of-gay-rights-in-europe-and-in-the-united-states/ (last accessed 7 February 2023).

251 See further on this point Johnson, 'LGBT Rights', supra fn 26, pp 103–108, for a detailed account of the Parliamentary Assembly's debates during the 1980s for amending Art 14, which were eventually unsuccessful.

252 The Parliamentary Assembly requested the inclusion of 'sexual orientation' in the protected grounds, but the request was unheeded. See W. A. Schabas, *The European Convention on Human Rights: A Commentary*, Oxford University Press, 2015, p 1185.

253 ECtHR, *Salgueiro da Silva Mouta v Portugal*, Judgment, App no 33290/96, 21 December 1999, §23.

Convention to overcome the heteronormative boundaries. In so doing, the Court seems to accept that at the core of the Convention lies a certain amount of disparity that cannot be overcome by judicial interpretation, but should necessarily pass through policy considerations, such as consensus. It may be argued that it is not the task of the Court, nor in its power, to overthrow the heteronormative conception that underlies the Convention. Nevertheless, as will be shown, this seems to be the path followed by other national and international jurisdictions, thus underlining the viability of this solution from a human rights perspective. Moreover, it has to be noted that the Court has the necessary tools to ensure that (at least formal) equality is applied in the system of the Convention, namely the principle of non-discrimination, and it may be sustained additionally that the Court should not confine itself to a mere interpretation of positive law, but should also employ evolutive interpretations of the Convention in order to better reflect the needs of inclusion of sexual minorities.

F. STRENGTHENING EQUAL TREATMENT BETWEEN HETEROSEXUALS AND HOMOSEXUALS IN THE ECHR

Given the situation depicted above, how can equality be improved? As a starting point, it must be noted that the recognition of the heteronormative character of the Convention does not prevent the implementation of equality; on the contrary, its acknowledgement should represent the first step towards the analysis of appropriate solutions to bridge the existing gaps in protection. To achieve this goal, three possible solutions – consensus, a new additional protocol and giving full weight to the principle of non-discrimination – are worth a thorough examination.

1. CONSENSUS

One possible option would be to continue relying, as the ECtHR has done so far, on the progressive and autonomous convergence of states parties until a common level of protection is achieved. Some maintain that this is in fact the most appropriate strategy to ensure that the human rights solutions adopted by the Court find fertile ground for acceptance and implementation by states parties. This will in in fact guarantee that the Convention retains its legitimacy, both among states and European society.[254] Moreover, as a trend towards legal recognition of sexual minorities is continuing to progress steadily, it is also maintained that the process of consensus, even if slow, is bound to eventually produce positive outcomes for equality and inclusion.[255]

254 See L. R. Helfer, 'Finding a Consensus on Equality: The Homosexual Age of Consent and the European Convention on Human Rights', 65 *New York University Law Review* (1990) especially 1056.

255 On such a view see, in particular, F. R. Ammaturo, 'The Right to a Privilege? Homonormativity and the Recognition of Same-Sex Couples in Europe, 23 *Social and Legal Studies* 2 (2004); A. A. Reyes-Torres, 'Oliari v. Italy: The First Step to Equal Marriage in Europe?', *Jurist*, 15 August 2015, https://www.jurist.org/commentary/2015/08/Amaury-Reyes-Torres-Equal-Marriage/ (last accessed 7 February 2023); G. Zago, 'Oliari and Others v. Italy: A Stepping Stone Towards Full Legal Recognition of Same-Sex Relationships in Europe, *Strasbourg Observers*, 16 September 2015, https://strasbourgobservers.com/2015/09/16/oliari-and-others-v-italy-a-stepping-stone-towards-full-legal-recognition-of-same-sex-relationships-in-europe/ (last accessed 7 February 2023).

While this line of reasoning seems realistic and well balanced, there are some problems in the use of consensus that need to be addressed and could lead to this option being set aside.

Firstly, as already mentioned, consensus is per se dysfunctional, as it relies on the previous acceptance by the majority of states. Given the fact that states are the expression of the will of their political majority, and that political majorities in a state are mostly embodied by heterosexuals, this mechanism creates a paradox where the heterosexual majority decides whether to expand the protection of the rights of other sexual minorities. In this dynamic, sexual minorities are helpless, since it is the majority who retain all the initiative and will have presumably no interest or gain in giving up their privileges. Ultimately, the fact that consensus operates to make social acceptance a pre-condition of human rights has been highly criticized and should generally be of concern.[256]

Secondly, consensus might be ultimately useless if used as a human rights protection enhancer. In fact, consensus consists in examining whether a certain human rights solution is already accepted and implemented by a sufficient number, if not the totality, of states parties. In this situation, the assessment of the Court would only come at the end of the process, thus only declaring what already exists. For example, if the Court were to declare a right to marry for same-sex couples only when same-sex marriage was guaranteed in all of the states parties, the determination of the Court would be superfluous. Where consensus exists, it is often that rights are already and mostly protected.

Thirdly, it is not clear what type of consequences the existence of consensus would entail. In this respect, the Court case law is quite ambiguous. The fact that most states implement a certain human rights solution does not per se create an obligation on other states to act accordingly, as is clear from the Court's case law. Even an almost unanimous consensus in this sense would not be a decisive factor. The Court clarified this aspect in *A, B and C v Ireland*,[257] where the existence of an undeniable strong consensus in favour of abortion rights was entirely disregarded because of the moral views expressed by society.[258] Accordingly, the respondent state was allowed a wide margin of appreciation in regulating access to abortion on the strictest conditions, even if Ireland was the only state permitting abortion solely on the ground of a risk to the life of the expectant mother.[259] *Mutatis mutandis*, the same argument could be raised in respect to homosexual marriage. States that are not inclined to favour LGBT rights could thus raise the existence of strong moral views opposed to it to justify their isolated position, even where a strong and undeniable consensus is present between contracting parties. For this reason, a general obligation based on consensus would not seem to be binding on 'unwilling' states.

Fourthly, consensus disregards the application of the principle of non-discrimination, as the case law of the ECtHR demonstrates. Nevertheless, if on the one hand consensus involves decisions mainly based on policy issues, on the other hand non-discrimination uses purely legal argumentation. Consensus in fact influences whether to accept a single-right solution, as it reflects the attitude of states towards the implementation of specific issues (for example, the acceptance by states of the introduction of same-sex marriage). Non-discrimination, instead, involves comparative-rights reasoning (for example, the right to marry of same-sex couples as opposed to the right to marry of opposite-sex couples), confronting situations and beneficiaries in a syllogistic formula (if A have B, and C are entitled to the same as A, then C must have B). Accepting that non-discrimination cannot be used to achieve a legal outcome in situations where the same result could not be obtained through consensus, as the ECtHR has maintained from *Schalk and Kopf* onwards, is thus unreasonable, as the two instruments rest on different premises. Moreover, this would amount to annulling the existence and significance of Article 14. If the Court agrees with the thesis of Professor Westen[260] that the principle of equality is empty as such and boils down to policy issues and moral statements, then it should make this clear. Otherwise, it should implement Article 14 accordingly.

Lastly, consensus might not be linear and progressive. The view that the protection and inclusion of sexual minorities is destined to increase with progress in society is optimistic, but not necessarily true. It is known, for example, that countries like Poland, Hungary (and one could also consider Russia, even though it has ceased to be a party to the Convention after 16 September 2022)[261] are strengthening their anti-homosexual and transgender agenda in attempts to protect their moral values.[262] In these countries, the protection of sexual minorities is in regression. Moreover, the achievements of LGBTIQ rights are not fixed, but can also be reversed, as demonstrated by the case of California, where equal marriage was abolished in 2008 by a popular referendum known as Proposition 8, before being reinstated consequently to a US Supreme Court ruling in 2013.[263] It is thus not

256 Similar concerns are largely shared in the literature. See, e.g., E. Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards', 31 *New York University Journal of International Law and Politics* (1998); G. Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR', 15 *European Journal of International Law* 2 (2000); J. A. Brauch, 'The Dangerous Search for an Elusive Consensus: What the Supreme Court Should Learn From the European Court of Human Rights', 52 *Howard Law Journal* (2008); L. Hodson, 'A Marriage by Any Other Name? Schalk and Kopf v Austria', 11 *Human Rights Law Review* 1 (2011); M. Shahid, 'The Right to Same-Sex Marriage: Assessing the European Court of Human Rights' Consensus-Based Analysis in Recent Judgments Concerning Equal Marriage Rights', 10 *Erasmus Law Review* (2017); O'Hara, 'Consensus, Difference and Sexuality', supra fn 56, 105.

257 *A, B and C v. Ireland*, Grand Chamber, Judgment, App no 25579/05, 16 December 2010.

258 Ireland's population voted against abortion in a referendum held in 1983.

259 A, *B and C* judgment, supra fn 65, §§236–239.

260 See P. Westen, 'The Empty Idea of Equality', supra fn 3.

261 Russia was initially expulsed from the Council of Europe on 16 March 2022 (see Resolution CM/Res(2022)3 of the Committee of Ministers) after the outbreak of the war in Ukraine.

262 The Russian Federation passed on 11 June 2013 the federal law 135-FZ 'for the Purpose of Protecting Children from Information Advocating for a Denial of Traditional Family Values', known also as the 'gay propaganda law', which prohibits the dissemination of LGBT ideas in the country. Poland came under the spotlight for the decision of some of its municipalities and regions to declare themselves unwelcoming of an alleged 'LGBT ideology' (on this see Resolution 471 (2021) of the Congress of Local and Regional Authorities of the Council of Europe, 17 May 2021). Hungary most recently amended its constitution (Act LXXIX of 2021) to introduce an explicit reference to the 'traditional family' composed of a man and a woman in order to exclude same-sex families from the protection of constitutional provisions.

263 US Supreme Court, *Hollingsworth v Perry*, 570 US 693 (2013).

true that consensus will eventually provide an effective, although slow, process of inclusion.

For all the reasons mentioned above, it appears that consensus might not be the most appropriate solution in terms of protection of sexual minorities.

2. ADOPTION OF A NEW ADDITIONAL PROTOCOL ENHANCING LGBT PROTECTION

The second option could be the adoption of a specific additional protocol with the aim of extending Convention rights to homosexuals and thus bridging the gaps in protection. This option was proposed as a legal defence by the Italian Government in the case of *Orlandi v Italy*. It contended that the Convention did not provide homosexual couples with the right to marry, and such a reading of Article 12 would require a consensus among states which could be better provided in an additional protocol.[264] Similar arguments were raised by third-party interveners in *Oliari v Italy*, maintaining that states adopted additional protocols in the past when they wished to regulate a certain issue (such as the additional protocol on the prohibition of the death penalty).[265]

Surely, this solution would be optimal. It would avoid the uncertainties surrounding the development of a strong consensus and imprint a decisive boost to the protection of sexual minorities in the system of the ECHR. Moreover, the adoption of an additional protocol targeted to bridge the gaps in protection would ensure that a broad political agreement among states parties supports these developments, encouraging social acceptance. The enhancing of protection through a legislative procedure would also be in line with similar initiatives adopted by the European Union in order to strengthen the protection of sexual minorities and realize the so-called 'LGBTIQ freedom zone'.[266]

Nevertheless, this option seems unrealistic, if not utopian, considering the current state of acceptance of LGBTIQ rights in some states parties to the Convention. It is difficult to think that conservative states would be willing to adopt a general protocol on LGBTIQ rights; the possibility that the protocol could be effective only for the ratifying Parties, as with other protocols, does not solve the issue of guaranteeing equality in the Convention, since the protection of sexual minorities would be as fragmented as it currently stands today.

One must take into consideration that other previous attempts at strengthening LGBTIQ protection by conventional amendments have not been fruitful. For example, in 1981 the Parliamentary Assembly of the Council of Europe discussed a draft recommendation included in a report presented by its Committee on Social and Health Questions with the title 'Discrimination Against Homosexuals',[267] proposing to 'modify Article 14 of the European Convention on Human Rights by adding to it the notion of "sexual preferences"'.[268] The Assembly rejected this proposal and adopted the final text of Recommendation 756 without references to it. In the discussions, the rapporteur of the Legal Affairs Committee stated that 'changing Article 14 of the Convention would be a lengthy, burdensome and far from certain process'.[269] The reluctance to change the wording expressing the non-discrimination principle persisted throughout the adoption of Protocol No. 12 in 2000, which included a general prohibition of discrimination. Currently, Article 1 of the Protocol omits explicit references to 'sexual orientation' in its text. It is far from being established that amendments to the wording of Article 14 or Article 1 of Protocol No. 12 would effectively strengthen the protection afforded to sexual orientation, since the ECtHR has already achieved this result in its case law by including sexual orientation in the residual notion of 'other status'. Nevertheless, the history of Article 14 shows that projects of conventional amendments encounter serious difficulties when dealing with the protection of sexual minorities. These episodes could be sufficient to rule out the possibility to effectively adopt an additional protocol or a separate treaty to enhance LGBTIQ protection in the Convention.

3. GIVING FULL WEIGHT TO THE PRINCIPLE OF NON-DISCRIMINATION

The third and last option is giving full weight and application to the principle of non-discrimination. In other words, this option maintains that the Court should apply the non-discrimination test even to core rights, whenever its conditions are met. Accordingly, the Court should set aside consensus and focus exclusively on examining differences in treatment based on their justifications and the assessment of necessity and proportionality.

From a strictly legal point of view, this option would be favourable. In fact, the principle of equality in its formal dimension ensures that persons deemed to be in the same circumstances should also have the same entitlements, by using almost pure legal logic. This would help to bridge the protection gaps in the Convention system where same-sex and opposite-sex couples are in comparable situations but are treated differently.

Nevertheless, a full use of the potential of the non-discrimination principle would encounter a number of difficulties that need to be examined. As a first point, the Court could face vigorous backlash from states parties or public opinion as a result of its judicial activism. This follows from the notorious problems of the Court

264 *Orlandi* judgment, supra fn 13, §171.

265 *Oliari* judgment, supra fn 14, §152.

266 European Parliament, Resolution of 11 March 2021 on the Declaration of the EU as an LGBTIQ Freedom Zone, 2021/2557(RSP).

267 Council of Europe, Report on Discrimination Against Homosexuals, Doc 4755, 1981.

268 Council of Europe, Second Part of the Thirty-Third Ordinary Session of the Parliamentary Assembly, Tenth Sitting, 1 October 1981, Official Report of Debates, Vol II, Sittings 8 to 19, 1982, 276.

269 Ibid, 260.

acting as counter-majoritarian, as some scholars have punctually pointed out.[270] Would contracting states, for example, be willing to accept a general obligation to grant same-sex marriage? Will they follow judgments that find violations of Article 12 in favour of same-sex couples? These concerns raise a more general question about the nature and function of human rights and human rights courts, as well as expose the everlasting contraposition between law and politics. While it is not possible to provide a final resolution to this complex dilemma, a few observations can nevertheless be made. From the outset, it has to be noted that in previous cases where the Court employed a bold type of judicial activism regarding LGBTIQ, backlash was never such as to compromise the effectivity of the judgments. On the contrary, as has been noted, the case of LGBT rights in the case law of the ECtHR provides an excellent example of how international courts can act as 'agents of legal change'.[271] To give an illustration, one year after *Oliari*, where the Court stated for the first time the obligation to provide same-sex couples with legal recognition, Italy adopted Law No. 76/2016 regulating same-sex civil unions. After *Vallianatos and others v Grecia*, where the Court held that the exclusion of same-sex couples from registered partnerships was contrary to non-discrimination, the Greek state opened the access to such institutions.

Moreover, the judgments of the Court can have various effects, not always limited to the case before it and to the respondent state. For example, even if a state does not comply with the obligation found by the Court, other states could spontaneously follow it, if they are persuaded by it. Additionally, one should observe that in present times the protection of human rights is not static, but is rather dynamically affected by a variety of sources that combine to create emerging global trends and produce a strong influence on political will and social spirit in domestic legal systems (think, for example, of the protection of the environment). A new and proactive attitude of the Court could thus be combined with analogous efforts and strategies currently adopted by other supernational organizations (such as the European Union[272]) and international organizations (such as the United Nations), other judgments issued by international courts and tribunals or legislative developments in national states[273] in order to stimulate and reinforce the global trend of progression of LGBTIQ rights.

Another difficulty in giving full weight to non-discrimination resides in the fact that it is debatable whether the ECtHR can effectively use this principle as a cornerstone in upholding equality. On the one hand, in fact, the Court agrees that equality represents a fundamental value for the Convention, just like the rule

270 O. Bassok, 'The European Consensus Doctrine and the ECtHR Quest for Public Confidence', in P. Kapotas, V. P. Tzevelekos (eds), *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond*, Cambridge University Press, 2019.

271 L. R. Helfer and E. Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe', 68 *International Organization* 1 (2014).

272 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Union of Equality: LGBTIQ Equality Strategy 2020-2025', COM/2020/698 final, 12 November 2020.

273 For example, Switzerland approved equal marriage by referendum as of 26 November 2021.

of law, social peace and tolerance.[274] On the other, however, it does not have the powers or jurisdiction of a supreme court and can only interpret positive law as it currently stands. As the supervisory body of an international agreement, it primarily protects, by definition, the expression of the will of the contracting parties. It follows that it is difficult for the ECtHR to employ this kind of judicial activism, so as to upset the original framework of values set in the Convention by contracting states, without previously finding a certain amount of consensus. If the ECHR has heteronormative premises, it will be difficult for the Court to subvert them based only on its authority.

The outcome is different if one looks at the powers of supreme national courts. Many examples can in fact be drawn from the national practice of supreme or constitutional courts that have realized the heteronormative prejudice of their legal system before allowing for equal marriage rights. In 2005, the South African Constitutional Court affirmed that 'the reference to "men and women" is descriptive of an assumed reality, rather than prescriptive of a normative structure for all time' before ruling in favour of same-sex couples.[275] Later on, in 2015, the US Supreme Court held that 'the limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest'[276] and then made the right to same-sex marriage the law of the land.[277] In 2017, the Austrian Constitutional Court also found that distinguishing between marriage for heterosexual couples and registered partnerships for homosexual couples constitutes discrimination since 'the very existence of two separate legal institutions is an expression of the fact that individuals with a same-sex sexual orientation are not equal to those with a heterosexual orientation'.[278]

Regardless of the alleged inability of international courts to act similarly to constitutional courts, one example of an international court following the abovementioned trend is Advisory Opinion No. 24 issued by the Inter-American Court of Human Rights (IACtHR). In 2018, the IACtHR issued a landmark decision on same-sex mar-

274 See, amongst many, ECtHR, *Străin and others v Romania*, Judgment, App no 57001/00, §59, 21 July 2005; ECtHR, *S.A.S. v France*, Grand Chamber, Judgment, App no 43835/11, 1 July 2014, §149.

275 Constitutional Court of South Africa, *Minister of Home Affairs v Fourie*, CCT60/04 (2005) ZACC 19, §100.

276 US Supreme Court, *Obergefell v Hodges*, 576 US 644 (2015), §17.

277 The decision has been widely discussed and has received both praise and criticism. On the one hand, commentators have highlighted its historic value and its potential for the protection of constitutional values, for which see, e.g., K. Yoshino, 'A New Birth of Freedom?: Obergefell v. Hodges', 129 *Harvard Law Review* (2015); N. Markard, 'Dropping the Other Shoe: *Obergefell* and the Inevitability of the Constitutional Right to Equal Marriage', 17 *German Law Journal* 3 (2016). On the other hand, the decision has met with criticism on account of its excessive use of the rhetoric of marital superiority. On this point see, e.g., M. Murray, 'Obergefell v. Hodges and Nonmarriage Inequality', 104 *California Law Review* (2016) 1207, 1249, 1252; L. Carpenter and D. S. Cohen, 'A Union Unlike Any Other: *Obergefell* and the Doctrine of Marital Superiority', 104 *Georgetown Law Journal Online* (2015).

278 Constitutional Court of Austria, 'Distinction Between Marriage and Registered Partnership Violates Ban on Discrimination', press release, 5 December 2017, https://www.vfgh.gv.at/downloads/VfGH_G_258-2017_Press_release_same-sex_marriage.pdf (last accessed 7 February 2023).

riage in regard to the requests presented by Costa Rica.[279] Addressing question number 5, it held that, according to the American Convention on Human Rights (ACHR), the contracting states should grant access to civil marriage to same-sex couples, as this would be 'the most simple and effective way to ensure the rights derived from the relationship between same-sex couples'[280]. In arriving at this conclusion, the Advisory Opinion is particularly interesting since it disregards completely the role of consensus, on the basis that it would contribute to perpetuating structural discrimination: 'the presumed lack of consensus within some countries regarding full respect for the rights of sexual minorities cannot be considered a valid argument to deny or restrict their human rights or to reproduce and perpetuate the historical and structural discrimination that such minorities have suffered'.[281] Moreover, the IACtHR held that any differential treatment between opposite-sex and same-sex couples regarding the way in which they can form a family could not be sustained if one applies the conditions laid down by the discrimination test: 'The establishment of a differentiated treatment between heterosexual couples and couples of the same sex – either by a de facto marital union or a civil marriage – does not pass the strict test of equality because, in the Court's opinion, there is no purpose acceptable under the Convention for which this distinction could be considered necessary or proportionate'.[282] In addition, it highlighted that states should extend access to marriage, rather than create civil partnerships, on the ground that doing otherwise would reinforce heteronormative stereotypes: 'there would be marriage for those who, according to the stereotype of heteronormativity, were considered "normal", while another institution with identical effects but with another name would exist for those considered "abnormal" according to this stereotype'.[283]

It is thus by recognizing the heteronormative prejudices underlying the Convention and by further relying on the principle of non-discrimination that the IACtHR could rule in favour of establishing a duty to extend civil marriage to homosexual couples deriving from the right to marry in Article 17, paragraph 2 ACHR.

Advisory Opinion No. 24 demonstrates that the solution of upholding equality through the full use of the non-discrimination principle could be available not only to supreme or constitutional courts, but also to international conventional bodies such as the ECtHR. Moreover, this option is the most logical since it relies on pure legal argumentation. Therefore, these two considerations should lead to the preference of this solution in order to improve LGBTIQ equality in the system of the ECHR.

279 IACtHR, *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, supra fn 28.

280 Ibid, §218.

281 Ibid, §219.

282 Ibid, §220.

283 Ibid, §224.

G. CONCLUDING REMARKS

This paper has tried to provide an assessment, although brief, of the implementation of non-discrimination in the system of the ECHR in regard to heterosexuals and sexual minorities. From the analysis conducted, some conclusions might be drawn. At present, homosexuals and heterosexuals are treated differently in the Convention, as they are not entitled to the protection of the same Convention rights. On the other hand, however, these two groups could be classified in many respects as 'likes' deserving to be 'treated alike'. As we have seen, however, the means usually employed by the ECtHR to achieve this result, namely the principle of non-discrimination, has been applied differently depending on whether additional rights or core rights were affected. This has been pointed out to be caused by the heteronormative character of the Convention, which influences the interpretation of positive law by the Court and prevents a full realization of equality without resorting to policy mechanisms, such as the concept of European consensus. Drawing from this argument, the possible solutions that can be used to effectively advance the protection of LGBTIQ rights in the system of the Convention have been assessed. It has thus been argued that two solutions, namely the use of consensus and the adoption of a specific additional protocol, present various challenges or are impracticable, while the last solution considered, namely the possibility of giving full weight to principle of non-discrimination with regards to the full range of Convention rights appears the most desirable as it relies mainly on legal arguments based on equality and could effectively benefit the protection of LGBITQ rights in the Convention.

5. THE PROHIBITION OF INCITEMENT TO HATRED AND VIOLENCE ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY

Wibke K. Timmermann[284]

A. INTRODUCTION

Individuals identifying as LGBTIQA+ are amongst those suffering from the worst human rights abuses, including various forms of sexual violence, brutal beatings, killings, torture, abuses in detention and discrimination in other areas of their lives.[285] The abusers target them because of their diverse gender identities or sexual orientations. In addition to violations of their right to privacy, freedom of speech and assembly, freedom from torture and inhuman or degrading treatment, as well as the right not to be discriminated against, they are also frequently the target of incitement to hatred, discrimination and violence, whether in the media, in political debates or at public LGBTIQA+ events such as pride parades.

A report published by the Norwegian Institute for Social Research in 2019 found that LGBTIQA+ people were the victims of hate speech more than twice as frequently as the rest of the population. They had been subject to concrete threats almost four times as often. Sixteen percent reported having been exposed to comments such as 'you shouldn't have been born' or 'you don't have the right to live'.[286] In May 2021, the LGBTQ advocacy group GLAAD reported that online hate speech against the LGBTIQA+ community, including on some of the most popular social media sites, was at 'epidemic levels'.[287] The UN Secretary-General has moreover described the struggle against homophobia and transphobia as 'one of the great, neglected human rights challenges of our time'.[288]

At the time when the first international human rights treaties were written, the need to specifically protect LGBTIQA+ individuals from human rights abuses or to add sexual orientation or gender identity as prohibited grounds of discrimination was not recognized. As Rosalind Petchesky has pointed out, until 1993, 'sexual life [was] acknowledged only implicitly, and then confined within the bounds of heterosexual marriage and reproduction'.[289] In 1993, the World Conference on Human Rights in Vienna marked a 'critical turning point', as Anthony J. Langlois has explained.[290] The Conference's Declaration and Programme of Action required states to eradicate 'gender based violence and all forms of sexual harassment and exploitation'.[291] Other conferences in Cairo and Beijing in 1994 and 1995, respectively, followed, further elaborating on sexual rights.

Consequently, the Universal Declaration of Human Rights, which was adopted in 1948 and which laid the groundwork for the many human rights instruments that followed, prohibits discrimination 'of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[292] The International Covenant on Civil and Political Rights (ICCPR), adopted in 1966, includes the same list in Articles 2(1) and 26.[293]

However, although there is no specific reference to sexual orientation or gender identity as prohibited grounds of discrimination, the phrases 'without distinction *of any kind*, such as …' and 'or other status' make it explicit that there is room for other grounds. As the United Nations Human Rights Committee (HRCttee) explained in its General Comment No. 18 on the right to non-discrimination, whilst other conventions such as the Convention for the Elimination of All Forms of Discrimination Against Women

> deal only with cases of discrimination on specific grounds … the term "discrimination" as used in the Covenant 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.[294]

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285 See, e.g., Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity: Report of the Office of the United Nations High Commissioner for Human Rights, UN doc A/HRC/29/23, 4 May 2015.

286 E. Høeg, 'One of Four LGBT People Experience Hate Speech', *Sciencenorway.no*, 23 March 2019, https://sciencenorway.no/forskningno-gender-and-society-norway/one-of-four-lgbt-people-experience-hate-speech/1553837.

287 'Online Hate Speech Targeting LGBTQ Community Is 'at Epidemic Levels', According to GLAAD', *NBCNews*, 11 May 2021, https://www.nbcnews.com/now/video/online-hate-speech-targeting-lgbtq-community-is-at-epidemic-levels-according-to-glaad-111686725749 (last accessed 22 February 2023).

288 In his message to the Oslo Conference on Human Rights, Sexual Orientation and Gender Identity, cited in Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity, supra fn 2, §7.

289 R. P. Petchesky, 'Sexual Rights: Inventing a Concept, Mapping an International Practice', in M. Blasius (ed), *Sexual Identities, Queer Politics*, Princeton University Press, 2001, p 139.

290 A. J. Langlois, 'Making LGBT Rights Into Human Rights', in M. J. Bosia, M. McEvoy and M. Rahman (eds), *The Oxford Handbook of Global LGBT and Sexual Diversity Politics*, Oxford University Press, 2020, p 78.

291 Ibid.

292 Art 2, Universal Declaration of Human Rights, 1948.

293 Arts 2(1), 26, International Covenant on Civil and Political Rights (ICCPR), 1976.

294 HRCttee, CCPR General Comment No. 18: Non-Discrimination, 10 November 1989, §8.

Moreover, in *Young v Australia*[295] and *X v Colombia*,[296] the HRCttee specifically found that sexual orientation was a prohibited ground of discrimination under the ICCPR.[297] In several concluding observations, the Committee has also stated that gender identity[298] and intersex[299] are prohibited grounds of discrimination. United Nations treaty bodies established under other human rights treaties have also consistently affirmed that sexual orientation and gender identity, including gender expression, are prohibited grounds of discrimination, exactly like race, sex, colour or religion.[300]

Yet, whilst the list of prohibited grounds of discrimination in Articles 2(1) and 26 ICCPR contains the phrase 'or other status', Article 20(2), which prohibits 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence', does not; on the face of it, it appears to be limited to advocacy of hatred on the basis of nationality, race or religion.[301] ICCPR commentator Manfred Nowak takes this view, arguing that the prohibited grounds listed in Article 20(2) are exhaustive.[302]

A related problem arises in the context of international criminal law. The Appeals Chambers of the International Criminal Tribunal for Rwanda (ICTR) in the *Nahimana et al* case[303] and the Mechanism for International Criminal Tribunals (MICT) in the *Šešelj* case[304] have recognized that very serious cases of hate speech and incitement to violence can amount to persecution, a crime against humanity. In the

295 HRCttee, **Edward Young v Australia, Comm no 941/2000, 18 September 2003**, UN doc CCPR/C/78/D/941/2000 (2003).

296 HRCttee, *X v Colombia*, Comm no 1361/2005, 1 May 2007, UN doc CCPR/C/89/D/1361/2005 (2007).

297 See also the earlier case of *Toonen v Australia*, where the HRCttee held that 'sexual orientation' was included within the prohibited ground 'sex'. HRCttee, *Nicholas Toonen v Australia*, Comm no 488/1992, 5 November 1992, UN doc CCPR/C/50/D/488/1992 (1994)

298 Concluding Observations of the Human Rights Committee: Japan, UN doc CCPR/C/JPN/CO/5, 18 December 2008, §29; Concluding Observations of the Human Rights Committee: Mongolia, UN doc CCPR/C/MNG/CO/5, 2 May 2011, §10; Concluding Observations of the Human Rights Committee: Dominican Republic, UN doc CCPR/C/DOM/CO/5, 19 April 2012, §16.

299 Concluding Observations of the Human Rights Committee: Guatemala, UN doc. CCPR/C/GTM/CO/3, 19 April 2012, §11.

300 See, e.g., Committee on the Rights of the Child, General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), UN doc CRC/C/GC/15, 17 April 2013, §8; Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, UN doc A/73/152, 12 July 2018, §17.

301 The *travaux préparatoires* reveal that during the Sixth Session (1950) of the Commission on Human Rights, the Philippines submitted a proposed amendment (which was however never voted upon), suggesting that the provision should require states to prohibit '[e]very act which tends to stir up hatred or violence against any person or groups of persons by reasons of race, colour, sex, language, religion, political, economic or other opinion, national or social origin, property, educational attainment, birth or other status'. See M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd edn, N. P. Engel 2005, p 469.

302 Ibid, pp 474–5.

303 ICTR, *The Prosecutor v Nahimana et al,* Appeals Chamber, Judgment, ICTR-99-52-A, 28 November 2007, §§986–988, 995.

304 MICT, *Prosecutor v Šešelj*, Appeals Chamber, Judgment, MICT-16-99-A, 11 April 2018, §63.

Rome Statute of the International Criminal Court (Rome Statute),[305] persecution is defined as 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'.[306]

The Elements of Crimes,[307] a 'primary source of law for the Court',[308] which is intended to 'assist the Court in the interpretation and application of articles 6, 7 and 8',[309] specifies that the perpetrator must target the group 'based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law'.[310] Again, gender identity and sexual orientation are not included as grounds of persecution. The phrase 'or other grounds that are universally recognized as impermissible under international law' appears to open up the possibility of including sexual orientation and gender identity. In the first edition of his commentary on the Rome Statute back in 2010, William Schabas opined however that 'it would be … difficult, at the present time, to contend that sexual orientation is an analogous ground because of the relatively primitive stage of international law in this area'.[311] Yet he also noted that 'the situation will undoubtedly change with the progressive development of international human rights law'.[312] How far has the law changed since then?

This paper will argue that it is of fundamental importance that the protection against hate speech and incitement to violence is extended to individuals identifying as LGBTIQA+. Acts of violence and persecution are often preceded and accompanied by hate speech and incitement to commit the acts in question. Where the persecution of such groups is undertaken as part of a systematic governmental or organizational policy, public hate propaganda is almost invariably included. It is employed to justify the acts in question and prepare the population for the commission of such crimes.[313] In addition, it would be deeply unfair for LGBTIQA+ people, who suffer some of the worst human rights violations, to be excluded from protection against such speech and propaganda.

1. A NOTE ON TERMINOLOGY

Various terms are used to describe the different members of sexual minorities, including homosexuals, gays, lesbians, bisexuals, transgender, intersex and more.

305 Rome Statute of the International Criminal Court, 2002 (Rome Statute).

306 Art 7(2)(g), Rome Statute.

307 International Criminal Court (ICC), Elements of Crimes, 2011.

308 W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press 2010, p 258.

309 Art 9(1), Rome Statute.

310 Art 7(1)(h), Elements of Crimes. See also Art 7(1)(h), Rome Statute.

311 Schabas, *The International Criminal Court*, supra fn 25, p 177.

312 Ibid, fn 309.

313 See also W. K. Timmermann, *Incitement in International Law*, Routledge, 2015, p 3.

The acronym LGBTIQA+ used in this paper stands for lesbian, gay, bisexual, transgender, intersex, queer/questioning and asexual.[314] It is 'an evolving acronym' – there are many other terms which people might employ to describe their experience of their gender or sexuality.[315] The term 'queer', sometimes considered pejorative in certain circumstances,[316] is now often seen as an 'umbrella term that identifies someone as being LGBTIQA+ without specifying which label/s apply'.[317] As Michael O'Flaherty has noted, because of the range of terms and usages, and the way in which some of them have changed over time, confusion can arise when trying to determine which human rights provision might apply.[318] As a result, the terms 'sexual orientation' and 'gender identity' are now generally used in human rights jurisprudence and discourse.[319]

The Yogyakarta Principles, which according to human rights experts 'reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity',[320] define 'sexual orientation' as 'each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender'.[321] 'Gender identity' is defined as 'each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms'.[322]

Further, I will generally use the term 'incitement' to refer to *public* forms of incendiary speech. The terms 'incitement to hatred', 'hate propaganda' and 'hate speech' will be employed interchangeably. Whilst there is no generally accepted definition of the term 'hate speech', it usually refers to public forms of expression that are abusive, insulting, intimidating or which justify or incite to hatred, violence or discrimination.[323] For the purposes of this article, I will use the terms 'hate speech' and 'incitement to hatred' to refer to those public forms of hate speech that fall short of calling for actual violence. Where I intend to refer to public calls for violence, I will use the term 'incitement to violence'.

B. INCITEMENT TO HATRED AND VIOLENCE ON THE BASIS OF GENDER IDENTITY OR SEXUAL ORIENTATION IN INTERNATIONAL HUMAN RIGHTS LAW

International human rights law protects freedom of speech.[324] However, this right entails certain duties and responsibilities and may be subject to restrictions. Under the ICCPR, such restrictions must be 'provided by law' and must be 'necessary' either to ensure respect for the rights or reputations of others, or to protect national security or public order, public health or morals.[325] The European Convention on Human Rights (ECHR) similarly provides that any restrictions must be 'prescribed by law' and 'necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others', inter alia.[326] Freedom of speech may therefore be restricted where it conflicts with the rights of others, as long as the restriction is provided by law and 'conform[s] to the strict tests of necessity and proportionality'.[327] Amongst the rights that freedom of speech may come into conflict with in cases of hate speech are

314 Whilst there are other acronyms, such as LGBT, LGBTI or LGBTIQ, the acronym LGBTIQA+ has been chosen as more inclusive. Of course, terminology is likely to evolve. LGBTIQA+ is also the acronym used by the Australian Government's Australian Institute of Family Studies following consultation with researchers at Queerspace, https://www.queerspace.org.au (last accessed 22 February 2023). See Australian Institute of Family Studies, 'LQBTIQA+ Glossary of Common Terms, February 2022, https://aifs.gov.au/cfca/publications/lgbtiq-communities#footnote-001 (last accessed 22 February 2023). LGBTIQA+ is also used by Legal Aid Western Australia. See Legal Aid Western Australia, 'LGBTIQA+ Factsheets', https://www.legalaid.wa.gov.au/resources/lgbtiqa-factsheets (last accessed 22 February 2023). This author was involved in the drafting of Legal Aid Western Australia's LGBTIQA+ Factsheets, which was done in close collaboration with the Youth Pride Network, https://www.youthpridenetwork.net (last accessed 22 February 2023).

315 La Trobe University, 'What does LGBTIA+ Mean?' https://www.latrobe.edu.au/students/support/wellbeing/resource-hub/lgbtiqa/what-lgbtiqa-means (last accessed 22 February 2023).

316 M. O'Flaherty, 'Sexual Orientation and Gender Identity', in D. Moeckli, S. Shah, S. Sivakumaran and D. Harris, *International Human Rights Law*, 3rd edn, Oxford University Press, 2018, p 296.

317 Legal Aid Western Australia, 'LGBTIQA+ Terms Used', 18 January 2021, https://www.legalaid.wa.gov.au/sites/default/files/inline-files/LGBTIQA%2B-Terms-used.pdf (last accessed 22 February 2023).

318 O'Flaherty, 'Sexual Orientation and Gender Identity', supra fn 33, p 296.

319 See, e.g., ibid, pp 296–7; HRCttee, Concluding Observations on the Fifth Periodic Report of Portugal, UN doc CCPR/R/PRT/CO/5, 28 April 2020, §16; HRCttee, Concluding Observations on the Fourth Periodic Report of Estonia, UN doc CCPR/C/EST/CO/4, 18 April 2019, §14; HRC Res 32/2, 15 July 2016. In June 2016, the Human Rights Council created the mandate of UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity for an initial period of three years (HRC Res 32/2, 30 June 2016); this was renewed in June 2019 under HRC Res 41/18, 12 July 2019. See Office of the UN High Commissioner for Human Rights (OHCHR), 'Independent Expert on sexual orientation and gender identity', https://www.ohchr.org/en/issues/sexualorientationgender/pages/index.aspx (last accessed 22 February 2023).

320 The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, March 2007, p 7, http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf (last accessed 22 February 2023). See also UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity Within the Context of Article 1A(1) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees', UN doc HCR/GIP/12/09, 23 October 2012.

321 The Yogyakarta Principles, supra fn 37, p 8.

322 Ibid.

323 See Article 19, *Responding to Hate Speech Against LGBTI People*, October 2013, p 8, https://www.article19.org/data/files/medialibrary/37279/LGBT-Incitement-Paper-October-2013.pdf (last accessed 22 February 2023).

324 See, e.g., Art 19(2), ICCPR; Art 10, European Convention on Human Rights (ECHR), 1950.

325 Art 19(3), ICCPR.

326 Art 10, ECHR.

327 HRCttee, *Rabbae, A.B.S. and N.A. v The Netherlands*, 29 March 2017, UN doc CCPR/C/117/D/2124/2011, §10.4.

the right to non-discrimination,[328] which, as noted above, is also guaranteed to LGBTIQA+ individuals, and the right to privacy.[329]

The European Court of Human Rights (ECtHR/the Court) has explicitly recognized the harms of hate speech directed against LGBTIQA+ people, emphasizing that 'discrimination based on sexual orientation is as serious as discrimination based on "race, origin or colour"'.[330] In the case of *Vejdeland et al v Sweden*, the applicants had been convicted of 'agitation against a national or ethnic group' in relation to hate speech against homosexuals by distributing anti-gay pamphlets at a school in Sweden.[331] The pamphlets were entitled 'Homosexual Propaganda' and described homosexuality as a 'deviant sexual proclivity' that had a 'morally destructive effect on the substance of society'. They also alleged that homosexuals' 'promiscuous lifestyle was one of the main reasons' for HIV and AIDS 'gaining a foothold' and that 'homosexual lobby organisations' were 'trying to play down paedophilia, and ask if this sexual deviation … should be legalised'.[332] Upholding the convictions, the Swedish Supreme Court found that the pamphlets were expressed 'in a way that was offensive and disparaging for homosexuals as a group'.[333]

The issue before the ECtHR was whether the applicants' convictions interfered with their right to freedom of speech, and if so, whether that interference was justified. The Court found that the convictions did indeed represent an interference with their freedom of expression.[334] However, it also held that this interference was provided by law and 'served a legitimate aim, namely "the protection of the reputation and rights of others"'.[335] The Court then considered whether the interference was 'necessary in a democratic society', i.e. whether it addressed a 'pressing social need'.[336] This involved a proportionality test: was the interference proportionate to the legitimate aim pursued and were the reasons given to justify the interference 'relevant and sufficient'?[337]

328 See, e.g., Arts 2, 26, ICCPR.

329 See, e.g., Art 17, ICCPR: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation'; Art 8, ECHR. As noted below, in *Beizaras and Levickas v Lithuania*, and *Association ACCEPT and others v Romania*, the European Court of Human Rights (ECtHR) found that if homophobic and/or transphobic hate speech attain a certain level of seriousness, they affect the victims' 'psychological well-being and dignity, thus falling within the sphere of their private life'. ECtHR, *Beizaras and Levickas v Lithuania*, Judgment, App no 41288/15, 14 January 2020, §117; ECtHR, *Association ACCEPTand others v Romania*, Judgment, App no 19237/16, 1 June 2021, §68.

330 ECtHR, *Vejdeland and others v Sweden*, Judgment, App no 1813/07, 9 February 2012, §55.

331 Ibid, §55.

332 Ibid, §8.

333 Ibid, §15.

334 Ibid, §47.

335 Ibid, §49.

336 Ibid, §51.

337 Ibid, §52.

The Court stated that even though the applicants' purpose in distributing the leaflets – 'starting a debate about the lack of objectivity of education in Swedish schools' – may have been acceptable, the wording of the leaflets mattered. Although the words used did not directly seek to persuade individuals 'to commit hateful acts', they represented 'serious and prejudicial allegations'.[338] The Court went on to emphasize:

> [I]nciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner … In this regard, the Court stresses that discrimination based on sexual orientation is as serious as discrimination based on 'race, origin or colour'.[339]

The Court concluded that the interference with the applicants' right to freedom of expression could 'reasonably be regarded by the national authorities as necessary in a democratic society for the protection of the reputation and rights of others'.[340]

In *Lilliendahl v Iceland*, the Court affirmed its finding that states were entitled to limit freedom of speech for the purposes of criminalizing incitement to hatred on the basis of sexual orientation. In that case, the municipal council of the town of Hafnarfjörður, Iceland, had approved a proposal to enhance the education and counselling in schools on matters relating to individuals identifying as LGBTIQA+.[341] This decision was discussed on a radio station. In comments below a subsequent news article on the radio show, the applicant stated, inter alia, that he and other listeners of the radio station had 'no interest in any [expletive] explanation of this *kynvilla* [derogatory word for homosexuality, literally 'sexual deviation'] … This is disgusting. To indoctrinate children with how *kynvillingar* [literally 'sexual deviants'] *eðla sig* ['copulate', primarily used for animals] in bed'.[342]

The applicant was convicted of 'publicly threatening, mocking, defaming and denigrating a group of persons on the basis of their sexual orientation and gender identity', contrary to Article 233(a) of the General Penal Code.[343] This conviction was ultimately upheld by the Supreme Court of Iceland.[344] The applicant was sentenced to a fine.[345]

338 Ibid, §54.

339 Ibid, §55.

340 Ibid, §59.

341 *Lilliendahl v Iceland*, Decision, App no 29297/18, 12 May 2020, §3.

342 Ibid, §5.

343 Ibid, §7.

344 Ibid, §10.

345 Ibid, §17.

The applicant then complained to the ECtHR under Article 10, alleging a violation of his right to freedom of expression.[346] The Court examined the case both under Article 17 and Article 10 ECHR. It found that Article 17, which provides that the ECHR may not be interpreted in such a way as to imply 'for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention', did not apply in the instant case, as it was 'only applicable on an exceptional basis and in extreme cases'. Thus, it only came into play where it was 'immediately clear that the impugned statements sought to deflect this Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention'.[347] Despite the fact that the comments in question were 'highly prejudicial', it was 'not immediately clear that they aimed at inciting violence and hatred or destroying the rights and freedoms protected by the Convention'.[348]

Turning its attention to Article 10, the ECtHR found that the applicant's conviction undoubtedly interfered with his freedom of expression.[349] However, the applicant's comments had been 'serious, severely hurtful and prejudicial' and such as to 'promote intolerance and detestation of homosexual persons'.[350] Moreover, the provision under which the applicant had been convicted, and thus the interference with his freedom of expression, fulfilled a legitimate aim, as its purpose was to 'protect the right to respect for private life and the right to enjoy human rights equally to others, as well as safeguard the rights of social groups which have historically been subjected to discrimination'.[351] The interference was moreover necessary in a democratic society: the Court emphasized that discrimination based on sexual orientation was 'as serious as discrimination based on "race, origin or colour"' and noted that 'both statutory bodies of the Council of Europe have called for the protection of gender and sexual minorities from hateful and discriminatory speech'.[352] Ultimately, the Court felt that the Supreme Court had 'adequately balanced the applicant's personal interests against the more general public interest in the case encompassing the rights of gender and sexual minorities'[353] and rejected the complaint under Article 10.[354]

It therefore appears settled that states may limit individuals' right to freedom of speech in order to proscribe hate speech directed against LGBTIQA+ people. However, is there an obligation to do so? With respect to the ECHR, in a couple of very

346 Ibid, §23.

347 Ibid, §25

348 Ibid, §26.

349 Ibid, §32.

350 Ibid, §38.

351 Ibid, §43.

352 Ibid, §45.

353 Ibid, §47.

354 Ibid, §48.

recent judgments, the ECtHR has found that there is such a duty, namely where the hate speech in question rises to such a level as to impact the victims' 'psychological well-being and dignity, thus falling within the sphere of their private life'.[355] In such cases, which because of their context attain a certain level of seriousness, there may be a violation of Article 14, taken in conjunction with Article 8, if the state in question fails to prevent incitement to hatred or violence by private individuals or to investigate in an effective manner whether there was a discriminatory motive behind the acts or whether they constituted incitement to hatred and violence.[356] Article 14 prohibits discrimination, whilst Article 8 guarantees the right to respect for private and family life.

Thus, in *Beizaras and Levickas v Lithuania*, the first applicant, who was an openly gay man in a same-sex relationship with the second applicant, had in December 2014 posted a photograph on his Facebook page showing a kiss between him and the second applicant.[357] The picture was publicly accessible and attracted more than 800 comments, most of them aimed at inciting hatred and violence against LGBTIQA+ people. They also included numerous comments which threatened the applicants personally.[358] The comments included statements such as 'I'm going to throw up – they should be castrated and burnt; cure yourselves, jackasses – just saying'; 'These faggots fucked up my lunch; if I was allowed to, I would shoot every single one of them'; 'Scum!!!!!! Into the gas chamber with the pair of them'; 'Hey fags – I'll buy you a free honeymoon trip to the crematorium'; 'Fucking faggots, burn in hell, garbage'; 'get the fuck out of Lithuania and don't shame us, you fucking capon; we should put your head under a car and into the noose, you fucking faggot', among various others.

At the request of the applicants, the NGO National Lesbian, Gay, Bisexual and Transgender (LGBT) Rights Association (the LGL Association) lodged a complaint with the prosecutor's office and requested that criminal proceedings be initiated under Article 170, §§2 and 3 of the Criminal Code,[359] which made it punishable for a person to 'publicly ridicule ... express ... contempt for, urge ... hatred of or incite ... discrimination against a group of people or a person belonging thereto on the grounds of sex, sexual orientation', among other grounds, and to 'publicly incite ... violence or the physically violent treatment of a group of people or a person belonging thereto' on the same grounds.[360]

However, the prosecutor decided not to initiate a pre-trial investigation, concluding, inter alia, that the comments were 'unethical' and 'immoral' but not crimi-

355 *Beizaras and Levickas* judgment, supra fn 46, §117; *Association ACCEPT* judgment, supra fn 46, §68.

356 *Association ACCEPT* judgment, supra fn 46, §96; *Beizaras and Levickas* judgment, supra fn 46, §129.

357 *Beizaras and Levickas* judgment, supra fn 46, §§7, 9.

358 Ibid, §10.

359 Ibid, §16. They also complained under Art 19, para 1(3) of the Law on the Provision of Information to the Public; however, the ECtHR focused on the complaint under Art 170.

360 *Beizaras and Levickas* judgment, supra fn 46, §§17, 30.

nal.[361] The city district court dismissed the LGL Association's appeal against the prosecutor's decision,[362] finding that by posting a picture of two men kissing in a public space, the applicants must have foreseen that such 'eccentric behaviour really did not contribute to the cohesion of those within society who had different views or to the promotion of tolerance'.[363] A final appeal to the regional court was also rejected.[364]

The applicants then complained to the ECtHR, claiming that they had been discriminated against because of their status, which had been the reason for the domestic authorities' refusal to open a pre-trial investigation with respect to the hateful comments. They alleged a breach of Article 14 of the Convention, in conjunction with Article 8.[365]

In its 2020 judgment, the Court began by explaining that the notion of 'private life' was a 'broad term not susceptible to exhaustive definition', but that it included 'also the physical and psychological integrity of a person'. An individual's 'sexual orientation and sexual life' formed part of 'the personal sphere protected by Article 8'. However, in order for Article 8 to come alive, an attack on a person had to reach a 'certain level of seriousness' and be made in such a way as to cause 'prejudice to the personal enjoyment of the right to respect for one's private life'.[366] The Court stressed that this right to 'effective respect for private life' entailed positive obligations for the state, which in the case of 'grave acts where essential aspects of private life are at stake' demanded criminalization.[367] Referring to its previous case law, the Court emphasized that 'where acts that constitute serious offences are directed against a person's physical or mental integrity, only efficient criminal-law mechanisms can ensure adequate protection and serve as a deterrent factor'.[368] Criminal measures were also necessary with regard to 'direct verbal assaults and physical threats, motivated by discriminatory attitudes'.[369]

Turning to the facts of the case at hand, the Court held that the 'comments on the first applicant's Facebook page … affected the applicants' psychological well-being and dignity, thus falling within the sphere of their private life'.[370] It referred to the domestic courts' description of the applicants' posting of the photo as 'eccentric behaviour' which 'did not contribute to social cohesion and the promotion of tolerance' and found that these comments made it 'clear that one of the grounds for refusing to open a pre-trial investigation was the courts' disapproval of the applicants' demonstrating their sexual orientation'.[371] The ECtHR stated that whilst not every instance of hate speech necessarily required criminal prosecution or sanctions, the instant case was different. Comments which constituted 'hate speech and incitement to violence, and are thus unlawful on their face' could 'in principle require States to take certain positive measures'.[372] The case at hand involved 'undisguised calls on attack [*sic*] on the applicants' physical and mental integrity' which necessitated 'protection by the criminal law'.[373]

The Court concluded that there had been a violation of Article 14, taken in conjunction with Article 8 ECHR.[374] It found that it was established,

> firstly, that the hateful comments including undisguised calls for violence by private individuals directed against the applicants and the homosexual community in general were instigated by a bigoted attitude towards that community and, secondly, that the very same discriminatory state of mind was at the core of the failure on the part of the relevant public authorities to discharge their positive obligation to investigate in an effective manner whether those comments regarding the applicants' sexual orientation constituted incitement to hatred and violence, which confirmed that by downgrading the danger of such comments the authorities at least tolerated such comments … In the light of those findings the Court also considers it established that the applicants suffered discrimination on the grounds of their sexual orientation.[375]

Jeroen Temperman has rightly described this case as '[a] revolutionary judgment in all regards', concluding that 'States parties to the European Convention not having inclusive criminal law protection in place to combat hateful incitement against LGBT persons or not properly investigating incidents of hateful incitement against LGBT persons under those laws are liable to be condemned by the Strasbourg Court pursuant to the Convention's (equal) right to private life'.[376]

In the subsequent case of *Association ACCEPT and others v Romania*, the ECtHR confirmed its findings in *Beizaras and Levickas*. In this case, the applicant association ACCEPT (an organization promoting the interests of lesbian, gay, bisexual and transgender people in Romania) had organized a number of cultural events to celebrate LGBT History Month. As part of the programme, it arranged for the screening of a film portraying a same-sex family. Following the screening, there was to be a

361 Ibid, §18.

362 Ibid, §19.

363 Ibid, §21.

364 Ibid, §23.

365 Ibid, §67.

366 Ibid, §109.

367 Ibid, §110.

368 Ibid, §111 (referring to ECtHR, *Identoba and others v Georgia*, Judgment, App no 73235/12, 12 May 2015, §86).

369 Ibid (referring, inter alia, to ECtHR, *R.B. v Hungary*, Judgment, App no 64602/12, 12 April 2016, §§80, 84–5).

370 Ibid, §117.

371 Ibid, §§120–121.

372 Ibid, §125.

373 Ibid, §128.

374 Ibid, §130.

375 Ibid, §129.

376 J. Temperman, Religious Speech, Hatred and LGBT Rights: An International Human Rights Analysis, Brill Nijhoff, 2021, p 25.

discussion about the rights of same-sex families.[377] On the day of the screening, the applicant association became aware of calls on social media platforms for a counter-demonstration during the screening of the film. Its representative requested protection from the police.[378] Ten police officers, later joined by seven gendarmes, attended the premises to provide protection, but remained in the corridor outside the screening room.[379] Approximately 20 people attended the screening, including the individual applicants. Fifty more people, who appeared to be associated with a far-right movement, the New Right, then entered the screening room. Displaying fascist and xenophobic signs as well as the flag of a Romanian far-right party, they screamed remarks such as 'death to homosexuals', 'faggots' or 'you filth' and threatened attendees of the screening.[380] The organizers alerted the police who entered the room, confiscated some flags but then left the room again.[381] The intruders blocked the projector, preventing the screening from continuing. The organizers then decided to stop the screening.[382]

Shortly after, the applicant association lodged a criminal complaint regarding the incident with the local police station, citing incitement to discrimination and the displaying of fascist, racist or xenophobic symbols in public, inter alia.[383] The case was sent to the prosecutor's office attached to the Bucharest Court of Appeal, which closed the investigation as it considered that the acts did not amount to criminal offences, but rather represented 'an exchange of views' between the participants.[384] Following several appeals, the Bucharest Court of Appeal upheld the prosecutor's decision.[385]

The applicant association and individual applicants then complained to the ECtHR, alleging a violation of Articles 3 and 8 (in that the state authorities had failed to protect them from degrading and humiliating treatment, and had also failed to conduct an effective investigation into the incident), as well as Article 14, read in conjunction with Articles 3 and 8 (in that the authorities' failure to protect them and investigate had been caused by their prejudice against the applicants because their sexual orientation).[386]

With respect to the complaint under Article 3, the ECtHR explained that treatment could be described as degrading if 'it arouses in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them'. Discriminatory treatment could, as a matter of principle, constitute such degrading treatment as long as

377 *Association ACCEPT* judgment, supra fn 46, §5.

378 Ibid, §6.

379 Ibid, §7.

380 Ibid, §§8–9.

381 Ibid, §10.

382 Ibid, §11.

383 Ibid, §17.

384 Ibid, §24.

385 Ibid, §34.

386 Ibid, §44.

it reached a level of severity which amounted to 'an affront to human dignity'. Thus, 'treatment that [was] grounded in a predisposed bias on the part of a heterosexual majority against a homosexual minority may, in principle, fall within the scope of Article 3'.[387] Nonetheless, in the instant case, the facts before the Court did not reveal the same 'level of mental suffering' as in other similar cases[388] where, in addition to the threatening language, there had also been 'searches, severe beatings, robbery and a series of humiliating and intimidating acts'.[389] Consequently, the minimum level of severity required for the case to fall within Article 3 had not been attained.

Turning to Articles 8 and 14, the Court reiterated its finding in *Beizaras and Levickas* that the term 'private life' was broad and also included the 'physical and psychological integrity of a person'. A person's sexual orientation was part of the personal sphere that was protected by Article 8. However, the violation in question had to reach a certain level of seriousness.[390] The Court emphasized that Article 14 applied to issues related to sexual orientation and gender identity.[391] In the instant case, it held that 'the treatment complained of affected the individual applicants' psychological well-being and dignity, thus falling within the sphere of their private life'. This was not changed by the fact that the violations had taken place during a public event. The Court found that 'the violent verbal attacks on the applicants, which, moreover, had occurred in the context of evidence of patterns of violence and intolerance against a sexual minority, had attained the level of seriousness required for Article 8 to come into play'.[392]

The Court further held that the authorities had a positive duty under Articles 8 and 14 'to prevent the infliction of hatred-motivated violence (whether physical attacks or verbal abuse) by private individuals and to investigate the existence of any possible discriminatory motive behind such violence'.[393] Pointing to the fact that the police officers had remained outside the auditorium, that they did not prevent the applicants from being bullied and insulted, that the authorities' attitude in remaining aside and in their subsequent reporting revealed 'a certain bias against homosexuals'[394] and that the police reports ignored any 'manifestations of homophobia' during the incident,[395] the Court concluded that 'the authorities failed to correctly assess the risk incurred by the individual applicants at the hands of the intruders and to respond adequately in order to protect the individual applicants' dignity against homophobic attacks by a third party'.[396]

387 Ibid, §52.

388 Ibid, §53.

389 Ibid, §54.

390 Ibid, §63

391 Ibid, §64.

392 Ibid, §68.

393 Ibid, §96.

394 Ibid, §§110–112.

395 Ibid, §112.

396 Ibid, §113.

Whilst the Court was careful to note that not every instance of hate speech required criminal sanctions, 'comments that amount to hate speech and incitement to violence, and are thus clearly unlawful on the face of things, may in principle require the State to take certain positive measures'.[397] In the instant situation, where 'homophobic slurs' had been uttered during the incident, and where there was a hostile attitude against the LGBTIQA+ community throughout the state, '[t]he necessity of conducting a meaningful inquiry' into possible discriminatory motives was 'absolute'.[398] The Court concluded that the Romanian authorities had 'failed to offer adequate protection in respect of the individual applicants' dignity (and more broadly, their private life), and to effectively investigate the real nature of the homophobic abuse directed against them'. Consequently, the individual applicants had 'suffered discrimination on the grounds of their sexual orientation',[399] and their rights under Article 14, taken in conjunction with Article 8, had been violated.[400]

Depending on the severity of the incitement and the attendant circumstances (e.g. whether there is a general climate of hostility against the LGBTIQA+ community in the respondent state), the ECtHR is therefore prepared to find that member states have an obligation to take effective measures to prevent, investigate and, if necessary, punish incitement to hatred and violence on the basis of sexual orientation and gender identity. Where states fail to live up to that obligation, the Court is prepared to find that there has been a violation of Article 14 read together with Article 8, in that the applicants' dignity and private life have not been protected.

In contrast to the ECHR, which does not contain a provision imposing an obligation on states to prohibit incitement to hatred or discrimination, as noted above, the ICCPR specifically requires states to prohibit by law '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.[401] The provision, however, does not refer to advocacy of hatred on the basis of sexual orientation or gender identity.

It has been suggested that in the same way that the non-discrimination provisions in international human rights instruments do not specifically refer to LGBTIQA+ individuals, but have been extended to encompass discrimination on that basis, the prohibition against advocacy of hatred in Article 20(2) should be regarded as including advocacy of hatred against LGBTIQA+ individuals.[402] As Temperman has noted, it is obvious that 'from a contemporary human rights perspective', the

397 Ibid, §119.

398 Ibid, §123.

399 Ibid, §127.

400 Ibid, §128.

401 Art 20(2), ICCPR.

402 Article 19, *Responding to Hate Speech Against LGBTI People*, supra fn 40, p 12: 'The HR Committee has not stated whether or not the protected grounds under Article 20(2) should be interpreted expansively to include sexual orientation or gender identity. The selectivity of the text may be attributed to the political context of the negotiations and the specific historical events they were responding to. However, interpreting Article 20(2) in light of developments in the HR Committee and states' understanding of non-discrimination provisions favours inclusion of these characteristics'.

grounds currently included in Article 20(2) 'strike as overly limited'.[403] In his opinion, the idea of interpreting Article 20(2) to also include the grounds of sexual orientation and gender identity 'is certainly not outlandish, seeing as the UN Human Rights Committee has in the past engaged theories of dynamic / evolutionary treaty interpretation and has especially repeatedly deployed the "living instrument" doctrine'.[404] The non-governmental organization Article 19 has similarly argued in a policy brief on *Responding to Hate Speech Against LGBTI People* that such an interpretation finds support in recent concluding observations by the HRCttee in respect of various countries.[405]

Whilst the HRCttee would in the past cite Articles 2 and 26 rather than Article 20 when it voiced concern over hate crimes against sexual minorities,[406] it has increasingly come to refer to Article 20 when urging countries to amend their criminal codes or otherwise proscribe hate speech and hate crimes on the grounds of sexual orientation or gender identity.

For instance, in 2009, it urged Poland to 'amend the Penal Code to define hate speech and hate crimes based on sexual orientation or gender identity among the categories of punishable offences'.[407] More recently, in 2019, it insisted that Estonia

> should ensure effective protection against hate speech and hate crimes, both in law and in practice, in accordance with articles 19 and 20 of the Covenant … including by: (a) Revising the penalties and the threshold for the offence of incitement to hatred, violence and discrimination under article 151 of the Criminal Code; (b) Including gender identity among the prohibited grounds for hatred-motivated offences provided for in article 151 and 152 of the Criminal Code; (c) Recognizing hate motives, including on the basis of sexual orientation and gender identity, as aggravating circumstances for all offences.[408]

In this case, the HRCttee explicitly linked its requests with Estonia's obligations under Articles 19 and 20 ICCPR.

The Committee against Torture, established under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as

403 Temperman, Religious Speech, Hatred and LGBT Rights, supra fn 94, p 31.

404 Ibid, p 34, referring to the HRCtte's comment in *Judge v Canada* that 'the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions'. HRCttee, *Judge v Canada*, Comm no 829/1998, 5 August 2002, UN doc CCPR/C/78/D/829/1998, §10.3.

405 Article 19, Responding to Hate Speech Against LGBTI People, supra fn 40, p. 12.

406 S. Joseph and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 3rd edn, Oxford University Press, 2013, p 628, para 18.76; Concluding Observations of the Human Rights Committee: United States of America, UN doc CCPR/C/USA/CO/3/Rev.1, 18 December 2006, §25; Concluding Observations of the Human Rights Committee: Russian Federation, UN doc CCPR/C/RUS/CO/6, 2 November 2009, §28.

407 Concluding Observations of the Human Rights Committee: Poland, UN doc CCPR/C/POL/CO/6, 15 November 2010, §8.

408 HRCttee, Concluding Observations on the Fourth Periodic Report of Estonia, supra fn 36, §14.

well as the Committee on the Rights of the Child, have expressed similar views in their concluding observations.[409] Further, in his 2015 Report to the Human Rights Council, the UN High Commissioner for Human Rights recommended that states address homophobic and transphobic violence by, inter alia, '[p]rohibiting incitement to hatred and violence on the grounds of sexual orientation and gender identity, and holding to account those responsible for related hate speech'.[410]

As the HRCttee explained in 2016 in *Rabbae et al v The Netherlands*, 'article 20(2) secures the right of people as individuals and as members of groups to be free from hatred and discrimination under article 26 by requiring States to prohibit certain conduct and expression by law'.[411] This broad definition, referring as it does to 'members of groups' without specifying the types of groups, as well as the recent practice of the HRCttee detailed above, suggests that Article 20(2) may no longer be limited to the advocacy of national, racial and religious hatred, but may be broader and also encompass advocacy of hatred on the grounds of sexual orientation and gender identity.

Further support for this proposition can be found in the Yogyakarta Principles, which have been drafted by human rights experts and which are said to 'reflect the existing state of human rights law in relation to issues of sexual orientation and gender identity'.[412] The Principles declare that states must ensure that 'the exercise of freedom of opinion and expression does not violate the rights and freedoms of persons of diverse sexual orientations and gender identities'.[413] The Principles further recommend that '[t]he mass media avoid the use of stereotypes in relation to sexual orientation and gender identity, and promote tolerance and the acceptance of diversity of human sexual orientation and gender identity, and raise awareness around these issues'.[414]

Various other organizations have emphasized the importance of legislation prohibiting incitement to hatred and violence on the basis of sexual orientation or

409 Committee against Torture: see, e.g., Concluding Observations on the Combined Sixth and Seventh Periodic Reports of Norway, Adopted by the Committee at its Forty-Ninth Session (29 October to 23 November 2012), UN doc CAT/C/NOR/CO/6-7, 13 December 2012, §21: 'The Committee notes with concern allegations of cases of ill-treatment, harassment, incitement to violence and hate speech towards minorities and other vulnerable groups in the State party, including persons belonging to the lesbian, gay, bisexual, and transgender (LGBT) community … The State party should ensure that violent acts, discrimination and hate speech are systematically investigated, prosecuted and the alleged perpetrators, if found guilty, convicted and sanctioned with penalties commensurate with the gravity of the offence'. Committee for the Rights of the Child: see, e.g., Concluding Observations on the Combined Third to Fifth Periodic Reports of Slovakia, UN doc CRC/C/SVK/CO/3-5, 20 July 2016, §16(d): 'The Committee urges the State party to: … (d) Investigate and sanction all cases of political figures and religious leaders using anti-Roma and anti-Muslim rhetoric as well as offensive discourse targeting sexual orientation'.

410 Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity, supra fn 2, §78(d).

411 *Rabbae*, supra fn 44, §10.4.

412 The Yogyakarta Principles, supra fn 37, p 7.

413 Ibid, Principle 19, para E.

414 Ibid, Additional Recommendations, para O.

gender identity,[415] including the Council of Europe whose Committee of Ministers issued a recommendation in 2010 that urged member states to 'take appropriate measures to combat all forms of expression, including in the media and on the internet, which may be reasonably understood as likely to produce the effect of inciting, spreading or promoting hatred or other forms of discrimination against lesbian, gay, bisexual and transgender persons'.[416] In 2018, the Organization of American States recommended that states '[a]dopt appropriate measures to combat hate speech against LGBTI persons and ensure that legislation to punish hate speech, which constitutes incitement to violence against LGBTI persons, is in accordance with Article 13.5 of the American Convention on Human Rights and the principles and standards established by the Inter-American Commission and Court'.[417]

In conclusion, there is an emerging obligation under international human rights law requiring states to prohibit incitement to hatred and violence against members of the LGBTIQA+ community. Despite the non-existence of an equivalent provision to Article 20(2) ICCPR in the ECHR, the ECtHR has recently held that states are obligated to prevent and investigate such incitement; failure to do so may constitute a violation of the victims' rights under Articles 14 and 8 ECHR. With respect to the ICCPR, in the context of the state reporting procedure, the HRCttee is increasingly referring to Article 20 when urging countries to amend their criminal codes or otherwise prohibit hate speech and hate crimes on the grounds of sexual orientation or gender identity. In recent case law, it also appears to be referring to Article 20(2) in more general terms, as protecting the right of people to be free from incitement to hatred and discrimination. Thus, whilst there has not yet been any individual communication alleging a violation of Article 20(2) in terms of incitement to hatred and discrimination against LGBTIQA+ people, through its concluding observations, the HRCttee has, as Temperman notes, 'steer[ed] on further proliferation of inclusive incitement legislation rendering protection to LGBT people'.[418]

415 See OECD, 'Which Laws Are LGBTI-Inclusive?', subsection 2.2.3: 'Protection of LGBTI People Against Violence', *Over the Rainbow? The Road to LGBTI Inclusion*, https://www.oecd-ilibrary.org/sites/95f4ce9f-en/index.html?itemId=/content/component/95f4ce9f-en (last accessed 22 February 2023).

416 Council of Europe, Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, 31 March 2010, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf40a (last accessed 22 February 2023), §6.

417 Inter-American Commission on Human Rights (IACHR), *Recognition of the Rights of LGBTI Persons*, 7 December 2018, Recommendation 22, http://www.oas.org/en/iachr/reports/pdfs/LGBTI-RecognitionRights2019.pdf (last accessed 23 February 2023).

418 Temperman, *Religious Speech, Hatred and LGBT Rights*, supra fn 94, p 46.

C. INCITEMENT TO HATRED AND VIOLENCE ON THE BASIS OF GENDER IDENTITY OR SEXUAL ORIENTATION IN INTERNATIONAL CRIMINAL LAW

1. PERSECUTION AS A CRIME AGAINST HUMANITY

The human rights violations suffered by LGBTIQA+ people are not isolated, but in many cases systematic and pervasive. Where individuals are systematically deprived of fundamental human rights and are targeted because of their membership of a particular group, the acts committed against them may amount to the crime against humanity of persecution.

As a crime against humanity, any act of persecution must be perpetrated as part of a widespread or systematic attack against a civilian population,[419] with knowledge of the attack.[420] An 'attack' refers to 'a campaign, an operation or a series of actions directed against the civilian population, *viz.* a course of conduct and not a single isolated act'. It need only be proven that this course of conduct consists of 'the multiple commission of acts'.[421] Within that context, a single act may constitute a crime against humanity.[422] 'Widespread' has been held to refer to 'massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims'.[423] 'Systematic' refers to 'the organised nature of the acts of violence and ... the improbability of their random occurrence'.[424] It is important to emphasize that the attack must be 'widespread *or* systematic'; it need not be both.

In addition, under the Rome Statute, the attack against the civilian population must also be carried out 'pursuant to or in furtherance of a State or organizational policy to commit such attack'.[425] The Elements of Crimes further explain that such a policy 'requires that the State or organization actively promote or encourage such an attack against a civilian population'.[426] It is not necessary that the entire civilian population of the area in question be targeted; it is sufficient that the policy 'target a particular civilian population or a part thereof'.[427] Moreover, for the purposes of proving that there was a policy, it only needs to be established 'that the State or organisation meant to ... eliminate, persecute or undermine a community'.[428]

By contrast, proving the *systematic* nature of the attack goes beyond this – it also requires an 'inquiry as to whether a series of repeated actions seeking to produce always the same effects on a civilian population was undertaken with consideration – identical acts or similarities in criminal practices, continual repetition of a same *modus operandi*, similar treatment meted out to victims or consistency in such treatment across a wide geographic area'.[429]

Persecution, which the Rome Statute defines as 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity',[430] must be directed 'against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender ... or other grounds that are universally recognized as impermissible under international law'.[431]

However, not every act depriving individuals of their fundamental rights will amount to the crime of persecution – the underlying acts, whether considered in isolation or jointly with other acts, must be of the same gravity as other crimes against humanity.[432] On the other hand, there is no need for the underlying acts of persecution to constitute crimes under international law.[433]

Setting aside for the time being consideration of whether gender identity and sexual orientation fall within the prohibited grounds of persecution, one can readily conclude that members of the LGBTIQA+ community have in the past been, and still are, the victims of various acts of persecution, with the Nazi persecutions in the 1930s and 40s amounting to the most abhorrent, involving a clear 'anti-homosexual policy'.[434] The Nazi acts of persecution against real and suspected homosexuals included arbitrary arrests, deportation and segregation in concentration

419 See, e.g., ICTY, *Prosecutor v Duško Tadić*, Appeals Chamber, Judgment, IT-94-1-A, 15 July 1999, §311; *Prosecutor v Dario Kordić and Mario Čerkez*, Appeals Chamber, Judgment, IT-95-14/2-A, 17 December 2004, §106.

420 Art 7(1), Rome Statute.

421 ICC, Situation in the Democratic Republic of the Congo in the Case of *The Prosecutor v Germain Katanga*, Trial Chamber, Judgment, ICC-01/04-01/07, 7 March 2014, §1101; Art7(2)(a), Rome Statute.

422 *Katanga* trial chamber judgment, supra fn 138, §101.

423 ICTR, *The Prosecutor v Jean-Paul Akayesu*, Judgment, ICTR-96-4-T, 2 September 1998, §580; see also *Katanga* trial chamber judgment, supra fn 138, §1098.

424 ICC, *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber, Decision on the Prosecutor's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, 4 March 2009, §81; see also *Katanga* trial chamber judgment, supra fn 138, §1098.

425 Art 7(2)(a), Rome Statute.

426 Art 7, Elements of Crimes: Crimes Against Humanity, Introduction, §3.

427 *Katanga* trial chamber judgment, supra fn 138, §1108.

428 Ibid, §1113.

429 Ibid.

430 Art 7(2)(g), Rome Statute.

431 Art 7, (1)(h), Rome Statute. Under the ICTY and ICTR Statutes, the grounds of persecution are 'political, racial and religious'. Art 5(h), ICTY Statute; Art 3(h), ICTR Statute.

432 See, e.g., *Nahimana et al* appeals chamber judgment, supra fn 20, §985; ICTY, *Prosecutor v Milorad Krnojelac*, Appeals Chamber, Judgment, IT-97-25-A, 17 September 2003, §185; ICTY, *Prosecutor v Blagoje Simić*, Appeals Chamber, Judgment, IT-95-9-A, 28 November 2006, §177; ICTY, *Prosecutor v Milomir Stakić*, Appeals Chamber, Judgment, IT-97-24-A, 22 March 06, §§327–328.

433 *Nahimana et al* appeals chamber judgment, supra fn 20, §985; ICTY, *Prosecutor v Radoslav Brđanin*, Appeals Chamber, Judgment, IT-99-36-A, 3 April 2007, §296; ICTY, *Prosecutor v Miroslav Kvočka et al*, Appeals Chamber, Judgment, IT-98-30/1-A, 28 February 2005, §323.

434 G. Grau and C. Shoppmann (eds), The Hidden Holocaust? Gay and Lesbian Persecution in Germany 1933-45, Routledge, 1995, p 1.

camps, compulsory castration, para-medical experiments including 'reversal of hormonal polarity' and extermination.[435]

At the present time, members of the LGBTIQA+ community still face persecution in various countries around the world. Homosexuality is criminalized in 69 countries; in Brunei, Iran, Mauritania, Saudi Arabia, Yemen and the northern states in Nigeria, same-sex sexual acts are subject to the death penalty.[436] Ugandan law, for instance, criminalizes oral and anal sex between persons of the same sex; such acts are punishable with up to seven years' imprisonment;[437] in the case of 'carnal knowledge', the act is punishable with life imprisonment.[438] In 2013, the Ugandan Parliament passed the Anti-Homosexuality Act 2014 which further prohibited sexual relations between members of the same sex. The original bill had provided for the death penalty in certain cases; the Act as passed amended this penalty to life in prison. The bill was signed into law in 2014,[439] but was later declared invalid on procedural grounds by the Constitutional Court of Uganda.[440] Nonetheless, LGBTIQA+ people continue to be subject to serious discrimination in Uganda, including frequent violent attacks, often by state officials. For instance, in June 2021, police raided the Happy Family Youth Shelter in Kampala and arrested 44 people, alleging that an illegal same-sex wedding was being conducted. Several of those arrested later claimed that police had subjected them to invasive anal examinations.[441]

These and many other examples meet the elements of persecution as a crime against humanity: the intentional and severe deprivation of the victims' fundamental rights because of their membership of a particular group; a systematic persecutory campaign orchestrated by state officials pursuant to a state policy (as evidenced by discriminatory legislation); and their being directed against civilians.

2. ARE GENDER IDENTITY AND SEXUAL ORIENTATION PROHIBITED GROUNDS OF PERSECUTION AS A CRIME AGAINST HUMANITY?

The Rome Statute specifically enumerates ethnic, political, racial, national, cultural, religious and gender as prohibited grounds of persecution.[442] In addition, the Statute mentions 'other grounds that are universally recognized as impermissible under international law'.[443] Whilst sexual orientation and gender identity are therefore not explicitly mentioned, they could potentially be included as 'gender grounds' or 'other grounds that are universally recognized as impermissible under international law'. Two further potential grounds, 'political' and 'cultural', will also be considered.

a. Gender Grounds

The Rome Statute defines 'gender' as referring to 'the two sexes, male and female, within the context of society'; it stresses that '[t]he term "gender" does not indicate any meaning different from the above'.[444] This definition is somewhat bizarre, as various commentators have pointed out. It appears that the wording was the result of a compromise between a large number of states who favoured a definition that 'reflected the socially constructed and fluid nature of gender over time and location', and a number of conservative Catholic and Arab states who sought to limit the meaning of the term to 'the roles ostensibly naturally flowing from biological sex in their societies' and resisted any formulation that could be interpreted as including any form of gender diversity or sexual orientation. This resulted in a definition that was intentionally ambiguous and contained elements satisfying both sides.[445]

On the face of it, the definition seems to categorically exclude intersex people or individuals who do not wish to be defined as either male or female. However, some scholars have argued that it might include sexual orientation. Arguably, this finds some support in the HRCttee's findings in *Toonen v Australia*, where it concluded that the reference to 'sex' in the ICCPR included sexual orientation.[446]

However, the phrase 'within the context of society' might open up a way to include gender diversity. As Valerie Oosterveld, who was a member of the Canadian delegation to the 1998 UN Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court and was involved in the negotiations on the definition of 'gender', has noted, the definition of 'gender' in the Rome Statute 'reflected the use of "constructive ambiguity" by the negotiators',[447] which left open 'opportunities for a positive and precedent-setting approach'.[448] Oosterveld has suggested that 'the phrase "within the context of society" was chosen to give the ICC judges the flexibility to determine the meaning of the phrase on a case-by-case basis'.[449]

435 Ibid, p 4.

436 'Homosexuality: The Countries Where it is Illegal to be Gay', *BBC News*, 12 May 2021, https://www.bbc.com/news/world-43822234.

437 Penal Code 1950, §148.

438 Ibid, §145.

439 F. Karimi and N. Thompson, 'Uganda's President Museveni Signs Controversial Anti-Gay Bill Into Law', *CNN*, 25 February 2014, https://edition.cnn.com/2014/02/24/world/africa/uganda-anti-gay-bill.

440 'Uganda Court Annuls Anti-Homosexuality Law', *BBC News*, 1 August 2014, https://www.bbc.com/news/world-africa-28605400.

441 J. Milton, 'Dozens of Queer Ugandans Finally Freed on Bail After Police "witch hunt"', *PinkNews*, 5 June 2021, https://www.pinknews.co.uk/2021/06/05/uganda-44-lgbt-people-detained-shelter-bail-frank-mugisha/.

442 Art 7(1)(h), Rome Statute.

443 Ibid.

444 Art 7(3), Rome Statute.

445 V. Oosterveld, 'The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law', 24 *William & Mary Journal of Women and the Law* (2017–2018) 450.

446 *Toonen*, supra fn 14.

447 Oosterveld, 'The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward of Back for International Criminal Justice?', 18 *Harvard Human Rights Journal* (2005) 57.

448 Ibid, 58.

449 Ibid, 74 (referring to C. Steains, 'Gender Issues', in R. S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, 1999, p 374.

Furthermore, in 2014, the International Criminal Court (ICC) Office of the Prosecutor (OTP) issued a Policy Paper on Sexual and Gender-Based Crimes, with, inter alia, the following objectives:

- Provide clarity and direction on issues pertaining to sexual and gender-based crimes in all aspects of operations; ...
- Contribute, through its implementation, to the ongoing development of international jurisprudence regarding sexual and gender-based crimes.[450]

The Policy Paper states that the term 'gender', according to Article 7(3) of the Rome Statute, 'refers to males and females, within the context of society'. It explains that '[t]his definition acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys'.[451] The paper thereby clearly differentiates between gender and sex,[452] viewing the latter as referring to 'the biological and physiological characteristics that define men and women'.[453] It goes on to define 'gender-based crimes' as 'those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles'.[454] Whilst this definition initially appears quite limited as it speaks only of 'male and female' persons, by stating that such crimes may be committed because of the persons' sex *and/or socially constructed gender roles*, it draws a clear distinction between sex and gender and specifically provides for the possibility of prosecuting individuals for persecution not only on grounds of sex, but also 'socially constructed gender roles'. This could conceivably encompass LGBTIQA+ individuals who transgress the gender roles prescribed by, and expected in, their society.

Interestingly, the Policy Paper states that it will interpret the definition of gender 'in accordance with internationally recognised human rights pursuant to article 21(3)'.[455] Whilst Article 21(3) does not refer to sexual orientation or gender identity, in 2012, in its Decision establishing the principles and procedures to be applied to reparations in the *Lubanga* case, an ICC Trial Chamber stated that pursuant to Article 21(3) of the Statute, 'reparations shall be granted to victims without adverse distinction on the grounds of gender, age, race, colour, language, religion or belief, political or other opinion, *sexual orientation*, national, ethnic or social origin, wealth, birth or other status'.[456] The Trial Chamber's decision to include sexual orientation in this definition may reflect a willingness on the part of the ICC to expand the grounds on which discrimination is prohibited beyond what is explicitly stated in the Rome Statute. This would be in conformity with the spirit of Article 21(3) which outlines the 'applicable law' and states: 'The application and interpretation of law pursuant to this article *must be consistent with internationally recognized human rights*, and be without any adverse distinction founded on grounds *such as* gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.'[457]

As elaborated on further in the next section, the rights of LGBTIQA+ people, including the right not to be discriminated against, have increasingly been recognized by international organizations such as the UN, NGOs and various states.[458] As Josh Scheinert has pointed out, even amongst those many states which still criminalize acts associated with homosexuality, only a 'small number of states ... actually choose to enforce their antigay laws ... the vast majority of the seventy-six states choose not to do so'.[459] Of course, this is not to minimize the horrendous persecution of LGBTIQA+ people; as Scheinert emphasizes, 'even if the laws are not enforced as forcefully as possible, their mere existence, and the knowledge of the potential for abusive treatment, is enough to instil feelings of fear and isolation, thus preventing individuals from living their lives freely'.[460] In Iran, which provides for the death penalty in cases of consensual same-sex acts, 'the threat of execution hangs above all Iranians who engage in such acts'.[461] In addition, state-sponsored hate speech incites members of the general population to commit acts of violence and murder against LGBTIQA+ people. However, the fact that many states do not enforce such laws provides further evidence that the rights of LGBTIQA+ people are now part of the corpus of 'internationally recognized human rights', which the ICC must have regard to when applying and interpreting its law.

In this context, it is also notable that Article 21(3) states that this must be done 'without any adverse distinction founded on grounds *such as* gender ... age, race, colour' etc. This implies that other relevant grounds must also be taken into account. It is submitted that these must include sexual orientation and gender identity.

The OTP, in its Policy Paper, appears to endorse such an expansive approach to the interpretation of the Rome Statute, when it proclaims its intention to 'take into account the evolution of internationally recognised human rights'[462] and quotes General Recommendation No. 30 by the Committee on the Elimination of Discrim-

450 Office of the Prosecutor (OTP), Policy Paper on Sexual and Gender-Based Crimes, June 2014, pp 10–11, para 6

451 Ibid, p 3, p 12, para 15.

452 See also Oosterveld, 'The ICC Policy Paper on Sexual and Gender-Based Crimes', supra fn 162, 444, 448.

453 Ibid, citing World Health Organization, 'What Do We Mean by "Sex" and "Gender"?', 2014.

454 OTP, Policy Paper on Sexual and Gender-Based Crimes, supra fn 167, p 3.

455 Ibid, p 12, para 15.

456 ICC, Situation in the Democratic Republic of the Congo in the Case of *The Prosecutor v Thomas Lubanga Dyilo*, Trial Chamber, Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06, 7 August 2012, §191 (emphasis added).

457 Emphasis added.

458 See also J. Scheinert, 'Is Criminalization Criminal? Antisodomy Laws and the Crime Agaisnt Humanity of Persecution', 24 *Tulane Journal of Law & Sexuality* (2015) 131.

459 Ibid, 133.

460 Ibid, 107.

461 *'We are a Buried Generation': Discrimination and Violence Against Sexual Minorities in Iran*, Human Rights Watch, December 2010, p 27, https://www.hrw.org/reports/iran1210webwcover_1.pdf (last accessed 23 February 2023), cited in Scheinert, 'Is Criminalization Criminal?', supra fn 175, 107.

462 OTP, Policy Paper on Sexual and Gender-Based Crimes, supra fn 167, p 15, para 26.

ination Against Women: '[i]nternational criminal law, including, in particular, the definitions of gender-based violence … must also be interpreted consistently with the Convention and other internationally recognized human rights instruments without adverse distinction as to gender'.[463] Even more significantly, it cites, as an example of the 'evolution of internationally recognised human rights', 'the efforts of the UN Human Rights Council and the Office of the High Commissioner for Human Rights (OHCHR) to put an end to violence and discrimination on the basis of sexual orientation or gender identity'.[464] Oosterveld concludes that by doing so, the OTP has taken 'a convincing position on the correct interpretation of Article 7(3)'.[465]

The OTP goes on to state that pursuant to Article 21(3), it will, inter alia, '[c]onsider not only acts of violence and discrimination based on sex, but also those related to socially constructed gender roles'.[466] Referring to the *Lubanga* decision mentioned above,[467] it moreover declares that it will '[u]nderstand the intersection of factors such as gender, age, race, disability, religion or belief, political or other opinion, national, ethnic, or social origin, birth, sex, *sexual orientation*, and *other status or identities which may give rise to multiple forms of discrimination and social inequalities*'.[468] It is notable that the OTP here not only specifically refers to 'sexual orientation', but also mentions a very broad definition of 'other status' which '*may*' cause various 'forms of discrimination and social inequalities'.

Finally, the OTP states that when interpreting the provision, it may take into account 'valuable precedents of law and practice about persecutions on the basis of gender in refugee law from various national systems'.[469] In this context, it refers to the UN High Commissioner for Refugees' (UNHCR's) Guidelines on International Protection: 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.[470]

These UNHCR Guidelines, which were drafted in 2002, contain several interesting statements. Firstly, from the beginning, they draw a clear distinction between sex and gender, defining 'sex' as 'a biological determination', whereas 'gender' is recognized to be neither static nor innate 'but acquires socially and culturally constructed meaning over time'.[471] Secondly, the Guidelines explain that '[g]ender-related claims have typically encompassed', inter alia, 'discrimination against homosexuals',[472] and, more specifically, that '[r]efugee claims based on differing sexual orientation contain a gender element'.[473] The Guidelines then effectively go on to include gender identity within such claims:

> A claimant's sexuality or sexual practices may be relevant to a refugee claim where he or she has been subject to persecutory (including discriminatory) action on account of his or her sexuality or sexual practices. In many such cases, the claimant has refused to adhere to socially or culturally defined roles or expectations of behaviour attributed to his or her sex. The most common claims involve homosexuals, transsexuals or transvestites, who have faced extreme public hostility, violence, abuse, or severe or cumulative discrimination.[474]

These statements appear to constitute a clear recognition that discrimination on the grounds of sexual orientation and gender identity fall within discrimination on the basis of gender.

Thirdly, the Guidelines explain that 'the analysis and understanding of sex and gender in the refugee context have advanced substantially in case law, in State practice generally and in academic writing', with parallel developments in international human rights law.[475] Given that this was written in 2002, it is fair to say that, since then, the recognition of the importance of LGBTIQA+ rights has advanced even more significantly in recent years.

Fourthly, the Guidelines determine that even though 'gender' is not specifically included in the Refugee Convention, there is no need to amend the Convention to insert an additional ground, as 'it is widely accepted that [gender] can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment'.[476] Consequently, 'the Refugee Convention, properly interpreted … covers gender-related claims'.[477]

Returning to the Rome Statute, Oosterveld has submitted that '[t]he views assuming that sexual orientation is excluded from the definition of "gender" are arguably incorrect', as there was no consensus on whether the definition of gender should include sexual orientation, leaving room for the ICC to interpret the term as it considers appropriate.[478]

463 Ibid, p 15, fn 23.

464 Ibid, p 16, fn 23.

465 Oosterveld, 'The ICC Policy Paper on Sexual and Gender-Based Crimes', supra fn 162, p 452.

466 OTP, Policy Paper on Sexual and Gender-Based Crimes, supra fn 167, p 16, para 27.

467 Ibid, p 16, fn 25.

468 Ibid, p 16, para 27 (emphasis added).

469 Ibid, p 19, fn 34.

470 UNHCR, Guidelines on International Protection: 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', UN doc HCR/GIP/02/01, 7 May 2002.

471 Ibid, §3.

472 Ibid.

473 Ibid, §16.

474 Ibid, §16.

475 Ibid, §5.

476 Ibid, §6.

477 Ibid.

478 Oosterveld, 'The Definition of "Gender" in the Rome Statute of the International Criminal Court', supra fn 164, 77. See also Scheinert, 'Is Criminalization Criminal?', supra fn 175, 130; C. B. 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', 101 *Minnesota Law Review* (2017) 1290, 1304.

Consequently, it is submitted that there are reasonable grounds for considering that gender identity and sexual orientation can be included within 'gender' under Article 7(1)(h), despite the definition of gender in Article 7(3).[479] This appears to also be supported by Schabas, who in the second edition of his commentary on the Rome Statute (2016) states that sexual orientation 'may well be subsumed within the term "gender"'.[480]

b. Other Grounds That Are Universally Recognized as Impermissible Under International Law

Might sexual orientation and gender identity be included as 'other grounds that are universally recognized as impermissible under international law'? To answer this question, we must consider at what point it can be said that a ground is *universally* recognized as impermissible under international law. It is fair to say that there are many countries that recognize discrimination on the grounds of sexual orientation and/or gender identity as impermissible, including, e.g., most European countries, as well as the USA, Canada, Australia, New Zealand, South Africa and various South American countries. However, as noted above, there are still several countries, mostly in Africa and the Middle East (with the notable exception of Israel),[481] that actively endorse such discrimination, including through criminalization.

It is submitted that universal recognition cannot require recognition by every single country in the world; various countries practice, permit and justify torture, for instance, but this has not prevented the prohibition against torture to have risen to the status of a *jus cogens* norm. Andrew Sumner Hagopian has similarly suggested that '"[u]niversal" likely does not need to be construed in a literal sense'.[482] Moreover, Schabas has convincingly explained that a strict construction of the term 'universally recognized' would 'probably be an impossible one'.[483] Likewise, 'it would be difficult to demonstrate that discrimination based upon many of the enumerated grounds in article 7 is "universally recognized as impermissible under international law"'.[484] This is undoubtedly correct, considering the continuing persecution of, for instance, religious minorities in various parts of the world.[485]

Schabas has instead suggested that in order to render the 'other grounds' phrase meaningful, it must be interpreted such 'that the real test is whether persecution on such grounds is deemed to be permissible under international law rather than universally prohibited'. Requiring 'positive evidence of a universal prohibition' would mean that 'other grounds' could never be identified. By contrast, Schabas's suggested 'positive approach to interpreting "other grounds" should direct the Court to a range of authorities in international law where the inclusion of other categories, like age, disability, and sexual orientation, are considered'. This would mean that '[u]nless there is evidence that discrimination based upon such "other grounds" is deemed to be acceptable, they should be readily included within the scope of article 7(1)(h) of the Rome Statute'.[486]

In recent years, international organizations and states have increasingly recognized gender identity and sexual orientation as prohibited grounds of discrimination.[487] The Charter of Fundamental Rights of the European Union expressly lists sexual orientation as a prohibited ground of discrimination.[488] In 2016, the UN Human Rights Council appointed the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.[489] This was preceded, in 2013, by the creation of the Special Rapporteur on the

479 This conclusion receives support from an April 2021 finding by the Colombian Special Jurisdiction for Peace (*Jurisdicción Especial para la Paz*): Case no 05, *Acreditación de las víctimas CA-01, CA-02, CA-03, CA-04 y CA-05*, Jurisdicción Especial para la Paz, 14 April 2021, §18.3. It held that five LGBTIQA+ victims of the armed conflict in Colombia had been persecuted on the basis of their gender identity and sexual orientation, and that this persecution constituted persecution on gender grounds under the Rome Statute. See also N. Leddy, 'Investigative and Charging Considerations for International Crimes Targeting Individuals on the Basis of Sexual Orientation and Gender Identity', 20 *Journal of International Criminal Justice* (2022) 911, 926. On the other hand, some commentators disagree, at least in part, with this conclusion. See, e.g., M. Bohlander, 'Criminalising LGBT Persons Under National Criminal Law and Article 7(1)(h) and (3) of the ICC Statute', 5 *Global Policy* 4 (2014), https://dro.dur.ac.uk/13400/1/13400.pdf?DDC71+DDD19+dla0mb+d700tmt (last accessed 23 February 2023).

480 W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd edn, Oxford University Press, 2016, p 198.

481 In 1992, Israel passed legislation which prohibited employment discrimination based on sexual orientation (A. Harel, 'Overview and Commentary: Bagaz 721/94 El-Al v Danilowitz and the Future of Sexual Minority Rights in Israel', 1 *National Journal of Sexual Orientation Law* (1995) 303); homosexuals have been allowed to serve openly in the military since 1993 (I. Eichner, 'Follow Israel's Example on Gays in the Military, US Study Says', *Ynetnews*, 8 February 2007, https://www.ynetnews.com/articles/0,7340,L-3362505,00.html); and the Israeli Supreme Court has held that a lesbian couple could legally adopt each other's children (Supreme Court of Israel, *Yaros-Hakak v Attorney General*, CA 10280/01, Judgment, 10 January 2005). See A. R. Reeves, 'Sexual Identity as a Fundamental Human Right', 15 *Buffalo Human Rights Review* (2009) 261.

482 A. S. Hagopian, 'Persecution and Protection of Sexual and Gender Minorities under Article 7(1)(h) of the Rome Statute', 3 *SOAS Law Journal* (2016) 65.

483 Schabas, *The International Criminal Court*, 2nd edn, supra fn 197, p 198.

484 Ibid, p 199.

485 For recent and current examples, see the systematic persecution of Bahá'ís in Iran and Yemen; the persecution of the Rohingya Muslims in Myanmar; or the persecution of the Yazidis in Iraq.

486 Schabas, *The International Criminal Court*, 2nd edn, supra fn 197, p 199.

487 See Reeves, 'Sexual Identity as a Fundamental Human Right', supra fn 198, 222: 'It is undeniable that decriminalizing homosexual conduct and guaranteeing equal rights has spread through much of the Western world, particularly Europe, over the last thirty years'; ibid, p 237: 'The last thirty-seven years have unquestionably brought impressive progress in recognition of the rights of sexual minorities, largely accomplished under laws that apply to everyone'. Referring to Justice Harry Blackmun's comments in his dissent in US Supreme Court, *Bowers v Hardwick* 478 US 186 (1986), p 199 ('This case is no more about "a fundamental right to engage in homosexual sodomy' … than *Stanley v Georgia* was about a fundamental right to watch obscene movies … Rather, this case is about the most comprehensive of rights and right most valued by civilized men, namely, the right to be let alone') and Justice Anthony Kennedy's ruling in US Supreme Court, *Lawrence v Texas* 539 U.S. 558 (2003), which overruled *Bowers* ('Freedom extends beyond spatial bonds … [and] presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct'), Reeves concludes that '[t]he freedom to be one's self in both innate and acquired ways is certainly a fundamental cornerstone of human rights'. Reeves, 'Sexual Identity as a Fundamental Human Right', supra fn 198, 256.

488 Art 21(1), Charter of Fundamental Rights of the European Union, 2010, p 396.

489 HRC Res 32/2, 30 June 2016.

Rights of LGBTI Persons of the Inter-American Commission on Human Rights.[490] In October 2019, the first joint consultation between the Independent Expert and the Special Rapporteur took place in Barbados to discuss, inter alia, the 'eradication of violence and discrimination based on sexual orientation and gender identity in the Caribbean'.[491] This discussion involved government representatives, ombudspersons, civil society organizations and other stakeholders from 15 Caribbean states. In December 2018, the Inter-American Commission had recognized that 'in recent years there have been a number of developments in the Americas with regard to the recognition of the rights of LGBTI persons', and referred to the 'increasing number of public policies and other measures ... that have been adopted in the past ten years by OAS Member States in favor of LGBTI persons'.[492]

Consequently, Oosterveld has proposed that '[s]exual orientation could possibly be considered in the crime against humanity of persecution, through the phrase "or any other grounds that are universally recognized as impermissible under international law"'.[493] Furthermore, Schabas who, as we have seen, argued in 2010 that it would be difficult to claim that sexual orientation fell within this definition, in the 2016 edition of his commentary on the Rome Statute cited sexual orientation, along with age and disability, as a 'rather classic example' of 'other grounds' which 'might be considered in this context'.[494]

In *Sexual Minorities Uganda (SMUG) v Lively*, the plaintiff – a Ugandan organization comprised of various member organizations advocating for the 'fair and equal treatment of ... LGBTI people' in Uganda – made a complaint against Scott Lively under the Alien Tort Statute (ATS).[495] Lively was an American citizen who, according to the complaint, held himself out to be an expert on the 'gay movement', as well as an attorney, author and evangelical minister.[496]

Lively had, according to the Massachusetts District Court, which was charged with adjudicating the case, 'aided and abetted a vicious and frightening campaign of repression against LGBTI persons in Uganda'.[497] He had engaged in vile hate speech and had travelled to Uganda where he had participated in conferences and given speeches, including in the media, encouraging persecution of LGBTI people[498] and speaking about the alleged dangers of homosexuality.[499] Whilst in Uganda, he met with a number of government officials. He also communicated with them via email about the so-called Ugandan Anti-Homosexuality Bill, which he reviewed and on which he offered suggestions.[500]

Under the ATS, district courts are given jurisdiction over 'any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.[501] When examining the question of whether it has jurisdiction, a court must, inter alia, determine whether the claim 'seeks to enforce an underlying norm of international law that is as clearly defined and accepted as the international law norms familiar to Congress in 1789 when the ATS was enacted'.[502]

In this case, the Massachusetts District Court found that it was obvious that '[w]idespread, systematic persecution of LGBTI people constitutes a crime against humanity that unquestionably violates international law'.[503] In response to the defendant's argument that persecution on the grounds of sexual orientation or gender identity had 'not been sufficiently recognized in international law', it acknowledged that it was 'true that many of the international treaties and instruments that provide jurisdiction over crimes against humanity list particular protected groups without specifying LGBTI people'.[504] However, the it argued, 'virtually all of these instruments provide savings clauses', citing Article 7(1)(h) of the Rome Statute ('other grounds that are universally recognized as impermissible under international law').[505] It then went further, declaring that even where there were no such savings clauses, 'international courts have interpreted the identity of the group requirement broadly to encompass persecution of a discrete identity'.[506] According to the Massachusetts District Court, then, there does not appear to be any serious doubt that sexual orientation and gender identity fall within the Rome Statute's savings clause. As it found, '[i]n light of the savings clauses in the international instruments and the expansive boundaries of customary law, the argument that international norms do not bar systematic persecution of LGBTI people, be-

490 See Organization of American States, 'The IACHR Creates Rapporteurship to Address Issues of Sexual Orientation, Gender Identity, Gender Expression, and Body Diversity', press release, 25 November 2013, http://www.oas.org/en/iachr/media_center/PReleases/2013/094.asp (last accessed 23 February 2023).

491 OHCHR, 'First Joint Consultation Discussing the Inclusion of LGBTI Persons in the Economic, Social and Cultural Sphere', https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25120&LangID=E (last accessed 23 February 2023).

492 IACHR, *Recognition of the Rights of LGBTI Persons*, supra fn 134, para 20.

493 Oosterveld, 'The Definition of "Gender" in the Rome Statute of the International Criminal Court', supra fn 164, 79. However, see Moore, 'Embracing Ambiguity and Adopting Propriety', supra fn 195, 1306, who argues that 'for a group to be considered "universally recognized", it appears as though the Rome Statute requires that the protection of such a group be at least a *jus cogens* norm'.

494 Schabas, *The International Criminal Court*, 2nd edn, supra fn 197, p 198. Schabas does, however, point out that '[u]se of the term in the *Rome Statute* was controversial'. Ibid.

495 See US District Court, *SMUG v Lively*, 960 F.Supp.2d 304 (D.Mass. 2013), Memorandum and Order Regarding Defendant's Motion to Dismiss, 14 August 2013; US District Court, *SMUG v Lively*, 254 F.Supp.3d 262 (D.Mass. 2017), Memorandum and Order Regarding Defendant's Motion for Summary Judgment, 5 June 2017. Note that the plaintiffs also filed two additional complaints under state law.

496 *SMUG v Lively* 2013, supra fn 212, pp 1–2.

497 *SMUG v Lively* 2017, supra fn 212, p 1.

498 Ibid, p 6.

499 Ibid, p 7.

500 Ibid, p 8.

501 Title 28, US Code, §1350.

502 *SMUG v Lively* 2013, supra fn 212, p 20.

503 Ibid.

504 Ibid, p 25.

505 Ibid, p 26.

506 Ibid, referring to ICTY, *Prosecutor v Mladen Naletilić, AKA ‹Tuta› and Vinko Martinović, AKA 'Štela'*, Trial Chamber, Judgment, IT-98-34-T, 31 March 2003, §636; and ICTR, *The Prosecutor v Nahimana et al*, Trial Chamber, Judgment, ICTR-99-52-T, 3 December 2003, §1071.

cause – in contrast to racial, ethnic or religious minorities – they are not explicitly mentioned is unpersuasive'.[507]

Relying on the finding in the *Tadić* trial chamber judgment that there were 'no definitive grounds in customary international law on which persecution must be based and a variety of different grounds have been listed in international instruments',[508] the Massachusetts District Court further pointed out that '[c]ustomary international law does not in general limit the type of group that may be targeted for persecution'.[509] This would also be a strong argument for countries exercising *universal jurisdiction* over persecution committed against LGBTIQA+ people on the basis of their gender identity or sexual orientation.

In 2017, however, for jurisdictional reasons, the Massachusetts District Court granted Lively's Motion for Summary Judgment.[510] Previous Supreme Court authority had held that the ATS did not provide a court with jurisdiction over a claim 'when the offensive conduct and the injury occurred "in the territory of a foreign sovereign"'.[511] In the instant case, Lively had visited Uganda several times, met with government officials and other individuals as well as given speeches there; however, his conduct within the United States had been limited; the Massachusetts District Court found that it was limited to 'sporadic emails sent … from the United States offering encouragement, guidance, and advice to a cohort of Ugandans prosecuting a campaign of repression against the LGBTI community in their country'.[512] This level of contact was not sufficient to 'overcome the presumption against extraterritoriality'.[513] In addition, it felt that it needed to exercise 'judicial caution' in a case where the 'Plaintiff's complaint accuses highly placed members of the Ugandan legislative and executive branches of complicity with Defendant;, giving rise to 'the potential for conflict with the sovereignty of a foreign nation'.[514]

c. Political Grounds

An additional ground of persecution within which discrimination against members of the LGBTIQA+ community might fall is 'political'. As Andrew Sumner Hagopian has pointed out, '[i]ndividual members of groups that undertake political activism in order to advance the rights of sexual and gender minorities meet

507 *SMUG v Lively* 2013, supra fn 212, pp 27–8.

508 Ibid, p 27, referring to ICTY, *Prosecutor v Duško Tadić*, Trial Chamber, Opinion and Judgment, IT-94-1-T, 7 May 1997, §711.

509 *SMUG v Lively* 2013, supra fn 212, p 27.

510 *SMUG v Lively* 2017, supra fn 212.

511 Ibid, p 14, citing US Supreme Court, *Kiobel v Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), p 1664.

512 *SMUG v Lively* 2017, supra fn 212, p 16.

513 Ibid, pp 16–17.

514 Ibid, p 22.

the definition of a political group'.[515] Importantly, for the purposes of the crime against humanity of persecution, it is the perpetrator who defines the victims' membership in a particular group.[516] Consequently, if the perpetrator regards certain LGBTIQA+ persons as political activists on behalf of gender equality, for instance, even if they are not politically active, the perpetrator could potentially be prosecuted for persecution (as long as the other elements are met).[517] Thus, in *SMUG v Lively*, the defendant consistently referred to those he denigrated and persecuted as 'the gay movement',[518] which suggests that he regarded most if not all LGBTIQA+ people as members of a political group.

d. Cultural Grounds

Lastly, it is submitted that perpetrators who persecute LGBTIQA+ people could be prosecuted on the basis that they have targeted their victims on 'cultural' grounds. Although there does not appear to be a lot of authority on what cultural grounds means exactly in this context, and this author has been unable to find proposals to regard LGBTIQA+ people as a cultural group for this purpose, it is submitted that this may in fact be a promising avenue.

Yao Li has suggested, citing Otto Triffterer and Kai Ambos' *The Rome Statute of the International Criminal Court: A Commentary*,[519] that cultural grounds 'can be interpreted as all grounds related to "customs, arts, social institutions"'. Li further submits that '[u]nderstood as discrimination grounded on the cultural customs and background of a person, such discrimination can also be qualified as ethnic, religious discrimination or discrimination based on the membership of a particular social group'.[520] There appears to be some commonality between the concept of a cultural group and a social group. It may be argued that discrimination against certain social groups can constitute discrimination (or persecution) on cultural grounds. Many, if not most, social groups arguably have particular cultures, depending on how this concept is understood. The Rome Statute, of course, does not provide any definition as to what cultural grounds might mean exactly.

In different contexts, the concept of culture has been described as 'determined by the values, beliefs, and qualities of the people involved in families, communities, or

515 Hagopian, 'Persecution and Protection of Sexual and Gender Minorities', supra fn 199, 59.

516 See *Naletilić* trial chamber judgment, supra fn 223, §636; *Krnojelac*, supra fn 149, §185.

517 See Hagopian, 'Persecution and Protection of Sexual and Gender Minorities', supra fn 199, pp. 58-60.

518 See, e.g., *SMUG v Lively* 2013, supra fn 212, pp 1 ('Defendant … holds himself out to be an expert on what he terms the "gay movement"), 9 ('Defendant … blamed the so-called "gay movement" for the dangerous effects of a "porn culture"), 13 ('Defendant boasted that an associate was told "that our campaign was like a nuclear bomb against the 'gay' agenda in Uganda.').

519 O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary*, 3rd edn, C. H. Beck, 2016, Art 7, para 81.

520 Y. Li, 'Persecution in International Criminal Law and International Refugee Law', 6 *Zeitschrift für Internationale Strafrechtsdogmatik* (2020) 306, https://www.zis-online.com/dat/artikel/2020_6_1372.pdf (last accessed 23 February 2023).

the nation',[521] or an 'integrated pattern of human behavior that includes thoughts, communications, actions, customs, beliefs, values, and institutions of a racial ethnic, religious, or social group'.[522] As Justine Carrillo and Julie Marie Houston have emphasized, 'culture is an important facet of human development that helps create a sense of community, belonging and place in the world, and allows peoples to know who they are in relation to others within various social structures'.[523] These definitions link the concepts of social groups and culture.

It may be noted at this point that if culture is thus related to social groups, one might extrapolate from the conclusion in the UNHCR's 2012 Guidelines on International Protection that the concept of persecution 'for reasons of … membership of a particular social group'[524] encompasses persecution on the basis of sexual orientation or gender,[525] and that persecution on that basis would also constitute persecution on cultural grounds. Of course, the Rome Statute and the Refugee Convention have different purposes and therefore such a conclusion might not be binding but merely persuasive. On the other hand, as a response to the 'increasing fragmentation in international law', the idea of being guided by the principle of 'systematic integration' in the interpretation of treaties has gained traction.[526] As the International Law Commission (ILC) has submitted, Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT)[527] might be regarded as expressing this principle, 'whereby international obligations are interpreted by reference to their normative environment'.[528] It further explains:

> All treaty provisions receive their force and validity from general law, and set up rights and obligations that exist alongside rights and obligations established by other treaty provisions and rules of customary international law. None of such rights or obligations has any *intrinsic* priority against the others. The question of their relationship can only be approached through a process of reasoning that makes them appear as parts of some coherent and meaningful whole.[529]

The ILC has moreover asserted that '[t]he doctrine of "treaty parallelism" addresses precisely the need to coordinate the reading of particular instruments or to see them in a "mutually supportive" light".[530] This is particularly pertinent in the case of the definition of persecution under the Refugee Convention and the Rome Statute, as for both, the basis of persecution is the severe violation of human rights on discriminatory grounds.[531] Based on the VCLT and the ILC's interpretations, it is submitted that there are significant reasons for interpreting the concept of 'persecution' and the grounds of persecution in the Refugee Convention and the Rome Statute consistently where possible. This is, of course, also supported by the OTP's intention, stated in its recent policy paper, to take into account the UNHCR's 2002 Guidelines, as outlined above.

When speaking of an LGBTIQA+ culture, it is of course important to note that someone's identity as LGBTIQA+ can never be defined as merely cultural, if 'cultural' is used as a synonym for lifestyle. When an individual identifies as LGBTIQA+, this is an inherent part of who they are and not a lifestyle choice.[532] Of course, however, the concept of culture expresses and contains far more than mere lifestyle; in fact, it is closely linked to an individual's identity. As the UN Special Rapporteur in the field of cultural rights explained in a recent report:

> Cultural resources and experiences is [*sic*] the way we build our identity, our sense of self and our place in the world. The gradual understanding of the concept of culture as 'a way of life' has democratized the way cultural rights are reconfigured as the emphasis has moved from objects of beauty to everyday expressions of identity. It emphasizes their importance in recognizing the human dignity expressed in all types of interactions, from communicating with one another to inhabiting a territory, from creating and transmitting knowledge to ensuring an adequate standard of living, from caring for loved ones to engaging in social, economic and political exchanges … Everyone has multiple cultural resources that shape them. These may derive from their ethnic backgrounds, their minority status, their family values, their continent's practices; and ultimately, our common culture as humankind.[533]

521 J. Carrillo and J. M. Houston, 'Exploring Cultural and Linguistic Aspects Within the Lesbian, Gay, Bisexual, Transgender, and Queer Youth Community', California State University, San Bernardino, *Electronic Theses, Projects, and Dissertations* 170, 2015, p 11, https://scholarworks.lib.csusb.edu/etd/170 (last accessed 23 February 2023).

522 J. Gilbert, T. D. Goode and C. Dunne, *Curricula Enhancement Module: Cultural Awareness,* National Center for Cultural Competence, Georgetown University Center for Child and Human Development, 2007, cited in National Association of Social Workers (NASW), *Standards and Indicators for Cultural Competence in Social Work Practice*, 2015, p 12, https://www.socialworkers.org/LinkClick.aspx?fileticket=7dVckZAYUmk%3D&portalid=0 (last accessed 23 February 2023).

523 Carrillo and Houston, 'Exploring Cultural and Linguistic Aspects', supra fn 238, p 12.

524 Art 1A(2), Refugee Convention, 1951: '… owing to well-founded fear of being *persecuted for reasons of* race, religion, nationality, *membership of a particular social group* or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country' (emphasis added).

525 UNHCR, Guidelines on International Protection No. 9, supra fn 37, §40 ('Refugee claims based on sexual orientation and/or gender identity are most commonly recognized under the "membership of a particular social group" ground'). See also UNHCR, Guidelines on International Protection, supra fn 187, §§28–30.

526 Li, 'Persecution in International Criminal Law and International Refugee Law', supra fn 237, 301.

527 Art 31(3)(c), Vienna Convention on the Law of Treaties, 1980: '*General rule of interpretation* … 3. There shall be taken into account, together with the context: … (*c*) any relevant rules of international law applicable in the relations between the parties'.

528 International Law Commission, 'Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, UN Doc A/CN.4/L.682, 13 April 2006, §413.

529 Ibid, §414.

530 Ibid, §417.

531 See also Li, 'Persecution in International Criminal Law and International Refugee Law', supra fn 237, 309.

532 For instance, to speak of a 'gay lifestyle' would be inaccurate, as it implies that being gay is a choice, or that LGBTIQA+ people necessarily have a distinctive lifestyle.

533 Cultural Rights: An Empowering Agenda: Report of the Special Rapporteur in the Field of Cultural Rights, UN doc A/HRC/49/54, 22 March 2022, §§10–11.

To speak of an LGBTIQA+ culture is not far-fetched. In 2021, the auction house Christies celebrated Pride month by 'explor[ing] the major events and cultural milestones from the last 70 years of LGBTQ+ history' on its web page 'Pride Timeline: A History of Contemporary Queer Culture and Art'.[534] The Queer Culture & Resource Center at California State University, Dominguez Hills provides visitors with access to 'Trans and Queer movies, shows, art, music, stories, mentors, friends, and workshops'.[535] The Cultural Detective web page 'Lesbian, Gay, Bisexual and Transgender' states: 'LGBT communities are defined by identities based on gender and sexual orientation. Their sense of culture emerges in their experiences in life due to core differences from the cultural norms surrounding gender and sexuality. These differences impact everyday attitudes and behaviors including those of survival, modes of expression, creation of family, and participation in community.'[536]

Various subcultures may be identified within the LGBTIQA+ community, such as gay men's culture, lesbian culture, bisexual culture, transgender culture, or youth culture.[537] According to the Lesbian, Gay, Bisexual and Transgender Resource Center at the University of California San Francisco, the word 'PRIDE' (which stands for 'Professionalism, Respect, Integrity, Diversity and Excellence') is 'an integral cultural concept within the Lesbian, Gay, Bisexual, Transgender, Queer, Intersex (LGBTQI) community, representing solidarity, collectivity, and identity as well as resistance to discrimination and violence'.[538]

In fact, an appreciation of LGBTIQA+ culture is of fundamental importance to ensure that any encounters and interactions are respectful and sensitive. In a study conducted in 2015 on cultural and linguistic aspects within the LGBTQ youth community,[539] Carrillo and Houston underscore the need for '*culturally sensitive* practices … in supporting LGBTQ youth'.[540] In the National Association of Social Workers' *Standards and Indicators for Cultural Competence in Social Work Practice*, published in 2015 in the US, the standard 'cross-cultural knowledge' provides that social workers have to 'possess and continue to develop specialized knowledge and understanding' of various aspects of culture, including 'sexual orientation' and 'gender identity or expression'.[541] It is explained that '[t]he term "culture" includes ways in which people with disabilities or people from various religious backgrounds or people who are gay, lesbian, or transgender experience the world around them'.[542] Culture includes sexual orientation and gender identity and expression.[543]

As mentioned above, moreover, for the purposes of the crime of persecution, the inclusion of the victim(s) in a particular group is largely defined by the perpetrator. It would therefore be irrelevant whether or not an LGBTIQA+ person views themselves as belonging to a LGBTIQA+ culture. Consequently, where the persecutors and hate mongers view their victims as members of a cultural group, then they persecute them on cultural grounds, and can be held accountable (provided the other elements are met). Many of those individuals and groups who persecute LGBTIQA+ people arguably perceive them as belonging to a certain culture, which is denigrated and described as harmful, pernicious and to be scorned.

3. INCITEMENT TO HATRED AND/OR VIOLENCE ON THE BASIS OF GENDER IDENTITY OR SEXUAL ORIENTATION AS PERSECUTION

As noted above, the ICTR and MICT Appeals Chambers have recognized that in very serious circumstances, incitement to hatred and violence can amount to persecution. In *Nahimana et al*, the ICTR Appeals Chamber found that 'hate speech targeting a population on the basis of ethnicity, or any other discriminatory ground, violates the right to respect for the dignity of the members of the targeted group as human beings, and therefore constitutes "actual discrimination"'.[544] Similarly, speech inciting violence against a population on a discriminatory ground violates their right to security and also constitutes 'actual discrimination'.[545] The Appeals Chamber concluded that in the context of the massive persecution campaign directed at the Tutsi population after April 1994, which also included acts of violence and destruction of property, the hate speeches broadcast by the radio station Radio-Télévision Libre des Mille Collines (RTLM) and published by the newspaper *Kangura*, which were accompanied by calls for genocide against the Tutsi, were of equal gravity to other crimes against humanity and therefore constituted underlying acts of persecution.[546]

In *Šešelj*, the accused, who had been president of the Serbian Radical Party and member of the Assembly of the Republic of Serbia, had delivered a speech in Hrt-

534 Christies, 'Pride Timeline: A History of Contemporary Queer Culture and Art', https://www.christies.com/features/Pride-timeline-a-history-of-modern-queer-culture-and-art-11747-1.aspx (last accessed 23 February 2023).

535 California State University, Dominguez Hills, 'Queer Culture and Resource Center', https://www.csudh.edu/qcrc/ (last accessed 23 February 2023).

536 V. Saxena, R. Wuebbeler, N. O'Brien, R. Stieghorst, S. Gore, R. Pusch, R. Parrilla and D. Hofner Saphiere, 'Lesbian, Gay, Bisexual, Transgender (LGBT)', Cultural Detective, https://www.culturaldetective.com/what/series-content/65:lesbian-gay-bisexual-transgender-lgbt.html (last accessed 23 February 2023). Wikipedia identifies the following as elements which are common to LGBT cultures: '[w]orks by famous gay, lesbian, bisexual, and transgender people', '[a]n understanding of LGBT social movements' and '[f]igures and identities present in the LGBT community; within LGBT communities in Western culture, this might include drag kings and queens, pride parades and the rainbow flag'. Wikipedia, 'LGBT Culture' https://en.wikipedia.org/wiki/LGBT_culture (last accessed 23 February 2023).

537 Wikipedia, 'LGBT Culture', supra fn 253.

538 Lesbian, Gay, Bisexual and Transgender Resource Center, University of California San Francisco, 'PRIDE Values', https://lgbt.ucsf.edu/pride-values (last accessed 25 February 2023).

539 Carrillo and Houston, 'Exploring Cultural and Linguistic Aspects', supra fn 238, p 9 (referring to G. Low, A. Molzahn and M. Kalfoss, 'Cultural Frames, Qualities of Life, and the Aging Self', 36 *Western Journal of Nursing Research* (2014)), emphasis added.

540 Carrillo and Houston, 'Exploring Cultural and Linguistic Aspects', supra fn 238, p 9 (emphasis added).

541 NASW, *Standards and Indicators for Cultural Competence in Social Work Practice*, supra fn 239, p 4.

542 Ibid, p 12.

543 Ibid.

544 *Nahimana et al* appeals chamber judgment, supra fn 20, §986.

545 Ibid.

546 Ibid, §988.

kovci in May 1992, in the course of which he stated that there was 'no room for Croats in Hrtkovci' and that 'we will drive them to the border of Serbian territory and they can walk on from there, if they do not leave before of their own accord'.[547] He emphasized that Croatians who were contemplating returning to Hrtkovci had 'nowhere to return to' and expressed his conviction that the Serbs from Hrtkovci and surrounding villages would 'promptly get rid of the remaining Croats'.[548] The MICT Appeals Chamber held that Šešelj's speech amounted to 'a clear appeal for the expulsion of the Croatian population in Hrtkovci' and consequently, 'Šešelj incited violence against them, in violation of their right to security'.[549] The Appeals Chamber further found that the speech 'denigrated the Croatians of Hrtkovci on the basis of their ethnicity' and thereby violated 'their right to respect for dignity as human beings'.[550] The speech rose to the required level of gravity and therefore constituted persecution as a crime against humanity.[551]

In the above cases, the victims were persecuted on the basis of their ethnicity, a ground which is specifically enumerated in the Rome Statute, along with political, racial, national, cultural, religious and gender grounds.[552] However, as has been argued above, persecution on the basis of sexual orientation or gender identity could be regarded as included in the Rome Statute in a number of ways, or alternatively, permit states to exercise universal jurisdiction.

It is of the utmost importance that incitement to hatred and violence against the LGBTIQA+ community are prosecuted and punished. Aside from the fact that it is a grievous injustice to allow prosecutions for such incitement committed on the basis of race, religion, ethnicity and other grounds, but deny them in the case of incitement on the basis of sexual orientation or gender identity, such incitement occurs on a regular basis, with grave consequences, frequently leading to violent attacks against those targeted. Where public and media figures make derogatory comments, incite hatred or even fail to condemn attacks against LGBTIQA+ people, this has a direct effect on how the public perceives the victim group and responds.[553] The UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity further explained in 2019: 'Incitement to violence, hatred, exclusion and discrimination are also aided by representations in media and cultural channels and lead to increased psychological distress for LGBT persons. For example, a submission remarked that Jamaican dancehall music, a popular musical genre that often speaks of beating and shooting gay men, appears to play a role in promoting anti-gay violence.'[554]

547 *Šešelj* appeals chamber judgment, supra fn 21, §§146, 161.

548 Ibid, §§146, 162.

549 Ibid, §163.

550 Ibid.

551 Ibid.

552 Art 7(1)(h), Rome Statute.

553 See Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, UN doc A/74/181, 17 July 2019, §3.

554 Ibid.

Religious figures and politicians have engaged in hate speech against LGBTIQA+ people. For instance, the late Fred Phelps, pastor of a virulently anti-LGBTIQA+ church in Kansas, referred to homosexuality as a sin and claimed that 'anyone who supports fags is just as guilty as they are'. He concluded that both were 'worthy of death'.[555] He called for gays and lesbians to be tried and executed and in 1998, together with his supporters, picketed the funeral of Matthew Shepard, a gay student who had been brutally murdered, carrying signs reading 'Matt Shepard Rots in Hell'.[556] In 2007, in a debate with other Republican presidential candidates, former Wisconsin Governor Tommy Thompson called for employers who disapprove of homosexuality to be able to dismiss gay employees.[557]

In numerous cases, such hate speech and/or incitement to violence is part of a state system or policy of persecution, which also includes legislation criminalizing homosexual conduct, often punishable by long prison sentences or even the death penalty, as well as targeted raids by police officers, resulting in humiliating torture[558] or sexual abuse such as rectal examinations[559] in custody, and other abuse. Where this is the case, it is submitted that the elements of persecution as a crime against humanity are fulfilled – the 'intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity',[560] which is 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.[561] As Michael Bohlander has written:

> It needs no elaboration that the enforcement or even mere existence of a state-sponsored law which allows for the killing, imprisonment and corporal punishment etc. of certain groups of people based on their sexual orientation is a systematic attack on a civilian population on discriminatory grounds based on a state policy resulting in the commission of acts subsumable, for example, under Art. 7(1)(a), (e), (f) and (k) [of the Rome Statute].[562]

Thus, in Iran, which engages in some of the most egregious human rights violations against LGBTIQA+ people, the revolutionary guards carried out a raid on a birthday party in Kermanshah, where around 80 people, both straight and gay Iranians, had gathered. According to *The Guardian*, '[a]t least 17 people who had tattoos, make-up, or were wearing rainbow bracelets were blindfolded and taken to

555 Reeves, 'Sexual Identity as a Fundamental Human Right', supra fn 198, 216.

556 Southern Poverty Law Center, 'Fred Phelps', https://www.splcenter.org/fighting-hate/extremist-files/individual/fred-phelps (last accessed 25 February 2023).

557 Reeves, 'Sexual Identity as a Fundamental Human Right', supra fn 198, 216–17.

558 See, e.g., Scheinert, 'Is Criminalization Criminal?', supra fn 175, 108–9.

559 E.g., in Cameroon and Egypt. See ibid, 106–7.

560 Art 7(2)(g), Rome Statute.

561 Art 7(1), ibid.

562 Bohlander, 'Criminalising LGBT persons', supra fn 196, 5.

an unknown location'.[563] On its news website, the revolutionary guard announced the arrest of what they claimed was a 'network of homosexuals and devil-worshippers'.[564] Public authorities had on previous occasions compared homosexuals to 'satanists'.[565] The association of homosexuals with devil-worshippers or satanists, published on a public 'news' website, constitutes public incitement to hatred, suggesting an insidious intent and implying that homosexuals represent a serious threat to Iranian society. The language used here is reminiscent of the reference to Tutsi as cockroaches during the Rwandan genocide,[566] or the description of Jews as parasites preceding and during the Shoah.[567]

More recently, the Malaysian Government decided to increase its attacks against LGBTIQA+ people.[568] Proposed amendments to anti-LGBTIQA+ legislation would provide for harsher penalties for same-sex conduct, and introduce new offences of changing one's gender or sharing on social media content considered obscene and indecent, including 'images of non-normative gender expression'.[569] Moreover, as noted by Human Rights Watch, 'State religious departments in Malaysia have a history of subjecting trans women to arbitrary arrest, assault, extortion, and violations of their privacy rights'.[570] Again, these human rights violations are accompanied by official hate propaganda. In July 2020, the religious affairs minister published a Facebook post in which he gave 'full licence' to Federal Territory Islamic Department officers to 'arrest transgender people and "counsel" or "educate" them so that they "return to the right path"'.[571] Again, as explained by Human Rights Watch,

> successive governments in Malaysia have employed anti-LGBT rhetoric as a political tool, calling on LGBT people to 'change' their gender identity or sexual orientation to 'return to the right path' or risk retribution. Officials have attempted to silence alternative narratives that advance LGBT people's rights and acknowledge their humanity. For instance, in December, the Home Ministry banned a book entitled 'Gay is OK! A Christian Perspective,' and denounced homosexuality as 'clearly forbidden and contrary to all religious teachings'.[572]

563 S. K. Dehghan, 'Iran Arrests "Network of Homosexuals and Satanists" at Birthday Party', *The Guardian*, 10 December 2013, https://www.theguardian.com/world/2013/oct/10/iran-arrests-network-homosexual-satanists.

564 Ibid.

565 Ibid.

566 See, e.g., ICTR, *The Prosecutor v Bikindi*, Trial Chamber, Judgment, ICTR-01-72-T, 2 December 2008, §114.

567 See, e.g., Strafsenat, *Jud Süß Case*, Judgment of 12 December 1949 Against H., StS 365/49, *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*, Walter de Gruyter, 1948, vol 1, p 293; see also Timmermann, *Incitement in International Law*, supra fn 30, p 167.

568 Human Rights Watch, 'Malaysia: Government Steps Up Attacks on LGBT People', 25 January 2021, https://www.hrw.org/news/2021/01/25/malaysia-government-steps-attacks-lgbt-people (last accessed 25 February 2023).

569 Ibid.

570 Ibid.

571 Ibid.

572 Ibid.

LGBTIQA+ individuals in Malaysia have reported that such government hate propaganda has had the effect of inciting members of the public to violence against LGBTIQA+ people.[573]

In Uganda, as noted above, persecution of LGBTIQA+ people has been pervasive and relentless. As indicated in the discussion of *SMUG v Lively*, by all accounts Lively's propaganda was part of a systematic persecutory campaign against the LGBTIQA+ community on the grounds of their sexual orientation. Lively had published a number of books and other publications vilifying homosexuals in the most abhorrent and absurd ways. Thus, he described 'homosexual activism' as a 'very fast-growing social cancer';[574] claimed that a fascist gay movement in pre-World War 2 Germany gave rise to Nazism; alleged that the Bible regarded homosexuality as 'a form of rebellion against God even worse … than mass murder';[575] and held homosexuals responsible for 'the Spanish Inquisition, the French "Reign of Terror," the era of South African apartheid, and the two centuries of American slavery'.[576] In his book *Redeeming the Rainbow*, Lively advocated 'criminalizing advocacy on behalf of LGBTI people and attributing acts of sexual violence against children to LGBTI individuals' purported obsession with pedophilia'.[577]

Lively travelled to Uganda several times, where he participated in conferences, gave speeches, made media appearances and attended meetings. Throughout, he presented his views on the dangers of homosexuality.[578] At a number of speaking events and media appearances in 2002, he alleged that there were links between homosexuality and pornography.[579] He met and communicated with a Ugandan cabinet minister and a member of the Ugandan parliament to discuss the Anti-Homosexuality Bill which proposed the death penalty for certain homosexual acts.[580] On another occasion, he met with the Kampala City Council.[581] In 2009, Lively spoke as one of the headliners at an anti-gay conference with the title 'Seminar on Exposing the Homosexual Agenda'. Several 'Ugandan religious and government leaders, parliamentarians, police officers, and teachers' were in attendance.[582] Lively's incitement to hatred was effective: 'the campaign was like a nuclear bomb against the "gay" agenda in Uganda'.[583] Consequently, Lively's acts were part of a systematic persecutory campaign sponsored and organized by various institutions

573 Ibid.

574 *SMUG v Lively* 2017, supra fn 212, p 4.

575 Ibid, p 5.

576 Ibid, p 2.

577 *SMUG v Lively* 2013, supra fn 212, p 13.

578 *SMUG v Lively* 2017, supra fn 212, p 6.

579 *SMUG v Lively* 2013, supra fn 212, p 8.

580 *SMUG v Lively* 2017, supra fn 212, p 8.

581 *SMUG v Lively* 2013, supra fn 212, p 9.

582 Ibid, p 12.

583 Ibid, p 13.

in Uganda, including government officials such as ministers and members of parliament, directed at homosexuals, a civilian population, on the grounds of their sexual orientation.

In Uganda, LGBTIQA+ people have been attacked and murdered following the publication of their names and pictures in certain newspapers. Thus, in October 2010, the tabloid *Rolling Stone* published the full names, addresses, photographs and preferred social meeting places of 100 allegedly gay and lesbian Ugandans, accompanied by the headlines '100 Pictures of Uganda's Top Homos Leak', 'National Scandal' and 'Hang Them'.[584] Subheadings stated, 'We Shall Recruit 1000,000 Innocent Kids by 2012 – Homos' and 'Parents Now Face Heart-breaks As Homos Raid Schools'.[585] As a result, at least four were attacked[586] and one woman was almost killed after her neighbours threw stones at her house;[587] many went into hiding.[588] A High Court judge issued a permanent injunction in 2011, and ruled that the incitement to violence violated the plaintiffs' fundamental rights, including their right to human dignity and privacy:[589]

> [B]y publishing the identities of the applicants and exposing their homes coupled with the explicit call to hang them because 'they are after our kids', the respondents extracted the applicants from the other members of the community who are regarded as worthy, in equal measures, of human dignity and who ought to be treated as worthy of dignity and respect. Clearly the call to hang gays in dozens tends to tremendously threaten their right to human dignity. Death is the ultimate end of all that is known worldly to be good. If a person is only worthy of death, and arbitrarily, then that person's human dignity is placed at the lowest ebb. It is threatened to be abused or infringed.[590]

The High Court hence drew the same conclusion as the ICTR and MICT Appeals Chambers in the *Nahimana et al* and *Šešelj* cases: incitement to hatred and violence represents a serious violation of the victims' human dignity, one of the most fundamental human rights.[591] The *Nahimana* trial chamber judgment similarly concluded that '[h]ate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack' and 'creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human'.[592]

Tragically, one of the plaintiffs who brought the case against *Rolling Stone*, David Kato, was murdered shortly after,[593] demonstrating the ongoing and lasting pernicious effects of propaganda. This example is reminiscent of what occurred during the Rwandan genocide, and formed part of the evidence against the accused in the *Nahimana et al* case. The Trial Chamber, in its judgment, referred to the fact that various RTLM broadcasts publicly named individuals who were clearly civilians as Rwandan Patriotic Front accomplices and 'called on listeners to be vigilant to the security risks posed by these individuals'.[594] Many of those named were subsequently murdered.[595]

Furthermore, the *Rolling Stone* case reminds us of the cover of *Kangura* no 26, published in November 1991 and discussed as part of the evidence during the *Nahimana et al* trial. Amongst other things, the title page showed a picture of former President of Rwanda Grégoire Kayibanda above the text 'How about re-launching the 1959 Bahutu revolution so that we can conquer the *Inyenzi-Ntutsi*'. Just left of the photograph was a black box with the text 'What Weapons Shall We Use To Conquer The Inyenzi Once And For All??'. Directly left of this text, there was a drawing of a machete.[596] The clear implication was that the machete should be used to defeat the '*Inyenzi*', i.e. the Tutsi; the reference to the 1959 revolution was a reference to the war between Hutu and Tutsi, when machetes were used to kill Tutsi.[597]

The Trial Chamber noted, however, that there was 'little evidence … with regard to the distribution of this cover and any link it may have had to the killings that took place in Bugesera in 1992'.[598] In any case, it was outside the temporal jurisdiction of the ICTR, although it could have been admitted to clarify the context, establish by inference criminal intent or demonstrate a deliberate pattern of conduct.[599]

584 Human Rights First, 'Court Affirms Rights of Ugandan Gays', 4 January 2011, https://www.humanrightsfirst.org/2011/01/04/court-affirms-rights-of-ugandan-gays (last accessed 25 February 2023); 'Hang Them!', *Queer Africa*, 19 October 2010, http://gayuganda.blogspot.com/2010/10/hang-them_19.html (last accessed 25 February 2023).

585 'Hang Them!', supra fn 301.

586 Human Rights First, 'Court Affirms Rights of Ugandan Gays', supra fn 301.

587 'Attacks Reported on Ugandans Newspaper "outed" as Gay', *BBC News*, 22 October 2010, https://www.bbc.com/news/world-africa-11608241.

588 Human Rights First, Court Affirms Rights of Ugandan Gays, supra fn 301.

589 Ibid.

590 *Kasha Jacqueline, Pepe Onziema & David Kato v Giles Muhame and The Rolling Stone Publications Ltd.*, cited in J. Burroway, 'Uganda's High Court Ruling Against "Hang Them" Tabloid Campaign', *Box Turtle Bulletin*, 3 January 2011, http://www.boxturtlebulletin.com/2011/01/03/28820 (last accessed 25 February 2023).

591 On the central position of human dignity in the international human rights regime, as well as the content of this concept and its importance more generally, see Timmermann, *Incitement in International Law*, supra fn 30, pp 39–47. On how incitement to hatred violates human dignity, see ibid, pp 47–53.

592 *Nahimana et al* trial chamber judgment, supra fn 223, §1072.

593 X. Rice, 'Ugandan Gay Rights Activist David Kato Found Murdered', *The Guardian*, 27 January 2011, https://www.theguardian.com/world/2011/jan/27/ugandan-gay-rights-activist-murdered.

594 *Nahimana et al* trial chamber judgment, supra fn 223, §376–7.

595 Ibid, §378. See also *Nahimana et al* appeals chamber judgment, supra fn 20, §513.

596 *Nahimana et al* trial chamber judgment, supra fn 223, §160.

597 Ibid §§161, 171–2.

598 *Ibid*, §173.

599 *Nahimana et al* appeals chamber judgment, supra fn 20, §315.

Both instances were mentioned by the ICTR in the *Nahimana et al* trial chamber judgment. Those responsible for these or similar acts were convicted of persecution as a crime against humanity (amongst other offences).[600] Arguably, the actions of the authors of the *Rolling Stone* article, with its headline 'Hang Them' and the publication of names, addresses, photos and preferred social hangouts were even more unequivocal and direct in their incitement to murder than was the case with the *Kangura* and RTLM propaganda.

In the case of Rwanda, the perpetrators of such acts of incitement were held responsible; those who incite to hatred and violence against individuals on the basis of their sexual orientation or gender identity must similarly be brought to account.

The case of crimes by ISIS (also known as ISIL, Daesh or IS) in Iraq represents one of the most egregious examples of crimes against humanity committed against LGBTIQA+ people. Men perceived as gay, people identified as trans and lesbians have been raped and murdered.[601] Courts appointed by ISIS have sentenced men to death based on their alleged non-conforming sexual orientation and gender behaviour. Executions have been carried out by pushing the victims off buildings, and then stoning to death those who survive the fall; occasionally, a bag filled with weights is placed over the victim's head so that they land on their head on impact. People regarded as homosexuals have also been frequently subjected to rape and other forms of torture before their executions. Those accused of being homosexuals have also been executed by 'firing squad, immolation or beheading'.[602]

The crimes are accompanied by extensive propaganda. ISIS is violently opposed to same-sex intimacy and views itself in opposition to the United States and Western Europe, which it regards as representing 'bestiality, transgenderism, sodomy, pornography, feminism, and other evils'.[603] Readers of ISIS's online magazine *Dabiq* were warned that 'sodomites represent the worst of sexual perversion, and are worthy of death'.[604] In another issue of *Dabiq*, readers were told that ISIS sought to enforce 'the rulings of Allah on those who practice any form of sexual deviancy or transgression'.[605] In June 2015, ISIS executed two women through shots to the head, alleging they were lesbians. Following the executions, 'ISIS militants announced that the women were "abominations"'.[606] After killing three men on 4 June 2015 for alleged homosexual acts, ISIS posted pictures of the killings on social media.[607] ISIS has frequently published such photos as propaganda. On 19 April 2016, its information office in Tel-Afar, Iraq, published a photo report portraying '"the imposition of Sharia punishment on a person who committed the acts of the people of [Prophet] Lot in the city of Tel-Afar" by throwing the blindfolded victim off a building'.[608]

All of these crimes and propaganda against LGBTIQA+ people have been systematic, following a policy of targeting members of this group, as can also be evidenced by the discriminatory laws directed against them, and have been committed in the context of widespread and systematic crimes against LGBTIQA+ people as well as other groups, first and foremost women.

4. INSTIGATION AND SOLICITATION/INDUCEMENT

In some instances, public incitement to violence against LGBTIQA+ people might constitute instigation (as it is referred to in the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and ICTR)[609] or solicitation/inducement (under the Rome Statute).[610] In the jurisprudence of international criminal tribunals, instigation or solicitation is a mode of accessorial liability, that is, a way of participating in the crime of another person.[611] Consequently, instigation is only punishable if the crime it seeks to bring about is actually committed (according to ICTR and ICTY jurisprudence) or is at least attempted (pursuant to Article 25(3)(b) of the Rome Statute, which states that a person is 'criminally responsible' if the person '[o]rders, solicits or induces the commission' of a crime within the ICC's jurisdiction 'which in fact occurs or is attempted').[612]

600 However, note that on appeal, in relation to the appellant Nahimana, some of the convictions were reversed, and only the convictions based on Art 6(3) of the Statute (command responsibility) in respect of RTLM broadcasts after 6 April 1994, for direct and public incitement to commit genocide and persecution as a crime against humanity were affirmed. With respect to the appellant Ngeze, editor of *Kangura*, the Appeals Chamber also reversed several of the convictions, affirming only his convictions for having aided and abetted the commission of genocide in the *préfecture* of Gisenyi, having directly and publicly incited the commission of genocide through *Kangura* publications in 1994 and having aided and abetted extermination as a crime against humanity in the *préfecture* of Gisenyi. Similarly, in relation to Barayagwiza, various convictions were overturned, leaving, among others, a conviction for having instigated the commission of persecution as a crime against humanity.

601 Human Rights and Gender Justice (HRGJ) Clinic of the City University of New York (CUNY) School of Law, MADRE and The Organization of Women's Freedom in Iraq (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, 8 November 2017, https://www.madre.org/sites/default/files/PDFs/ICC%20Petition%20with%20Sept%2010%20Addendum.pdf (last accessed 25 February 2023), para 2.

602 Ibid, para 67.

603 Ibid, para 50 (citing Sha'ban, 'The Fitrah of Mankind and the Near-Extinction of the Western Woman', 15 *Dabiq* 1437.

604 Ibid.

605 Ibid, para 68, citing Rabi' Al-Akhar, 'From Hypocrisy to Apostasy: The Extinction of the Grayzone', 7 *Dabiq* 1436.

606 Ibid, para 63.

607 Ibid, para 70.

608 Ibid, para 72, citing OutRight Action International, 'Timeline of Publicized Executions for Alleged Sodomy by the Islamic State Militias', 30 June 2016.

609 Art 7(1), ICTY Statute; Art 6(1), ICTR Statute.

610 Art 25(3)(b), Rome Statute.

611 See, e.g., ICTY, *Prosecutor v Naser Orić*, Trial Chamber, Judgment, IT-03-68-T, 30 June 2006, §269; see also Timmermann, *Incitement in International Law*, supra fn 30, p 222; A. Coco, 'Instigation', in J. de Hemptinne, R. Roth and E. van Sliedregt, (eds), *Modes of Liability in International Criminal Law*, Cambridge University Press, 2019, p 257.

612 Coco, 'Instigation', supra fn 328.

At the ICTR and ICTY, instigation has been defined as 'prompting' another person to commit a crime.[613] The instigator's words must have made a 'substantial contribution' to the conduct of the principal perpetrator, although there is no need to show that that the crime would not have been committed 'but for' the instigation.[614] It must be more than merely facilitating the commission of the offence. The principal perpetrator must be influenced in some way; however, the original plan need not have originated with the instigator.[615]

In relation to the *mens rea*, the perpetrator must either directly intend that the offence be committed, or be aware of the substantial likelihood that a crime will be committed in the execution of the acts or omissions instigated.[616]

The ICC has interpreted 'soliciting' and 'inducing' in very similar terms. In *Gbagbo*, a pre-trial chamber stated that '"ordering", "soliciting" and "inducing" in essence fall into a broader category of "instigating" or "prompting another person to commit a crime", in the sense that they refer to a conduct by which a person is influenced by another to commit a crime'.[617] Again, in terms of the *mens rea*, a trial chamber held in *Bemba Gombo* that '[t]he perpetrator meant to "solicit" or "induce" the commission of the offence, or must have been at least aware that the offence(s) would be committed "in the ordinary course of events" as a consequence of the realisation of his or her act or omission'.[618]

The ICTY, ICTR and ICC have all made it clear that instigation and solicitation/inducement cover both public and private speech acts. This means that where, for instance, an individual publicly calls for the commission of the crimes against humanity of murder, deportation, torture or rape against LBTIQA+ people, and as a result of this speech, such crimes are committed or attempted, the speaker may be liable for soliciting or inducing the commission of these crimes.

However, a difficulty has arisen at the international criminal tribunals as well as the ICC in terms of proving that there was a causal link between the speech act and the crimes committed in response. As noted above, a person is criminally responsible for instigation (or solicitation or inducement) where the crime instigated is actually committed or at least attempted. This requires proof of a causal link between speech and crime. As I have argued elsewhere:

> Where a speaker publicly addresses a large crowd of people, stirs up their emotions and calls for the commission of violence or various crimes, the group of addressees is typically undefined. Consequently, where crimes are committed following the inciting speech, a causal link between a particular crime and the speech in question is much more difficult to establish than in a case of more private instigation, where an individual persuades a specific individual or limited number of individuals to commit a particular offence.[619]

Of course, where there is a large temporal or spatial difference between the speech and the crimes in question, the difficulty increases. As the ICTR Appeals Chamber held in *Nahimana et al*, 'the longer the lapse of time between a broadcast and the killing of a person, the greater the possibility that other events might be the real cause of such killing and that the broadcast might not have substantially contributed to it'.[620]

In the *Ruto and Sang* case before the ICC, applications by the defence for judgments of acquittal were granted because, inter alia, a sufficient causal link between the language and violent conduct had not been proven: the mere fact that 'crimes were actually committed against Kikuyu and other perceived PNU [Party of National Unity] supporters in the Rift Valley' did not permit 'a strong enough inference' against Ruto: 'The geographic and temporal distance between Mr Ruto's alleged speeches and the commission of the crimes is too large'.[621] It is therefore often difficult to prove a causal link in the case of public speeches, where crimes are committed too far away from or long after the speech.

Such difficulties may, of course, also arise in any attempts to prosecute those who publicly call for violence and other crimes against members of the LGBTIQA+ community. However, in the *Rolling Stone* case, for example, this would not appear to be a significant problem. As described above, the tabloid published the full names, addresses, photographs and preferred social meeting places of the victims, with the headline 'Hang Them', a specific call for violence against identified individuals. Only a couple of weeks later, there were attacks on several of those individuals (many went into hiding so as to avoid being attacked).[622]

613 *Kordić and Čerkez* appeals chamber judgment, supra fn 136, §27.

614 Ibid.

615 Orić trial chamber judgment, supra fn 328, §271; see also ICC, The Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Trial Chamber, Public Redacted Version of Judgment Pursuant to Article 74 of the Statute ICC-01/05-01/13, 19 October 2016, §81.

616 *Kordić and Čerkez* appeals chamber judgment, supra fn 136, §§29, 32.

617 ICC, Situation in the Republic of Cote d'Ivoire in the Case of *The Prosecutor v Laurent Gbagbo*, Pre-Trial Chamber, Public Redacted Decision on the Confirmation of Charges Against Laurent Gbagbo, ICC-02/11-01/11, 12 June 2014, §243. See also ICC, Situation in the Central African Republic in the Case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Trial Chamber, Public Redacted Version of Judgment Pursuant to Article 74 of the Statute, ICC-01/05-01/13, 19 October 2016, §74: 'both notions [i.e. solicitation and inducement] describe in general the conduct of the accessory prompting the commission of an offence by another person'.

618 *Bemba et al* trial chamber judgment, supra fn 334, §82.

619 W. K. Timmermann, 'International Speech Crimes Following the *Šešelj* Appeal Judgment', in P. Dojčinović (ed), *Propaganda and International Criminal Law: From Cognition to Criminality*, Routledge, 2020, p 107.

620 *Nahimana et al* appeals chamber judgment, supra fn 20, §513.

621 ICC, Situation in the Republic of Kenya in the Case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Public Redacted Version of Decision on Defence Applications for Judgments of Acquittal, 5 April 2016, §135.

622 The issue in question was published on 2 October 2010; the attacks were reported shortly after (e.g. on 22 October 2010 on *BBC News*: 'Attacks Reported on Ugandans Newspaper "outed" as Gay', supra fn 304).

With respect to the crimes committed by ISIS in Iraq, they have clearly been preceded and accompanied by a massive propaganda campaign, which has resulted in '[w]idespread killings, rapes and acts of genocide ... committed by followers of ISIS, which additionally indicates that their propaganda is perceived as a call for such actions', as Mohamed Elewa Badar and Polona Florijančič have submitted.[623] However, based on the reports consulted by this author, it is difficult to assess whether any particular instance of incitement to hatred or violence by ISIS might constitute instigation or solicitation/inducement.

D. CONCLUSION

Although the importance of securing rights for, and preventing discrimination against, LGBTIQA+ people has been increasingly recognized, members of this group are still subject to unspeakable human rights abuses around the world. Such abuses, which in various cases rise to the level of crimes against humanity, are regularly accompanied by vicious incitement to hatred and/or violence. Because such incitement causes, exacerbates and perpetuates the abuses and crimes, it is of the utmost importance to prevent it and hold those responsible accountable.

I have argued that both Article 20(2) ICCPR and persecution under Article 7 of the Rome Statute must be interpreted in such ways as to encompass discrimination on the grounds of sexual orientation and gender identity. In the case of Article 20(2), which requires states to prohibit by law '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility and violence', recent developments in the practice of international human rights bodies such as the HRCttee, UN High Commissioner for Human Rights, the Council of Europe and the Organization of American States support the submission that Article 20(2) should be extended to incorporate advocacy of hatred on the basis of sexual orientation or gender identity. These organizations have increasingly called on states to prohibit such incitement to hatred and violence and hold those who engage in it accountable. This conclusion is also supported by the fact that the ECtHR now recognizes an obligation of states to prevent, investigate and punish incitement to hatred and violence against LGBTIQA+ people in certain circumstances.

In the context of persecution as a crime against humanity, I have argued that in a large number of cases, the incitement to hatred and violence directed against LGBTIQA+ people is sufficiently grave and moreover accompanied by a systematic attack against that population, consisting also of discriminatory laws, arbitrary arrests, physical and sexual abuse in custody and other human rights violations, and therefore amounts to persecution. Although sexual orientation and gender identity are not specifically included as prohibited grounds of persecution in the Rome Statute, they can arguably be included within 'gender', 'other grounds that are universally recognized as impermissible under international law' or even 'political' or 'cultural' grounds.

Alternatively, in certain cases, public incitement to violence or other crimes against LGBTIQA+ people can amount to instigation or solicitation/inducement, as long as a causal link can be proven between the inciting words and the crimes committed as a result.

In 2018, the Security Council established the UN Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD).[624] This was in response to a request by the Iraqi Government in August 2017 for assistance with ensuring that ISIL members were held accountable for the crimes they had committed in Iraq.[625] Between 2014 and 2017, ISIL had committed various abuses of international human rights law, international criminal law and international humanitarian law, likely amounting to war crimes, crimes against humanity and possibly genocide.[626] As described above, the crimes included, among various others, systematic torture and persecution committed by ISIS against individuals on the basis of their sexual orientation and/or gender identity.[627] Incitement to hatred and violence played a significant part in ISIS's crimes.

In 2015, the ICC Prosecutor had declined to begin an investigation into such crimes in Iraq, as there was only a very narrow jurisdictional basis for opening a preliminary investigation at the time. ISIS was primarily led by nationals of Iraq and Syria, which were not signatories to the Rome Statute, and although some crimes might have been committed by state-party nationals, these were unlikely to hold leadership positions within ISIS.[628]

Within UNITAD, the Sexual and Gender-Based Crimes and Crimes against Children Unit (SGBCCU) of the Office of Field Investigations is responsible for making sure that UNITAD effectively investigates sexual and gender-based crimes and crimes against children committed by ISIS in Iraq.[629] According to the UNITAD website, the SGBCCU 'takes the investigative lead in three thematic areas', amongst them 'Crimes against the LGBTQ community'.[630] Three organizations (the Human Rights and Gender Justice Clinic of the City University of New York School of Law, MADRE and the Organization of Women's Freedom in Iraq) collected documen-

623 M. E. Badar and P. Florijančič, 'The Cognitive and Linguistic Implications of ISIS Propaganda: Proving the Crime of Direct and Public Incitement to Commit Genocide', in Dojčinović (ed), *Propaganda and International Law*, supra fn 336, p 50.

624 UNSC Res. 2379, 21 September 2017.

625 Ibid.

626 See UN Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD), 'Our Mandate', https://www.unitad.un.org/content/our-mandate (last accessed 25 February 2023).

627 HRGJ, MADRE and OWFI, Communication to the ICC Prosecutor, supra fn 318.

628 Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Alleged Crimes Committed by ISIS', 8 April 2015, https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1 (last accessed 25 February 2023).

629 See UNITAD, 'Supporting Victims of Sexual and Gender-Based Crimes and Crimes Against Children', https://www.unitad.un.org/content/supporting-victims-sexual-and-gender-based-violence (last accessed 25 February 2023).

630 Ibid.

tation showing, inter alia, systematic persecution of LGBTIQA+ people by ISIS.[631] They initially made an unsuccessful request for a preliminary examination by the ICC Prosecutor,[632] which was denied, as indicated above. The OTP subsequently released the request and allowed MADRE to share their documentation with UNITAD.[633] It remains to be seen whether any ISIS members will be held accountable for their crimes against the Iraqi LGBTIQA+ community, and specifically for their incitement to hatred and violence.

631 See HRGJ, MADRE and OWFI, Communication to the ICC Prosecutor, supra fn 318; J. Lester Feder, 'The Secret Battle to Save LGBT People From ISIS – and Bring Their Persecutors to Justice', *BuzzFeed News*, updated on 24 June 2019, https://www.buzzfeednews.com/article/lesterfeder/isis-iraq-lgbt-majid-ahlam-owfi.

632 HRGJ, MADRE and OWFI, Communication to the ICC Prosecutor, supra fn 318.

633 MADRE, 'Seeking Justice for ISIS Rights Abuses: The Next Phase', 28 January 2020, https://www.madre.org/press-publications/article/seeking-justice-isis-rights-abuses-next-phase (last accessed 25 February 2023).

PART TWO:

DISCRIMINATION AGAINST OTHER MINORITY GROUPS

6. FROM LEGISLATED DISCRIMINATION TO SYSTEMIC RACISM: INDIGENOUS WOMEN AND SETTLER COLONIALISM IN CANADA

Eloïse Décoste[1]

A. INTRODUCTION

On 28 September 2020, 37-year-old Joyce Echaquan, an Atikamekw woman from Manawan, died in a hospital in Joliette. Admitted two days earlier for stomach pains, Echaquan had travelled almost 200 kilometers to access healthcare. Like many Indigenous communities in Canada, Manawan only has a nursing station. Moments before her death, she livestreamed herself, pleading for help in her mother tongue, Atikamekw Nehiromowin. In the video, which went viral, Echaquan, who suffered from a pre-existing heart condition, complains about being over-medicated. In the background, the taunts and racial slurs hurled by the healthcare workers on duty are loud and clear.[2] Less than an hour later, her heart stopped beating.[3] Echaquan's brave gesture to record the circumstances of her death, despite the excruciating pain she is visibly in, provides first-hand evidence of the degrading treatment she endured while in care. Her death sparked nationwide outrage about discrimination and systemic racism in Canada's healthcare

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2 A. Riopel, 'Les dernières heures de Joyce Echaquan', *Le Devoir*, 2 October 2020, https://www.ledevoir.com/societe/587114/les-dernieres-heures.

3 On 6 October 2020, the Office of the Chief Coroner of Quebec ordered an inquest into her death. Public hearings were held from 13 May to 2 June 2021 in the Trois-Rivière Courthouse. The testimonies gathered during the inquest clearly point to patterns of mistreatment of Indigenous peoples in the province's healthcare system: L. Perreaux,'Quebec Coroner Finishes Joyce Echaquan Inquest', *The Globe and Mail* updated 3 June 2021, https://www.theglobeandmail.com/canada/article-quebec-coroner-finishes-echaquan-inquest/. On 1 October 2021, coroner Géhane Kamel released her final report. It concludes that Joyce Echaquan died of a shock-induced pulmonary oedema cardiogenic in the context of a diseased heart, associated with potentially deleterious maneuvers and racial prejudice.: Me Géhane Kamel, *Rapport d'enquête concernant le décès de Joyce Echaquan,* Bureau du Coroner du Québec, 2021, https://www.coroner.gouv.qc.ca/fileadmin/Enquetes_publiques/2020-EP00275-9.pdf (last accessed 5 April 2023).

system.[4] Taking place merely a few months later, many have called this troubling event 'Canada's George Floyd moment'.[5]

For Indigenous[6] women,[7] the tragic sight was all but too familiar. Although the Canadian Government likes to boast about the country being a benevolent peacekeeper, systemic racism against Indigenous peoples[8] is still rampant in Canada.

4 While Joyce Echaquan's death brought the issue into the spotlight, systemic racism in Canada has been documented for years. Notably, in 2015, a report showed that racism contributes to poorer health outcomes for Indigenous peoples compared to other Canadians. B. Allan and J. Smylie, *First Peoples, Second Class Treatment: The Role of Racism in the Health and Well-Being of Indigenous Peoples in Canada*, Wellesley Institute, 2015, https://www.wellesleyinstitute.com/wp-content/uploads/2015/02/Summary-First-Peoples-Second-Class-Treatment-Final.pdf (last accessed 2 March 2023). Moreover, nearly a year before Echaquan's troubling death, a provincial inquiry had concluded that Indigenous peoples living in Quebec are subject to violence and systemic discrimination in the delivery of public services, including healthcare. Public Inquiry Commission on relations between Indigenous peoples and certain public services in Québec: listening, reconciliation and progress, *Final Report*, Commission d'enquête sur les relations entre les autochtones et certains services publics, 2019, https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Rapport/Final_report.pdf (last accessed 2 March 2023).

5 Radio-Canada, 'Mort de joyce Echaquan: enquête publique sur fond de manifestations', *ICI Grand Montréal*, *Radio Canada*, updated 4 October 2020, https://ici.radio-canada.ca/espaces-autochtones/1738492/joyce-echaquan-manifestation-montreal-racisme-justice-nakuset (last accessed 2 March 2023); E. Clavel, 'Les cris de «Justice pour Joyce» résonneront à Montréal samedi', *HuffPost Quebec*, 2 October 2020, https://www.huffpost.com/archive/qc/entry/manifestation-justice-pour-joyce-echaquan-montreal_qc_5f772851c5b6371dda89dafa; 'Mort de Joyce Echaquan: «on a assisté à un meurtre au second degree», soutient le Dr Stanley Vollant', *Le Journal de Québec*, 2 October 2020, https://www.journaldequebec.com/2020/10/03/mort-de-joyce-echaquan-on-a-assiste-a-un-meurtre-au-seconde-degre-soutient-le-dr-stanley-vollant; M. Groguhé, 'Ce que George Floyd a changé', *La Presse*, 19 December 2020, https://www.lapresse.ca/societe/2020-12-19/retrospective-2020/ce-que-george-floyd-a-change.php.

6 In this article, the term 'Indigenous' is used, as it is the term chosen by the Indigenous representatives who participated in the negotiation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007, https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf (last accessed 2 March 2023). In Canada, the Constitution uses the term 'Aboriginal'. However, 'Indigenous' has become, in recent years, the preferred umbrella term in the Canadian context as well.

7 The term 'women' is used in an inclusive fashion and encompasses all Indigenous persons who identify and/or navigate the world being gendered as such. For the sake of conciseness, the term 'women' is used to refer to women of all ages, instead of the commonly used expression 'Indigenous women and girls'. The choice to limit the discussion to Indigenous women is in no way intended to minimize the consequences of colonialism on other Indigenous persons, but rather to highlight the particular ways in which colonialism has targeted and impacted Indigenous women.

8 There is no authoritative definition of 'Indigenous peoples' under international law. The relevant international instruments, namely UNDRIP, supra fn 6, and the Indigenous and Tribal Peoples Convention, 1989, adopted by the General Conference of the International Labour Organisation on 7 June 1989 and entered into force on 5 September 1991, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 (last accessed 2 March 2023), rather insist on the importance of self-determination. Nonetheless, the following definition put forward in the 1982 UN study on discrimination against Indigenous populations remains insightful: 'Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems'. J. R. Martinez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study of the Problem of Discrimination Against Indigenous Populations: Volume V–Conclusions, Proposals and Recommendations, UN Doc E/CN.4/Sub.2/1986/7/Add.4, 1987, §379.

The root causes of today's racial injustices are deeply entangled in the country's colonial history and the ongoing legacy of the state's policies aimed at assimilating Indigenous peoples into the dominant Euro-Canadian society. Indigenous women have been the prime targets of the state's onslaught on Indigenous peoples, as their very existence as givers of life and mothers as well as heads of families in matrilineal nations poses a symbolic and physical threat to the settler colonial project.[9]

This paper will examine why, while non-discrimination is well entrenched in international law, Canada is persistently failing to protect Indigenous women's human rights. It will start by demonstrating that the marginalization of Indigenous women has been a prime tool of colonialism in Canada. To do so, it will present how the state established, maintained and defended, during a century and a half, a legislated regime of discrimination against Indigenous women. It will then examine how the legacy of colonialism has dramatic and ongoing impacts on the lives and wellbeing of Indigenous women in Canada today. To illustrate this, examples of systemic violations of Indigenous women's right to life and security, and sexual and reproductive rights will be discussed. Finally, the paper will posit that, given how integral the marginalization of Indigenous women has been to the making of the settler state, a better implementation of human rights protections is and will always be insufficient to address the epidemic levels of violations of Indigenous women's human rights in Canada.

B. LEGISLATED DISCRIMINATION: SETTLER COLONIALISM AND THE MARGINALIZATION OF INDIGENOUS WOMEN

For 150 years, the Canadian state maintained a system of legislated inequalities that discriminated against Indigenous women. While Indigenous men who married non-Indigenous women remained 'Indians'[10] under Canadian law and could transmit that status to their wife and children, Indigenous women who married non-Indigenous men were forced to leave their communities. This exclusion contributed to the economic marginalization, social isolation and devaluing of the lives of Indigenous women.[11] This discriminatory treatment was certainly a product of the state's own patriarchal values, but there was more to it. Indigenous women's role as givers of life and their 'ability to produce future generations and en-

9 D. M. Lavell-Harvard and J. Brant, 'Introduction', in D. M. Lavell-Harvard and J. Brant (eds), *Forever Loved: Exposing the Hidden Crisis of Missing and Murdered Indigenous Women and Girls in Canada*, Demeter Press, 2016, p 3.

10 The term 'Indian' is used strictly to refer to the legal category enshrined in the Indian Act, RSC 1985, c I-5. The author however acknowledges that it is an archaic, colonial term that ought not to be used or understood as a synonymous for Indigenous.

11 S. D. McIvor, 'Aboriginal Women Unmasked: Using Equality Litigation to Advance Women's Rights', 16 *Canadian Journal of Women and the Law* (2004).

sure the continuance of [their] people … threaten[ed] the entire colonial project'.[12] Thus, to adequately apprehend the pervasive consequences of a century and a half of legislated inequalities and Canada's persistent failure to protect Indigenous women's human rights, one must first examine how gender-based discrimination constitutes an integral part of Canada's colonial fabric.

1. SETTLER COLONIALISM AND THE 'LOGIC OF ELIMINATION'

Canada, like other former British colonies (such as Australia, New Zealand and the United States), is a settler colonial state. As a distinct form of social and political formation, settler colonialism is characterized by a 'logic of elimination', intended to achieve the permanent replacement of Indigenous peoples and the challenge their claims pose to settler sovereignty and occupation by an uncontested settler society.[13] This is what James Tully calls 'internal colonisation', whereby the colonizing society is built on the territories of formerly free Indigenous peoples and imposes its jurisdiction and a system specifically designed to achieve their disappearance as distinct and free governing societies.[14] In his words, 'the essence of internal colonisation … is the appropriation of the land, resources and jurisdiction of the indigenous peoples … for the territorial foundation of the dominant society itself'.[15]

What settler colonial theory teaches us is that the modern Canadian state was built upon the dispossession and denial of Indigenous peoples' sovereignty.[16] Consequently, settler colonialism must be understood as an enduring structure – not an event – striving for the dissolution of Indigenous societies and characterized by historical continuity.[17] Patrick Wolfe described this process as a 'structural genocide',[18] one that operates through the ongoing process of disconnecting Indigenous peoples from their histories, territories, languages, cultures, social relations and worldviews.[19]

2. CREATING THE 'INDIAN': SETTLER COLONIALISM AND RACIST IDEOLOGIES

During the initial period of contact, the relationship between Indigenous societies and European colonizers was primarily commercial and marked by patterns of cooperation, with Indigenous nations enjoying the upper hand in populations and knowledge of the land, essential for survival.[20] That period was also one of mutual recognition, whereby Indigenous and European nations signed treaties and 'appear[ed], however reluctantly at times, to have determined that the best course of action was to treat the other as a political equal in most important respects'.[21] Nonetheless, European colonizers and their imperial ambitions profoundly perturbed all aspects of life across what is known today as North America and provoked dramatic decline in Indigenous populations through imported disease, war, massacres and famines.[22]

By the mid-nineteenth century, the balance of power had drastically shifted. While European immigration was ever increasing, the colonial economic base changed. As the fur trade – which was dependent on cooperation with Indigenous nations – was replaced by agriculture and resources exploitation, colonizers wanted land for permanent settlement. Meanwhile, loss of land, the scarcity of game and the continuing ravages of disease gravely undermined Indigenous economies, which were now perceived as incompatible with the colonizers' imperial ambitions.[23] 'Formerly autonomous [Indigenous] nations came to be viewed, by prosperous and expanding Crown colonies, as little more than an unproductive drain on the public purse.'[24] Settler society hence sought to impose a new relationship on Indigenous peoples, characterized by displacement and dispossession.

12 Lavell-Harvard and Brant, 'Introduction', supra fn 9, p 4. See also A. Smith, *Conquest: Sexual Violence and American Indian Genocide*, Duke University Press, 2015; W. Stevenson, 'Colonialism and First Nations Women in Canada', in M. J. Cannon and L. Sunseri (eds), *Racism, Colonialism and Indigeneity in Canada: A Reader*, Oxford University Press, 2011; M. Eberts, 'Victoria's Secret: How to Make a Population of Prey', in J. Green (ed), *Indivisible: Indigenous Human Rights*, Fernwood Publishing, 2014.

13 P. Wolfe, 'Settler Colonialism and the Elimination of the Native', 8 *Journal of Genocide Research* 4 (2006). See also P. Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event*, Cassel, 1999; L. Veracini, *Settler Colonialism: A Theoretical Overview*, Palgrave Macmillan, 2010; E. Battell Lowman and A. J. Barker, *Settler Identity and Colonialism in 21st Century Canada*, Fernwood Publishing, 2015.

14 J. Tully, 'The Struggles of Indigenous Peoples for and of Freedom', in D. Ivison, P. Patton and W. Sanders (eds), *Political Theory and the Rights of Indigenous Peoples*, Cambridge University Press, 2000.

15 Ibid, p 39.

16 C. Cunneen, 'State Crime, the Colonial Question and Indigenous Peoples', in A. Smuelers and R. Haveman (eds), *Supranational Criminology: Towards a Criminology of International Crimes*, Intersentia Press, 2008.

17 Wolfe, 'Settler Colonialism and the Elimination of the Native', supra fn 13, 390. On this specific aspect of settler colonial theory, see J. Kēhaulani Kauanui, '"A Structure, Not an Event": Settler Colonialism and Enduring Indigeneity', 5 *Lateral* 1 (2016).

18 This is the term suggested by Patrick Wolfe to describe the specificity of settler colonialism and the logic of elimination without downplaying its impact by resorting to a qualified genocide. In his opinion, this term avoids creating hierarchy among victims and highlights the structural induration of settler colonialism. He argues that when removal is no longer possible, there are two eliminatory options available: mass killings (as in the Holocaust) or assimilation (as in settler colonial states): See Wolfe, 'Settler Colonialism and the Elimination of the Native', supra fn 13, 403.

19 Ibid. See also L. Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples*, University of Otago Press, 1999, p 28.

20 See *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (RCAP vol 1), 1996, pp 95, https://data2.archives.ca/e/e448/e011188230-01.pdf (last accessed 2 March 2023).

21 Ibid, p 96.

22 Ibid, p 97.

23 Ibid, p 130–131

24 Ibid, p 131.

Colonial governments adopted laws based on racist ideologies in order to justify the subjugation of Indigenous peoples.[25] Through these laws, diverse Indigenous societies – with rich histories and their own systems of governance and social organization – became 'Indians' divided into 'bands'. As explained by Cree scholar Val Napoleon, 'the colonially created entity called a band is a historic and bears no relationship to the larger nation or its ancient cultural systems of governance, land tenure, laws, or citizenship'.[26] The band system led to the political and administrative fragmentation of Indigenous nations, in a conscious effort to undermine societal structures.[27] It also disrupted the roles of women in traditional governance systems, which in turn greatly impacted their place within Indigenous societies.[28] Meanwhile, the racialization of Indigenous peoples was achieved through the codification of 'Indianness', 'to make it a [legal] category that could be granted or withheld, according to the needs of the settler society'.[29] By emphasizing racial differences and using racist ideologies to uphold the premise of European superiority and 'Indian' inferiority, the settler state could then justify its assimilationist policies.[30]

In 1857, the British Crown adopted the Gradual Civilization Act, which sought the 'gradual removal of all legal distinctions between [Indian Tribes] and Her Majesty's other Canadian subjects, and to facilitate the acquisition of property and of the rights accompanying it'[31] through a process it called enfranchisement. Any Indigenous man between 21 and 40 years old could ask to be enfranchised,[32] by means of which he would cease to be considered a member of his band in exchange for up to 50 acres of land within the reserve and his per capita share in the principal of the treaty annuities and other band moneys.[33] To qualify, they had to show they were 'civilized',[34] which was defined around the matrix of a Christian education, permanent settlement and agriculture.[35]

25 B. Lawrence, 'Gender, Race and the Regulation of Native Identity in Canada and the US: An Overview', 18 *Hypatia* 2 (2003), 5.

26 V. Napoleon, 'Extinction by Number: Colonialism Made Easy', 16 *Canadian Journal of Law and Society* (2010) 126.

27 See *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship,* vol 2 (RCAP vol 2), p 235, https://data2.archives.ca/e/e448/e011188230-02.pdf (last accessed 2 March 2023).

28 Stevenson, 'Colonialism and First Nations Women in Canada', supra fn 12, p 51.

29 Lawrence, 'Gender, Race and the Regulation of Native Identity', supra fn 25, 7.

30 Ibid, 8.

31 Act to Encourage the Gradual Civilization of the Indian Tribes in this Province, and to Amend the Laws Respecting Indians, SC 1857, c 26, Preamble, http://caid.ca/GraCivAct1857.pdf (last accessed 2 March 2023).

32 His wife and children were automatically enfranchised with him, regardless of their wishes and without receiving a share of reserve lands like him. Ibid, §VIII.

33 Ibid, §VII.

34 The criteria used by the colonial authorities were: ability to read and write English or French; be reasonably well educated (by colonial standards); be free of debt; and considered of good moral character (as determined by a commission of settler examiners): Ibid, §IV.

35 K. Jamieson, *Indian Women and the Law in Canada: Citizens Minus,* Canadian Advisory Council on the Status of Women and Indian Rights for Indian Women, 1978, 20.

'The enfranchisement policy was a direct attack on the social cohesion of [Indigenous] nations.'[36] It sought to reduce the numbers of 'Indians' and to gradually extinguish 'reserve lands'.[37] The premise of the policy was that by removing all legal distinctions between Indigenous peoples and settlers, it would be possible to absorb them fully into colonial society. In turn, the disappearance of these legal distinctions would translate into the elimination of the continued challenges the existence of Indigenous nations, as distinct political entities, posed to the Crown's claim to land and sovereignty.[38] However, the first iteration of enfranchisement, which was voluntary, proved to be a failure. During the period between 1857 and 1876, only one Indigenous man chose to enfranchise.[39] Consequently, in order for the settler colonial project to succeed, more effective assimilationist policies were needed.

3. THE BIRTH OF CANADA: THE GENESIS OF LEGISLATED DISCRIMINATION

The 1867 Confederation of Canada drastically changed the constitutional relationship between Indigenous peoples and the state. This new relationship was decided unilaterally, without discussion or consultation with Indigenous peoples on their future position within the federation.[40] According to the Constitution of the Dominion of Canada, 'Indians and Lands reserved for the Indians' fell under the exclusive legislative authority of parliament.[41] From then on, the state sought to define the term 'Indian' as narrowly as possible, in order to restrict the numbers of people it was responsible for. The logic went as follows: 'a narrow definition of "Indian" furthers Canada's own land ambitions in several ways: the fewer Indians it recognizes, the less land must be allocated as reserves in the first place; and the more people who are excluded from bands, the more quickly the Indian population will shrink'.[42]

Merely two years after confederation, the new parliament adopted An Act for the Gradual Enfranchisement of Indians,[43] which marked the formal incorporation of the ethos of assimilation into Canadian law.[44] While the 1869 Act continued the policy of enfranchisement, it incorporated a whole new policy aimed at the disappearance of 'Indians' through the exclusion of Indigenous women from their band. The Act provided that an 'Indian' woman who married a 'non-Indian' man

36 RCAP vol 1, supra fn 20, p 138.

37 'Importantly, [enfranchisement] was a threat to the integrity and land base of communities, an attempt to "break them to pieces" one leader charged.' Ibid.

38 See Wolfe, 'Settler Colonialism and the Elimination of the Native', supra fn 13.

39 RCAP vol 1, supra fn 20, p 138.

40 Ibid, p 165.

41 Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, no 5, §91(24).

42 Eberts, 'Victoria's Secret', supra fn 12, p 148.

43 An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act 31st Victoria, 42 (Gradual Enfranchisement Act), SC 1869, c 6, https://dev.nctr.ca/wp-content/uploads/2021/01/1869-Gradual-Enfranchisement-Act.pdf (last accessed 2 March 2023).

44 RCAP vol 1, supra fn 20, p 166.

lost her status and band membership, as would any children of that marriage.[45] However, the reverse scenario did not happen; Indigenous men who 'married out' remained 'Indians' under Canadian law and transmitted that status to their wife and children.

This new policy was intended to ensure 'more control over Indians, more efficient and thus more economical management of Indians affairs during the transition to civilization and eventual assimilation'.[46] To alleviate its financial burden, the settler state imposed a Victorian model of gender relations, positioning the male as the patriarch and the female as his dependent and obedient spouse.[47] Thenceforth, either Indigenous women married 'Indian' men and lived on reserve as conventional Victorian unions or they would marry a white man whom they would be forced to follow off reserve like a good subservient wife. Such a model of gender relations was foreign to Indigenous family and governance structures.

The construction of perfect Victorian wives intended to accelerate the assimilation of Indians into the dominant settler society. The cultural values underlying the settler colonial project were based primarily on the needs of a society organized around agriculture. Private property and inheritance through the male line were indispensable to establishing this system upon Indigenous communities, which required control and repression of women's sexuality.[48] Thus, the inscription of gender hierarchy into Indigenous societies was not merely a means of patriarchal control, but also a tool of colonialism.[49] The ideal of womanhood projected on Indigenous societies was used to contrast savagism from civility.[50] Thereupon, the patriarchal Madonna–whore dichotomy,[51] coupled with racist ideologies, led to

45 '[A]ny Indian woman marrying any other than an Indian, shall cease to be an Indian within the meaning of this Act, nor shall the children issue of such marriage be considered as Indians within the meaning of this Act', Gradual Enfranchisement Act, supra fn 43, §6.

46 Jamieson, *Indian Women and the Law in Canada*, supra fn 35, p 32.

47 Eberts, 'Victoria's Secret', supra fn 12, p 149.

48 Jamieson, *Indian Women and the Law in Canada*, supra fn 35, p 13.

49 R. Kuokkanen, 'Globalization as Racialized, Sexualized Violence: The Case of Indigenous Women', 10 *International Feminist Journal of Politics* 2 (2008) 220; Smith, *Conquest*, supra fn 12, p 23.

50 D. D. Smits, 'The "Squaw Drudge": A Prime Index of Savagism', 29 *Ethnohistory* 4 (1982) 298.

51 Pursuant to the dominant ideology prevailing during the Victorian period, men and women's roles were sharply defined. The two sexes were conceived as inhabiting 'separate spheres', whereby women, physically weaker than men but morally superior, were to be confined to the domestic sphere, while men occupied the public sphere. Women were thus expected to desire marriage and motherhood. Women seeking sexual pleasures were cast as deviant. Consequently, Victorian society-constructed meanings about female sexuality rested upon the dichotomy of virgin (normalcy) and whore (deviancy), which in turn served as a tool of enforcement of patriarchal control over women's sexuality and more largely women's roles within society. Feminist scholars have described the ideology underlining this dichotomy as designed to reinforce patriarchy, unequal gender roles, women's agency and sexuality. See notably B. K. Conrad, 'Neo-Institutionalism, Social Movements, and the Cultural Reproduction of a Mentalité: Promise Keepers Reconstruct the Madonna/Whore Complex', 47 *The Sociological Quarterly* (2006); C. Young, 'New Madonna/Whore Syndrome: Feminism, Sexuality, and Sexual Harassment', 38 *New York Law School Law Review* (1993); N. Wolf, *Promiscuities: The Secret Struggle for Womanhood,* Random House, 1997; J. S. Forbes, 'Disciplining Women in Contemporary Discourses of Sexuality', 5 *Journal of Gender Studies* (1996); S. de Beauvoir, *Le deuxième sexe*, Gallimard, 1949.

the binary imaging of Indigenous women as either the archetypal 'noble savagess' – namely the virginal 'Indian princess', who is naturally innocent, and inclined to civilization and Christian conversion – or the 'ignoble savagess', who lives a brutal life, transgresses 'civilized' Christian norms, is thirsty for blood and vengeance and is sexually licentious.[52]

4. THE INDIAN ACT: LEGALLY 'MAKING' AND 'UNMAKING' INDIANS

The first iteration of the Indian Act was adopted in 1876.[53] A product of the consolidation of separate pieces of colonial legislation aimed at Indigenous peoples, the goal of this new law was to bring all Indigenous nations (with whom the Crown had distinct relationships) under a single relationship with the settler state, one that was both homogenizing and deeply paternalistic.[54] In essence, it was intended to serve three main functions, which were at the heart of the Crown's policy towards 'Indians': (1) Assimilation of Indigenous peoples and lands into the dominant settler society; (2) 'Better management' of Indian affairs and lands to control costs and resources; (3) A restrictive definition of who qualified as 'Indian'.[55]

The Act gave sweeping powers to the state with regards to the political structures, governance, cultural practices and education of Indigenous nations to achieve the settler colonial project. 'The *Indian Act* further facilitated the imposition of the government's assimilative will by insisting on conformity with Canadian social mores and providing penalties for non-compliance.'[56] Canada's ambitions were clear and notorious. As stated before parliament in 1887 by then Prime Minister Sir John A. Macdonald, 'the great aim of our legislation has been to do away with the tribal system and assimilate the Indian people in all respects with the inhabitants of the Dominion'.[57] The Act was amended over the years, introducing notably the banning of

52 Stevenson, 'Colonialism and First Nations Women in Canada', supra fn 12, pp 45–48; See also J. Acoose, *Iskwekak Kah'ki yaw ni Wahkomakanak: Neither Indian Princess Nor Easy Squaws*, Women's Press, 1995; S. L. Smith, 'Beyond the Princess and Squaw: Army Officers' Perceptions of Indian Women', in S. Armitage and E. Jameson (eds), *The Women's West*, University of Oklahoma Press, 1987.

53 An Act to Amend and Consolidate the Laws Respecting Indians, SC 1876, c 18, https://www.tidridge.com/uploads/3/8/4/1/3841927/1876indianact.pdf (last accessed 2 March 2023).

54 'Our Indian legislation generally rests on the principle, that the aborigines are to be kept in a condition of tutelage and treated as wards or children of the State … [T]he true interests of the aborigines and of the State alike require that every effort should be made to aide the Red man in lifting himself out of his condition of tutelage and dependence, and that is clearly our wisdom and our duty, through education and every other means, to prepare him for a higher civilization by encouraging him to assume the privileges and responsibilities of full citizenship'. Canada, Department of Interior, Annual Report for the Year Ended 30th June, 1876, in Sessional Papers, vol 7, no 11 (1877), p xiv.

55 Jamieson, *Indian Women and the Law in Canada*, supra fn 35, p 28.

56 RCAP vol 1, supra fn 20 , p171,

57 Sessional Papers, vol 20b, Session of the 6th Parliament of the Dominion of Canada, 1887, p 37.

cultural practices,[58] mandatory attendance in residential schools,[59] the creation of the pass system and the permit system,[60] to name a few of its brutal policies.

One central component of the Act, which is still in force today, is the unilateral determination of who is considered 'Indian' under the law, namely who is entitled to 'Indian status'.[61] The 1876 Act defined the term 'Indian' as any man with status, his children or 'any woman lawfully married to him', with the obvious effect of continuing the policy of excluding the women who married 'non-Indians'.[62] Moreover, enfranchisement was maintained and rendered compulsory in some circumstances.[63] As Mohawk scholar Audra Simpson explains, 'the Indian Act of 1876, the overarching "law" of Indians in Canada, legally "made" and "unmade" Indians and their rights in a Western, specifically Victorian, model of patrilineal descent (and rule) that attempted to order their winnowed territories'.[64]

Under the guise of 'civilization', Indigenous nations were to be fragmented into small government-dependent polities of 'Indians' that replicated Victorian villages. This scheme rested both on the view that the humanity of Indigenous peoples was less than that of the European and that, as reflected by the imposition of the Victorian patriarchal model, the only proper place for women was under the dominion

58 See infra fn 72.

59 'Canada's residential school system for [Indigenous] children was an education system in name only for much of its existence. The residential schools were created for the purpose of separating [Indigenous] children from their families, in order to minimize and weaken family ties and cultural linkages, and to indoctrinate children into a new culture – the culture of the legally dominant Euro-Christian Canadian society … The schools were in existence for well over 100 years, and many successive generations of children from the same communities and families endured the experience of them … Children were abused, physically and sexually, and they died in the schools in numbers that would not have been tolerated in any school system anywhere in the country, or in the world.' Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada, 2015, Preface, https://irsi.ubc.ca/sites/default/files/inline-files/Executive_Summary_English_Web.pdf (last accessed 2 March 2023).

60 The pass and the permit systems were used to regulate all economic activity among Indigenous communities. These systems allowed government officials to regulate movement into and from reserves, while imposing licencing requirements for economic activities, which dramatically restricted Indigenous peoples' access to key economic sectors, creating dependency on government funding: RCAP vol 1, supra fn 20, p 169.

61 Ibid, p 167.

62 The Act defined the term 'Indian' as follows: '*First.* Any male person of Indian blood reputed to belong to a particular band*; Secondly.* Any child of such person; *Thirdly.* Any woman who is or was lawfully married to such person: … (c) Provided that any Indian woman marrying any other than an Indian or a non-treaty Indian shall cease to be an Indian in any respect within the meaning of this Act … (d) Provided that any Indian woman marrying an Indian of any other band or a non-treaty Indian shall cease to be a member of the band to which she formerly belonged, and become a member of the band or irregular band of which her husband is a member.An Act to Amend and Consolidate the Laws Respecting Indians, supra fn 53, §3(3).

63 As per the 1876 Act, any Indigenous man who graduated from university, became a Christian minister, a doctor or a lawyer, or served in the armed forces, and automatically ceased to be an 'Indian' in the eyes of Canadian law as did his wife and children. Ibid, §§86(1), 88.

64 A. Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States*, Duke University Press, 2014, p 12.

of men.[65] Moreover, the reproductive ability of Indigenous women and their role as culture bearers endangered the continued success of the settler colonialism.[66] Likewise, 'clan mothers stood at odds with the male-dominated European systems of hierarchy, so dismantling female power became critical in colonial conquest'.[67] Hence, attacking the social status of Indigenous women was a way for the settler state to undermine the power of Indigenous societies as a whole.[68] Sexist and racist stereotyping of Indigenous women as hypersexual, lascivious, unfit and needing control served to justify this persistent policy of exclusion and subjugation.[69]

In sum, the unequal treatment of Indigenous men and women under the Indian Act constitutes both an expression of the patriarchal values of the settler state and of its colonial ambitions. Not only were women deemed inferior and a man's chattel, but they were also perceived as a threat to the colonial project. Expelling Indigenous women from their nations and replacing them with settler women constituted a strategy to undermine Indigenous peoples' political, cultural and societal structures, to the benefit of colonial ideologies. Likewise, depicting Indigenous women as hypersexual and unfit parents served to justify the control of their domestic life through the imposition of the Victorian patriarchal model of motherhood, which in turn served the colonial project.[70] In that sense, discrimination against Indigenous women was (and still is) integral to the fabric of settler colonialism.[71]

5. POST-WWII: SUBSCRIBING TO HUMAN RIGHTS, CONSOLIDATING THE EXCLUSION OF INDIGENOUS WOMEN

In 1951, following the Second World War and in the wake of the emergence of the international human rights regime, the Indian Act was significantly reformed. Some of the Act's oppressive restrictions, like the banning of the potlatch,[72] were removed from the law.[73] The main modification with regards to 'status' was the creation of the registration system. Until then, federal officials had kept records of band membership and treaty distribution lists on various registers. The creation of

65 Ibid.

66 Smith, *Conquest*, supra fn 12, p 79; E. Rule, 'Seals, Selfies, and the Settler State: Indigenous Motherhood and Gendered Violence in Canada', 70 *American Quarterly* 4 (2018) 741.

67 K. M. Labelle in collaboration with the Wendat/Wandat Women's Advisory Council, *Daughters of Aataentsic: Life Stories from Seven Generations*, McGill-Queen's University Press, 2021, p 4.

68 Lawrence, 'Gender, Race and the Regulation of Native Identity', supra fn 25, 5.

69 Eberts, 'Victoria's Secret', supra fn 12, p 150.

70 Rule, 'Seals, Selfies, and the Settler State', supra fn 66, 747.

71 R. Bourgeois, 'Generations of Genocide: The Historical and Sociological Context of Missing and Murdered Indigenous Women and Girls', in K. Anderson, M. Campbell and C. Belcourt (eds), *Keetsahnak: Our Missing and Murdered Indigenous Sisters*, The University of Alberta Press, 2018, pp 68–70.

72 The potlatch is a ceremony practised by coastal Indigenous Nations, which constitutes an integral part of their governing structure, social order, culture and spiritual traditions. In 1884, the federal government imposed a ban on potlatch and criminalized participation, because it considered the practice to be an impediment to the Christianization and the assimilation of Indigenous peoples. See RCAP vol 1, supra fn 20, pp 73–76, 169.

73 Ibid, pp 283–285.

the 'Indian register' enabled a centralized record of those entitled to registration (and to receipt of federal benefits) as 'Indians'.[74]

The introduction of the registration system further reinforced the exclusion of women and their descendants. Prior to the 1951 amendments, women who lost status through marriage could still retain their links to their communities through the issuance by some Indian agencies of informal ID cards known as 'red tickets', which enabled some women to continue living on reserve and receive treaty payments, based on band practices.[75] Although the legal status of these women was unclear prior to 1951, they could still in some ways be recognized as members of their communities. Under the new regime, women would not only lose status upon marriage with a 'non-Indian', they would also be enfranchised.[76] Therefore, in 1956, the 'red ticket' women were paid a lump sum amount and put into the same legal position as the women who married out after the 1951 revision.[77] There were then no more doubts; the women who 'married out' were no longer 'Indians', they were not part of any community and as such they had to dispose of any lands they held and leave the reserve. In essence, enfranchisement amounted to 'statutory banishment'.[78]

This marked the consolidation of the colonial project through the strengthening of the policy of exclusion of Indigenous women through marriage. And it was effective. It is estimated that just between 1958 and 1968, more than 100,000 women and their children lost status as a result of the 'marry-out' provisions of the Indian Act.[79] Considering that once these women lost status and had to leave their community, all of their descendants were also alienated from their Indigeneity, 'the scale of cultural genocide caused by gender discrimination becomes massive'.[80] The fact that the exclusion of Indigenous women was consolidated, even though the Indian Act was amended to weaken some of its oppressive policies, further highlights how central gender-based discrimination is to the settler colonial project.

74 Ibid, p 286.

75 Ibid, p 277.

76 The Indian Act, SC 1951, c 49, §12(1)(b).

77 RCAP vol 1, supra fn 20, p 278; See also Jamieson, *Indian Women and the Law in Canada*, supra fn 35, pp 61–62.

78 RCAP vol 1, supra fn 20, p 278.

79 [7]9 B. Joseph, *21 Things You May Not Know About the Indian Act*, Indigenous Relations Press, 2018, p 21, citing P. J. Blair, *Fact Sheet: Rights of Aboriginal Women On- and Off-Reserve*, The Scow Institute, 2005, http://scow-archive.libraries.coop/library/documents/RightsofWomenFacts.pdf (last accessed 2 March 2023).

80 Lawrence, 'Gender, Race and the Regulation of Native Identity', supra fn 25, 9.

6. REFORMING THE INDIAN ACT, MAINTAINING THE INEQUITIES

The 'marry-out' policy affected women and their children in numerous ways. Once married to a 'non-Indian', the women were forced to leave their community; they could not own property on the reserve nor inherit it from their relatives; they were denied access to cultural and social services in their community; they could no longer participate in its political and social life; even after divorcing, separating or being widowed, they could not return, or if they did, often with children, they faced evictions; and upon death, they could not be buried on the reserve with their ancestors.[81] Overall, this policy had serious deleterious effects on the excluded women and their descendants. Moreover, the stereotyping used to justify the exclusion of the women who 'married out' ultimately affected all women. Indeed, 'the Act's definition of "Indian" is conditioned by the reduction of Indigenous women's identity to primarily, if not exclusively, that of ungovernable sexual beings, appropriately treated as "sub-humans"'.[82] The stereotyping embedded in the law thus fuelled the devaluing of Indigenous women's lives. Meanwhile, the patriarchal values permeated Indigenous communities and further reinforced the marginalization of Indigenous women.[83]

The enhanced regime of exclusion of Indigenous women remained in force until 1985 when the Indian Act was finally amended to remove the explicit gender-based discrimination. The legislative modification was a result of concomitant factors, including the ratification by Canada of the United Nations Convention on the Elimination of All Forms of Discrimination against Women[84] in 1981 and the adoption of the Canadian Charter of Rights and Freedoms,[85] which enshrined the right to equality into the Constitution.[86] Most importantly, the changes came after more than two decades of Indigenous women's political and legal activism,

81 Jamieson, *Indian Women and the Law in Canada*, supra fn 35, pp 1, 72.

82 Eberts, 'Victoria's Secret', supra fn 12, p 145.

83 For discussion on how the internalization and adoption of colonial policies and practices have led to reluctance and, at times, refusal of Indigenous leadership and institutions to address discrimination and violence against Indigenous women, see R. Kuokkanen, 'Gendered Violence and Politics in Indigenous Communities: The Cases of Aboriginal People in Canada and the Sami in Scandinavia', 17 *International Feminist Journal of Politics* 2 (2015) 271.

84 UN Convention on the Elimination of All Forms of Discrimination against Women, 1979.

85 Canadian Charter of Rights and Freedoms, §15, Part I of the Constitution Act, 1982, Being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

86 Napoleon, 'Extinction by Number: Colonialism Made Easy', supra fn 26, 119.

both nationally and internationally.[87] Notably, in 1981, the UN Human Rights Committee concluded that refusing to let the women who 'married out' return to their community and belong to their band infringed upon their cultural rights as persons belonging to an ethnic, religious or linguistic minority, as guaranteed by Article 27 of the International Covenant on Civil and Political Rights.[88]

Bill C-31, adopted in 1985, removed the explicitly discriminatory provisions from the Indian Act and provided for the reinstatement of status to the women who were excluded through marriage, but not on an equal footing to men.[89] All those who had status at the time of the legislative modifications were entitled to maintain it and were registered under section 6(1)(a) of the Act. The 'reinstated' women, however, were registered under section 6(1)(c). Although this might seem like legal technicalities, it had significant repercussions on Indigenous women and their descendants as it maintained the discriminatory effects of the law. By virtue of the 'second generation cut-off rule'[90] – a new form of legal assimilation introduced with the 1985 amendments[91] – the women who were reinstated found themselves with a lessened ability to transmit the status to their descendants. Hence, through apparently neutral provisions, the gendered effects of the Act were maintained.[92] Prior to the 1985 amendments, the Indian Act provided for a one (male) parent rule. Since 1985, 'the two-parent rule … compels an *Indian Act* family modelled after the monogamous patriarchal Victorian family, with two status Indian parents and no crossing of race lines in the production of offspring'.[93]

It took another 35 years of activism and litigation before gender-based discrimination was finally removed from the Indian Act. During that period, the Canadian state fought hard to keep the discriminatory regime in place. Notably, when the Act was challenged in court[94] and ruled contrary to the equality provision of the

87 On the political front, Indigenous women mobilized to demand 'Indian Rights for Indian Women'. This was the name of a grassroots campaign led by Indigenous women activists such as Mary Two-Axe Early that was founded in 1967. Actions included submitting a brief to the Royal Commission on the Status of Women and speaking out at the International Women's Year conference in Mexico in 1975. See Jamieson, *Indian Women and the Law in Canada*, supra fn 35; J. Silman, *Enough is Enough: Aboriginal Women Speak Out,* Women's Press, 1987; McIvor, 'Aboriginal Women Unmasked', supra fn 11. Their activism led to a recommendation in the final report of the Royal Commission on the Status of Women in Canada in 1970 for the immediate amendment of the Indian Act to repeal the sections that discriminate on the basis of sex so that Indigenous women and men can enjoy equal rights. Report of the Commission of Inquiry on the Status of Women in Canada, 1970, p 238. On the judicial front, two Indigenous women fought in court to challenge their loss of status upon marriage to a 'non-Indian'. First, Jeannette Corbiere Lavell challenged the law on the grounds of discrimination by reason of sex. She alleged that subsection 12(1)(b), Indian Act (RSC, c I-6, 1970), which provided for the 'marry-out' rule, violated the equality clause of the 1960 Canadian Bill of Rights. The trial judge rejected her claim, but she won in appeal. Federal Court of Appeal, *Re Lavell v Attorney-General of Canada* [1971] FC 347, at 193, 22 DLR (3d) 188. Second, Yvonne Bedard, from the Six Nations of the Grand River, who separated from her husband in 1970, sought to return to the reserve with her children to live in a house inherited from her mother, but the band council refused to grant her permission to reside on reserve, as she was no longer legally entitled to inherit property on reserve, having lost her status. The band council gave her a year to dispose of the property and leave. Fearing eviction, Bedard brought legal action against the band, arguing on the same grounds as Jeannette Corbiere Lavell. She won in trial. High Court of Justice, *Bedard v Isaac et al*, [1972] 2 OR 391, at 397, 25 DLR (3d) 551. Both cases were appealed jointly at the Supreme Court of Canada, which ruled, in 1974, that the Bill of Rights protected equality of treatment in the enforcement and application of the laws of Canada, and that no such inequality was at play. Supreme Court of Canada, *Attorney General of Canada v Lavell,* [1974] SCR 1349, at 1372–1373, 38 DLR (3d) 481.

88 Sandra Lovelace Nicholas, a Maliseet Woman from the Tobique First Nation, brought the issue to the UN Human Rights Committee following the Supreme Court's disappointing ruling. Sandra Lovelace Nicholas had lost her status through marriage. When her marriage ended, she returned to the reserve, but since she was no longer registered, the band council refused to give her a subsidized house on their land and denied her access to healthcare and education for her children. Before the Human Rights Committee, she alleged that Canada was contravening its obligations pursuant to the International Covenant on Civil and Political Rights, 1966 (accession by Canada, 19 May 1976). The Committee concluded that by denying Lovelace the right to reside on her reserve, the Indian Act interfered with her right to access her culture and language, which constituted an unjustified interference with Art 27 of the Covenant. HRCttee, **Sandra Lovelace v Canada, Comm no R.6/24, 29 December 1977, UN doc supp no 40 (A/36/40) at 166 (1981).**

89 An Act to Amend the Indian Act, SC 1985, c 27.

90 The 1985 Indian Act rules governing 'Indian Status' introduced a new policy, by virtue of which after two consecutive generations of one 'non-Indian' parent, the third generation is no longer entitled to registration. This is the result of the introduction of two distinct subsections, namely 6(1) and 6(2), which operate as follows: those with two 'Indian' parents are registered under §6(1), while those with only one parent registered under §6(1) will be registered under §6(2). Consequently, those registered under §6(2) cannot transmit status to their children if the other parent is not entitled to registration. As a result, after two generations, the subsequent generations are no longer entitled to registration. See Assembly of First Nations, *Second-Generation Cut-Off Rule*, https://www.afn.ca/wp-content/uploads/2020/01/06-19-02-06-AFN-Fact-Sheet-Second-Generation-cut-off-final-revised.pdf (last accessed 2 March 2023). See also G. Hartley, 'The Search for Consensus: A Legislative History of Bill C-31, 969-1985', in *Aboriginal Policy Research, Volume 5: Moving Forward, Making a Difference,* Thompson Educational Publishing, 2013, pp 21–22. It is interesting to note here that the distinction made within the Act between those born from two status parents and those born with only one, namely subsection 6(1) and 6(2), resulted in a 'Indian Status' policy whose operation is clearly contradictory to the findings of the Human Rights Committee in *Lovelace*. See A. M. Robinson, 'Boomerang or Backfire? Have We Been Telling the Wrong Story about Lovelace v. Canada and the Effectiveness of the ICCPR?', 14 *Canadian Foreign Policy* 1 (2007) 43. The 'second-generation cut-off rule' also raises important issues as it pertains to the fact that under the 1985 Indian Act, children born to an unknown or undeclared father are considered to have only one 'Indian' parent, such that they will only be entitled to status if their mother is registered under §6(1). Otherwise, the child will not be considered an 'Indian' under Canadian law. This policy is particularly problematic in the context of domestic and/or sexualized violence. See notably, Eberts, 'Victoria's Secret', supra fn 12, pp 156–157; S. Clatworthy, 'Unstated Paternity: Estimates and Contributing Factors', *Aboriginal Policy Research, Volume 2: Setting the Agenda for Change,* Thomson Educational Publishing, 2013, p 225.

91 M. Cannon, 'Revisiting Histories of Legal Assimilation, Racialized Injustice and the Future of Indian Status in Canada', in *Aboriginal Policy Research Series, Volume 5*, supra fn 90, p 41.

92 In its fourth periodic report on Canada, the UN Human Rights Committee wrote: 'The Committee is concerned about ongoing discrimination against [Indigenous] women. Following the adoption of the Committee's views in the Lovelace case in July 1981, amendments were introduced to the Indian Act in 1985. Although the Indian status of women who had lost status because of marriage was reinstituted, this amendment affects only the woman and her children, not subsequent generations, which may still be denied membership in the community. The Committee recommends that these issues by addressed by the State party'. Concluding Observations of the Human Rights Committee: Canada, 7 April 1999, UN doc CCPR/C/79/Add105, §19.

93 Eberts, 'Victoria's Secret', supra fn 12, p 156.

94 In 2007, lawyer and activist Dr Sharon McIvor of the Nlaka'pamuk Nation and her son, Jacob Grismer, challenged the Act alleging that reinstated women could not pass on entitlement to status to their grandchildren to the same extent as men in the same position. McIvor had lost status through marriage prior to 1985 and was reinstated following Bill C-31. Her son, born prior to 1985, was thus registered under §6(2), such that his children, with a non-status woman, were not entitled to registration.

Canadian Charter in 2009,[95] the state's response failed to adequately remove the inequities built into the law. Rather, the 2010 Gender Equity in Indian Registration Act (Bill C-3) [96] was purposely tailored to narrowly focus on remedying the Court's specific finding of discrimination, without seeking to address comprehensively all the remaining gender-based inequalities, although it was clear and obvious that the Act was still contrary to the Charter.[97] It did not take long before the issue was back in court and once again found in violation of Canada's constitution.[98] Bill S-3 was finally adopted in 2017.[99] Yet, it took almost another two years before it was fully implemented.[100] In December 2020, the government submitted its final report to parliament, stating that 'the provisions in section 6 of the Indian Act no longer privilege one sex or gender over another'.[101] This finding came almost 40 years after the Act was found to be discriminatory by the UN Human Rights Committee. The salience of the onslaught against Indigenous women to the settler colonial project explains why Canada fought for decades to maintain its discriminatory regime, despite repeated criticisms, both nationally and internationally.

C. ONGOING COLONIALISM: FROM LEGISLATED DISCRIMINATION TO SYSTEMIC VIOLATIONS

The Indian Act has been a prime tool of settler colonialism in Canada. Since confederation, racism and sexism have worked hand in hand to achieve the state's assimilationist goals. As demonstrated above, this intersectional discrimination

95 British Columbia Court of Appeal, *McIvor v Canada (Registrar of Indian and Northern Affairs),* 2009 BCCA 153, 306 DLR (4th) 193.

96 An Act to Promote Gender Equity in Indian Registration by Responding to the Court of Appeal for British Columbia Decision in McIvor v Canada (Registrar of Indian and Northern Affairs), SC 2010, c 18.

97 Eberts, 'Victoria's Secret', supra fn 12, p 157. See also G. Brodsky 'McIvor v. Canada: Legislated Patriarchy Meets Aboriginal Women's Equality Rights, in J. Green (ed), *Indivisible: Indigenous Human Rights*, Fernwood Publishing, 2014; M. Eberts, 'McIvor: Justice Delayed – Again', 8 *Indigenous Law Journal* (2010) 41.

98 Superior Court of Quebec, *Descheneaux v Canada (Attorney General),* 2015 QCCS 3555, [2016] 2 CNLR 175.

99 An Act to Amend the Indian Act in Response to the Superior Court of Quebec Decision in Descheneaux c. Canada (Procureur général), SC 2017, c 25.

100 The implementation of Bill S-3 occurred in two phases. First, some amendments to the Indian Act came into force immediately after the adoption of the Bill. These amendments essentially corrected the inequities found by the Quebec Superior Court in the two scenarios at the heart of the *Descheneaux* case. Then, between 2018 and 2019, the Government undertook what it called the Collaborative Process on Indian Registration, Band Membership and First Nation Citizenship in order to 'consult' with First Nations on remaining issues. In June 2019, in its report to parliament, the government indicated that the consultation had shown general agreement for the removal of the '1951 cut-off'. Consequently, on 15 August 2019, Bill S-3 was fully brought into force with the removal of the '1951 cut-off' and the repealing of all the 6(1)(c) subsections to replace them with new 6(1)(a) provisions. The second-generation cut-off rule was kept, however. Moreover, to this day, the situation of women who were enfranchised pursuant to their husband's enfranchisement has not been corrected (they are still registered under §6(1)(d), meaning that they cannot transmit full (6(1)) status to their children, unlike the women who 'married out' prior to 1985.

101 Indigenous Services Canada, The Final Report to Parliamenton the Review of S-3, December 2020, 'Objective 1: Reviewing the Elimination of Sex-Based Inequities'.

was not simply an expression of the patriarchal values that dominated back then, but also an intentional tool of the settler colonial project, purposefully targeted at Indigenous women. Consequently, to understand the particular vulnerability of Indigenous women to human rights violations today, it is essential to conduct the analysis through the prism of their position at the confluence of both mechanisms of oppression, namely race and gender, as they operated in the framework of settler colonialism. [102]

The effects of this discrimination are still deeply felt today by all Indigenous women, regardless of whether they 'married out' or not. As explained by Sámi scholar Rauna Kuokkanen, 'the history of colonization of indigenous peoples continues to manifest itself in structural factors such as poverty, lack of access to lands and resources or limited access to education and health services, and indigenous women often bear the excessive brunt of these factors'.[103] Settler colonialism has sought from the start to undermine Indigenous women's existence and reproductive capacities in order to advance the goal of the 'elimination of the Native'.[104] Consequently, 150 years of legislated discrimination against Indigenous women has left deep wounds, as a result of a history of persistent economic marginalization, social isolation and overall devaluing of the lives and roles of Indigenous women within their communities. As a result, Indigenous women's right to life and security, and their sexual and reproductive rights are still being compromised today at epidemic levels, despite the entrenchment of human rights protection internationally and within Canadian law.

1. THE RIGHT TO LIFE AND SECURITY

Statistics regarding violence against Indigenous women in Canada are troubling. Following his visit in 2013, the then UN Special Rapporteur on the rights of Indigenous peoples, James Anaya, noted that in Canada '[Indigenous] women are eight times more likely to be murdered than non-indigenous women'.[105] The following year, the Royal Canadian Mounted Police (RCMP) published compiled statistics from all federal, provincial and municipal polices forces, which showed that nearly 1,200 Indigenous women had been murdered or had gone missing over a three-decade period. This means that, although they make up only 4 percent of the country's female population, Indigenous women represent around 16 percent of all femicides and 12 percent of the missing women in Canada according to the RCMP data.[106] Civil

102 Kuokkanen 'Globalization as Racialized, Sexualized Violence', supra fn 49, 218; C.f. K. Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color', in K. Crehsnahw (ed), *Critical Race Theory: The Key Writings That Formed the Movement*, New Press, 1996.

103 Kuokkanen, 'Gendered Violence and Politics', supra fn 83, p 272.

104 Wolfe, 'Settler Colonialism and the Elimination of the Native', supra fn 13.

105 J. Anaya, 'Statement Upon Conclusion of the Visit to Canada by the United Nations Special Rapporteur on the Rights of Indigenous Peoples', 15 October 2013, UN Office of the High Commissioner for Human Rights https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13868&LangID=E (last accessed 2 March 2023).

106 Royal Canadian Mounted Police (RCMP), *Missing and Murdered Aboriginal Women: A National Operational Overview*, 2014, https://www.rcmp-grc.gc.ca/en/missing-and-murdered-aboriginal-women-national-operational-overview (last accessed 2 March 2023).

society organizations have warned, however, that these numbers are probably much lower than reality, given notably the lack of trust within Indigenous communities towards law enforcement and inadequate data collection by the authorities. That being said, one fact remains evident: there is an over-representation of Indigenous women amongst the victims of murder and disappearances in Canada.

In addition to the disproportionate levels of violence, numerous reports and studies have shown that police have systematically failed to provide Indigenous women with adequate levels of protection.[107] In 2012, a provincial commission mandated to inquire into the high rates of women reported missing from the Vancouver Downtown Eastside area – amongst whom Indigenous women were disproportionately represented – found that police failures in the initiation and conduct of the missing and murdered women investigations, characterized by systemic inadequacies and repeated patterns of error, had detrimental impacts on the outcomes of these investigations. After analysing the police investigations into cases of missing women, Commissioner Oppal found the following systemic failures: poor report taking and follow ups; faulty risk analysis and risk assessments; an inadequate proactive strategy to prevent further harm; failure to follow established practices and policies for case management, to consider and properly pursue all investigative strategies, to address cross-jurisdictional issues and ineffective coordination between police forces; and inadequate internal review and external accountability mechanisms.[108]

All of these patterns of investigative errors point to the state's failure to fulfill its obligation to act with due diligence, a duty that comprises the obligations to prevent, investigate, punish and make reparations for human rights violations.[109] The Inter-American Commission on Human Rights (IACHR) has notably insisted on the strong link between discrimination, violence and state failure to act with due diligence and has urged Canada to implement all necessary measures to ensure appropriate responses to reports of missing Indigenous women.[110] It has also highlighted how the longstanding stereotyping of Indigenous women has caused and exacerbated their vulnerability to multiple forms of violence while undermining the state's response.[111]

107 See notably, Amnesty International, *Canada: Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada*, 2004, https://www.amnesty.org/en/documents/amr20/003/2004/en/ (last accessed 2 March 2023); Human Rights Watch (HRW), *Those Who Take Us Away: Abusive Policing and Failures in Protection of Indigenous Women and Girls in Northern British Columbia, Canada*, 2013, https://www.hrw.org/report/2013/02/13/those-who-take-us-away/abusive-policing-and-failures-protection-indigenous-women (last accessed 2 March 2023); Inter-American Commission on Human Rights (IACHR), *Missing and Murdered Indigenous Women in British Columbia, Canada,* 2014, https://www.oas.org/en/iachr/reports/pdfs/indigenous-women-bc-canada-en.pdf (last accessed 2 March 2023).

108 The Honorable Wally T. Oppal, QC Commissioner, *Forsaken: The Report of the Missing Women Commission of Inquiry. Volume IIB, Nobodies: How and Why We Failed the Missing and Murdered Women*, https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/inquiries/forsaken-vol_2b.pdf (last accessed 2 March 2023).

109 IACHR, *Missing and Murdered Indigenous Women in British Columbia*, supra fn 107, §153.

110 Ibid, §§95–101.

111 Ibid.

Furthermore, Commissioner Oppal found that the inadequate protection of women from violence and ineffective investigation into these crimes is a product of institutional failures to remedy historic racist and sexist practices and policies, which is manifested in systemic discrimination against Indigenous women.[112] Similarly, the IACHR concluded that the root causes of the high levels of violence against Indigenous women in Canada can be traced back to 'a history of discrimination beginning with colonization and continuing through laws and policies such as the Indian Act and residential schools' which have 'laid the foundations of pervasive violence against Indigenous women, and have created circumstances that contribute to the risks these women face, through economic poverty, social dislocation, and psychological trauma'.[113] In other words, not only do Indigenous women experience higher levels of all forms of violence – both in terms of incidence and severity – because they live in 'a society that poses a risk to their safety',[114] but this vulnerability to violence is coupled with and heightened by the state's repeated failure to fulfil its duty of due diligence.[115]

In September 2016, after over a decade of grassroots mobilization and increasing attention from international organizations,[116] Canada finally launched a National Inquiry into Missing and Murdered Indigenous Women and Girls. The inquiry

112 Oppal, *Forsaken*, supra fn 108, pp 218–219.

113 IACHR, *Missing and Murdered Indigenous Women in British Columbia*, supra fn 107, §93.

114 The Honorable Wally T. Oppal, QC Commissioner, *Forsaken: The Report of the Missing Women Commission of Inquiry. Executive Summary*, 2012, p 7, https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/inquiries/forsaken-es.pdf (last accessed 2 March 2023).

115 Amnesty International, *Canada: Stolen Sisters*, supra fn 107, pp 5–6.

116 In 2004, Amnesty International Canada published *Stolen Sisters* (ibid), the first report documenting and scrutinizing violence against Indigenous women in Canada. While attention had previously been drawn to individual cases of the murder and disappearance of Indigenous women, this report ignited nationwide mobilization to demand government actions to address the issue. Notably, the Native Women's Association of Canada (NWAC) launched the Sisters in Spirit initiative in the following year to research the root causes and trends of missing and murdered Indigenous women and girls in Canada. In 2010, NWAC published a first report which identified 582 cases of the disappearance or death of Indigenous women and girls across Canada between the 1960s and 2010. NWAC, *What Their Stories Tell Us: Research Findings from the Sisters in Spirit Initiative,* 2010, https://nwac.ca/assets-knowledge-centre/2010_What_Their_Stories_Tell_Us_Research_Findings_SIS_Initiative-1.pdf (last accessed 5 March 2023). Jointly with Amnesty International Canada and KAIROS Canada, NWAC held the first Sisters in Spirit Vigil on 4 October 2006. Such vigils are now held annually across Canada on that date. Other grassroots initiatives like Walking With Our Sisters were born over the years to commemorate and honour the lives of the missing and murdered. Walking With Our Sisters, 'The Project', http://walkingwithoursisters.ca (last accessed 5 March 2023). The issue eventually attracted the attention of international bodies such as the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) and the IACHR, which urged Canada to take immediate action to investigate thoroughly the high levels of violence against Indigenous women and to address the causes of the state's failure to effectively protect them from such violence: CEDAW Committee, Report of the Inquiry Concerning Canada of the Committee on the Elimination of Discrimination Against Women Under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, 2015, UN doc CEDAW/C/OP.8/CAN/1, 30 March 2015; IACHR, *Missing and Murdered Indigenous Women in British Columbia*, supra fn 107. In recent years, the CEDAW Committee has notably been actively following the situation of discrimination and violence against Indigenous women in Canada and the implementation of its own inquiry. CEDAW Committee, Concluding Observations on the Combined Eighth and Ninth Periodic Reports of Canada, UN doc CEDAW/C/CAN/CO/8-9, 25 November 2016; CEDAW Committee, List of Issues and Questions Prior to the Submission of the Tenth Periodic Report of Canada, UN Doc CEDAW/C/CAN/QPR/10, 18 November 2019.

was mandated to 'look into and report on the systemic causes of all forms of violence against Indigenous women and girls, including sexual violence'.[117] To complete its mandate, the commissioners held 24 hearings and statement-gathering events across Canada in 2017 and 2018. In total, 2,386 survivors, family members and loved ones, frontline service providers, representatives of Indigenous organizations, scholars, legal experts and Indigenous leaders were heard.[118] The final report, released on 3 June 2019, presents in great detail the underlying social, economic, cultural, institutional and historical causes that contribute to the ongoing violence and particular vulnerabilities of Indigenous women in Canada. Moreover, the commissioners delivered 231 recommendations, entitled 'Calls for Justice', directed at the federal, provincial and territorial governments, public institutions, social-service providers, industries and the general public.[119]

While the issue had already been documented widely,[120] the Inquiry's main conclusions on its root causes were non-equivocal:

> The significant, persistent, and deliberate pattern of systemic racial and gendered human rights and Indigenous rights violations and abuses – perpetuated historically and maintained today by the Canadian state, designed to displace Indigenous Peoples from their land, social structures, and governance and to eradicate their existence as Nations, communities, families and individuals – is the cause of the disappearances, murders, and violence against Indigenous women, girls and 2SLGBTQQIA[121] people, and is genocide. This colonialism, discrimination, and genocide explains [*sic*] the high rates of violence against Indigenous women, girls, and 2SLGBTQQIA people.[122]

According to the commissioners, the root cause of the violence perpetrated against Indigenous women is nothing less than genocide, 'not only because of the genocidal acts that were and still are perpetrated against them, but also because of all the societal vulnerabilities it fosters, which leads to deaths and disappearances and

117 National Inquiry into Missing and Murdered Indigenous Women and Girls (National Inquiry), 'Our Mandate, Our Vision, Our Mission', https://www.mmiwg-ffada.ca/mandate/ (last accessed 5 March 2023).

118 Ibid.

119 National Inquiry, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, https://www.mmiwg-ffada.ca/final-report/ (last accessed 5 March 2023).

120 See notably, Amnesty International, *Canada: Stolen Sisters*, supra fn 107; NWAC, *What Their Stories Tell Us*, supra fn 116; HRW, *Those Who Take Us Away*, supra fn 107; IACHR, *Missing and Murdered Indigenous Women in British Columbia*, supra fn 107; RCMP, *Missing and Murdered Aboriginal Women*, supra fn 106; Special Committee on Violence Against Indigenous Women, Invisible Women: A Call to Action, March 2014, https://www.ourcommons.ca/Content/Committee/412/IWFA/Reports/RP6469851/IWFArp01/IWFArp01-e.pdf (last accessed 5 March 2023); CEDAW Committee, Report of the Inquiry Concerning Canada, supra fn 116.

121 This acronym, chosen by the National Inquiry to discuss sexual and gender diversity, stands for 'two-spirit, lesbian, gay, bisexual, transgender, queer, questioning, intersex and asexual'.

122 National Inquiry, *Reclaiming Power and Place*, vol 1b, supra fn 119, p 174.

which permeates all aspects of Canadian society today'.[123] Furthermore, they concluded that Canada is failing to meaningfully implement the many international instruments it has ratified, by providing inadequate protection of Indigenous women's human rights and ineffective remedies for the violations that have been consistently perpetrated against them.[124] These conclusions point to two interrelated phenomena to explain the over-representation and under-protection of Indigenous women as victims of violence in Canada: social and economic marginalization and the persistence of racist and sexist stereotypes. Together, these two phenomena have created fertile ground for violence against Indigenous women.

One the one hand, Indigenous women are disproportionately exposed to diverse forms of physical, psychological and sexual violence because they face multiple forms of discrimination which pose significant obstacles to their capacity to exercise their rights to participate fully in society – both settler and Indigenous – and in turn have little access to socio-economic, cultural and political opportunities and decision making.[125] In the words of the National Inquiry, 'social and economic marginalization ensures that the structures of the past are carried forward into contemporary systems of oppression'.[126] Colonialism, as it permeates governments, institutions, systems and policies, has caused and maintained poor conditions of life for Indigenous peoples, in particular Indigenous women who experience some of the highest rates of poverty, homelessness, food insecurity, unemployment and barriers to education.[127] 'As the poorest and most disenfranchised segment of society, Indigenous women are at the receiving end of not only physical and sexual violence, but also structural, political and economic violence all of which reinforce and reproduce one another.'[128]

On the other hand, the persistent stereotyping of Indigenous women as sexually 'available' contributes to the assumption on the part of the perpetrators of violence that their actions are justifiable or condoned by society.[129] Meanwhile, these stereotypes are also relied upon by law enforcement to justify insufficient, sloppy or late investigation following reports of violence against Indigenous women. Tellingly, in 1991, the Manitoba Inquiry into the brutal murder of Helen Betty Osborne, a 19-year-old Cree student, concluded that racial biases on the part of the police force delayed and undermined the quality of the investigation, while the

123 National Inquiry, *A Legal Analysis of Genocide: Supplementary Report*, p 8, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Supplementary-Report_Genocide.pdf (last accessed 5 March 2023).

124 National Inquiry, *Reclaiming Power and Place*, vol 1b, supra fn 119, p 174.

125 Secretariat of the United Nations Permanent Forum on Indigenous Issues, International Expert Group Meeting on Combating Violence Against Indigenous Women and Girls: Article 22 of the United Nations Declaration on the Rights of Indigenous Peoples, 18–20 January 2012, UN doc PFII/2012/EGM.

126 National Inquiry, *Reclaiming Power and Place*, vol 1a, supra fn 119, p 324.

127 National Inquiry, *Reclaiming Power and Place: Executive Summary of the Final Report*, p 22, https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Executive_Summary.pdf (last accessed 5 March 2023).

128 Kuokkanen, 'Globalization as Racialized, Sexualized Violence', supra fn 49, 220.

129 Amnesty International, *Canada: Stolen Sisters*, supra fn 107, p 17.

perpetrators' own stereotyped view led them to believe that as a young Indigenous woman, the victim had no human value beyond sexual gratification.[130]

As discussed previously, the imposition of a gender hierarchy was instrumental to achieving the desired disappearance of Indigenous peoples as distinct political entities and their assimilation into the dominant Euro-Christian society. Likewise, attacking the social status of Indigenous women by relying on dehumanizing stereotypes served to justify their disenfranchisement. 'The constricting Victorian family model in the *Indian Act*, justified by the image of Indigenous women as needing control, has fractured families and impoverished and oppressed women for over a century, creating conditions of acute vulnerability.'[131] Hence, the legislated discrimination Indigenous women suffered for almost a century and a half fostered conditions of poverty and lack of economic and social security, by expelling women from their communities and undermining their relations. As explained by Indigenous feminist scholar Joyce Green, '[d]enied band membership, meaningful exercise of Aboriginal and treaty rights and perhaps most importantly, denied the right to practise identity by living and raising children in their own communities, the affected women and their children are exiled to the dominant society where, thanks to racism, they are seen forever as "Indian"'.[132]

It is important, however, to insist on the fact that the impact of the legislated discrimination affects all Indigenous women today. The operation of the settler colonialism is premised on the aim of making Indigenous peoples vanish. The simultaneous racialization of Indigenous peoples and devaluing of women, enshrined in the Indian Act, are core to that goal. It was and still is the very existence of Indigenous women that is at stake. Thus, this translates today into an endemic threat to Indigenous women's safety, resulting from the state's systemic failure to uphold their rights to life and security. To paraphrase the National Inquiry, colonial violence has been so deeply embedded in everyday life and enabled by colonial structures and policies for so long that it can be said to amount to genocide, with Indigenous women as its prime victims.[133]

2. SEXUAL AND REPRODUCTIVE RIGHTS

In July 2017, the Saskatchewan Health Authority published a report documenting the experiences of 16 Indigenous women who reported being coerced into having a tubal ligation during or immediately after childbirth in the province's hospitals

130 Aboriginal Justice Inquiry of Manitoba, 'Racism', *The Death of Helen Betty Osborne*, 1991, http://www.ajic.mb.ca/volumeII/chapter9.html (last accessed 5 March 2023). See also S. H. Razack, 'Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George', in S. H. Razack (ed), *Race, Space and the Law: Unmapping a White Settler Society*, Between the Lines, 2002.

131 Eberts, 'Victoria's Secret', supra fn 12, p 158.

132 J. Greene, 'Canaries in the Mines of Citizenship: Indian Women in Canada', 34 *Canadian Journal of Political Science* 4 (2001).

133 National Inquiry, *A Legal Analysis of Genocide*, supra fn 123.

over a five-year period (2005–2010).[134] The women interviewed expressed 'feeling invisible, profiled and powerless'.[135] Their accounts reveal abuses of power by health professionals who used different means to pressure them to be sterilized while in labour, without providing enough information about alternative forms of birth control or about the procedure itself, often misrepresenting its permanency. Overall, the interviews show that tubal ligations were carried out without the women's knowledge or real understanding of what was happening, or even after an express refusal that was ignored.[136]

According to the drafters of the report, today's reproductive rights violations are to be understood in the context of the long-lasting negative effects on Indigenous women's physical, mental and social health of the institutions, laws, legislations and policies shaped by patriarchal values.[137] They are a product of the socio-economic marginalization of Indigenous women resulting from the gendered consequences and ongoing legacies of colonialism. The cumulative impacts of racism, poverty, lower educational attainment, higher unemployment, poorer physical and mental health and lack of housing put Indigenous women in situations of vulnerability in all spheres of their life, including when accessing healthcare. In sum, 'the issues are compounded by the negative effects of racism and systemic discrimination that is grounded in false notions that somehow they are in some way responsible for their own plight'.[138]

While the report documents 16 individual cases, it is unknown how many Indigenous women have been subjected to forced sterilization in Canada in recent years. What is known however is that, historically, Indigenous women were disproportionately represented amongst the victims of Canada's sterilization policies, motivated by eugenics and aimed at those deemed 'mentally unfit'.[139] Research has revealed notably that approximately 1,150 Indigenous women were sterilized in federally operated 'Indian hospitals' during a 10-year period ending in the early 1970s. Archives related to these cases reveal racist and paternalist attitudes, which led to the view that sterilization was in the women's best interests, regardless of their wishes.[140] In the words of the National Inquiry, 'sterilization was viewed as a way to eventually eliminate the Indigenous population entirely'.[141] Justified by the racist and sexist view of Indigenous women as promiscuous and uncivilized intentionally fomented

134 Dr Y. Boyer and Dr J. Bartlett, *External Review: Tubal Ligation in the Saskatoon Health Region: The Lived Experience of Aboriginal Women,* Saskatchewan Regional Health Authority, 2017, https://www.saskatoonhealthregion.ca/DocumentsInternal/Tubal_Ligation_intheSaskatoonHealthRegion_the_Lived_Experience_of_Aboriginal_Women_BoyerandBartlett_July_22_2017.pdf (last accessed 5 March 2023).

135 Ibid, p 17.

136 Ibid, pp 17–23.

137 Ibid, p 6.

138 Ibid, p 8.

139 Ibid, pp 7–8.

140 Standing Senate Committee on Human Rights, *Forced and Coerced Sterilization of Persons in Canada*, June 2021, p 18.

141 National Inquiry, *Reclaiming Power and Place*, vol 1a, supra fn 119, p 266.

by the settler colonialism, the legacy of eugenics continues to have long-lasting and ongoing consequences for Indigenous women's reproductive rights.

While the legislative framework is different today and forced sterilization laws were repealed in the 1970s, the practice still exists, as evidence by an external review commissioned by the Saskatchewan regional health authority, and the reported cases are not isolated. In October 2017, two Indigenous women who alleged being sterilized without consent launched a class action. Quickly, more than 100 Indigenous women from 7 different provinces and territories contacted the lawyer leading the case, claiming to have been sterilized without free, prior and informed consent, often in very troubling circumstances of coercion.[142] Research still needs to be conducted in order to gain a full understanding of the magnitude of the issue. However, what is clear is that forced or coerced sterilization blatantly violates Indigenous women's human rights.[143]

Notably, in its 2018 Concluding Observations on the Seventh Periodic Report of Canada, the UN Committee against Torture expressed concerns about the reports of extensive forced or coerced sterilization of Indigenous women in Canada and the lack of information provided by the state about actions taken to address the issue. The Committee insisted that the state must protect Indigenous women from such mistreatment, by ensuring impartial investigation, accountability and redress, as well as by adopting all necessary measures to prevent and criminalize such practice.[144] As in the case of missing and murdered Indigenous women, Canada is failing to fulfil its due diligence obligation by inadequately protecting Indigenous women's sexual and reproductive rights. Moreover, in the words of the National Inquiry, 'forced sterilization of women represents directed state violence against Indigenous women, and contributes to the dehumanization and objectification of Indigenous women'.[145]

Another troublesome practice affecting disproportionately Indigenous women in Canada is what is known as 'birth alerts', whereby social workers flag an expectant parent to hospital staff without their consent, based on the belief that the parent may put their newborn at risk. The hospital then notifies the social worker of the birth, which might result in the apprehension of the child, sometimes only minutes after delivery. The expectant parents are often not informed such an alert has been triggered by social workers.[146] This practice violates the parents' right to privacy, as personal information is shared by social workers with hospital staff without consent.

Statistics show that 'birth alerts' disproportionately impact Indigenous parents. For example, in British Columbia, it has been estimated that 58 percent of those impacted by the practice were Indigenous, although they only constitute only about 6 percent of the province's population.[147] Unlike forced or coerced sterilization, which were outlawed in Canada in the 1970s, but continue to be practised, 'birth alerts' are still lawful in some Canadian provinces, while other provinces have officially banned them in the last few years, at least on paper.[148]

Nonetheless, the practice has been repeatedly denounced as a violation of the human rights of Indigenous parents. Notably, the National Inquiry wrote in its final report, 'birth alerts are racist and discriminatory and are a gross violation of the rights of the child, mothers, and the community'[149] and urged all governments to immediately end the practice.[150] Moreover, it highlighted the fact that 'birth alerts' constitute a contributing factor to the gross over-representation of Indigenous children apprehended by child welfare in Canada.[151] Insisting on the interconnectedness between this practice and child welfare, the commissioners heard testimonies of 'birth alerts' being issued based on the sole fact that the mother herself had been apprehended by child welfare in the past, without taking into consideration the time lapsed or her actual preparedness for parenting.[152]

Both forced sterilization and 'birth alerts' are premised on the longstanding racist and sexist assumptions that Indigenous women are promiscuous, unfit parents and in need of control. The legislated discrimination in the Indian Act played a crucial role in constructing Indigenous women as lascivious, shameless and unmaternal. While the Act imposed a Victorian family model, one key distinction cannot be ignored. Within settler society, the mother had no legal authority, but had the responsibility for rearing children. Under the Indian Act, however, Indigenous children were not to be raised by their parents at all, but rather in residential 'schools'[153] designed to indoctrinate them into the values and ways of the settler

142 Standing Senate Committee on Human Rights, *Forced and Coerced Sterilization of Persons in Canada*, supra fn 139, pp 19–20.

143 'Human rights bodies have affirmed that the failure to provide reproductive health information and to ensure full, free and informed consent for sterilization procedures for women belonging to ethnic minorities [and Indigenous women] is a violation of basic human rights, including the right to information, women's right to determine the number and spacing of their children, the right to be free from inhumane and degrading treatment, and the right to private life. They have also found that it is a manifestation of multiple discrimination on the grounds of gender and race'. World Health Organization, *Eliminating Forced, Coercive and Otherwise Involuntary Sterilization: An Interagency Statement, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO* 2014, p 5.

144 UN Committee against Torture, Concluding Observations on the Seventh Periodic Report of Canada, UN doc CAT/C/CAN/CO/7, 21 December 2018.

145 National Inquiry, *Reclaiming Power and Place*, vol 1a, supra fn 119, p 267.

146 Ibid, pp 364–368.

147 B. Morgan, 'Potential for Class Actions as a Result of "Illegal and Unconstitutional" Birth Alerts Say B.C. Lawyers', *IndigiNews*, 14 January 2021, https://indiginews.com/vancouver-island/birth-alert-class-action.

148 T. Vikander and B. Marelj, 'Several Canadian Provinces Still Issue Birth Alerts, Deemed "Unconstitutional and Illegal" in B.C.', *Aboriginal Peoples Television Network*, 15 January 2021, https://www.aptnnews.ca/national-news/provinces-continue-birth-alerts/.

149 National Inquiry, *Reclaiming Power and Place*, vol 1a, supra fn 119, p 355.

150 National Inquiry, *Reclaiming Power and Place*, vol 1b, supra fn 119, p 195 (Call for Justice 12.8).

151 Ibid, p 364. For discussions on the causes and consequences of the over-representation of Indigenous children in child welfare in Canada, see notably C. Blackstock, N. Trocmé and M. Bennett, 'Child Maltreatment Investigations Among Aboriginal and Non-Aboriginal Families in Canada', 10 *Violence Against Women* 8 (2004).

152 National Inquiry, *Reclaiming Power and Place*, vol 1b, supra fn 119, pp 365–366.

153 See supra fn 59.

society.[154] Meanwhile, the women who 'married out' ceased to be an 'Indian' in the eyes of the law. Thus, while they were allowed to rear their children, they were not considered 'real Indians' by the state. In that way, settler colonialism has consistently worked to delegitimize Indigenous motherhood, as Indigenous women's capacity to rear the next generations of Indigenous peoples poses a direct threat to the settler colonial project. Hence, 'attacks on Indigenous motherhood functioned as a form of gendered violence in service of settler colonialism'.[155]

Moments before her death, Joyce Echaquan was told by the health workers that she was stupid, that she made bad decisions and that her children would be ashamed if they saw her.[156] The racist insults she endured while in care were deeply gendered and directly attacked her as a mother. As the report on forced sterilization documents, her experience is not exceptional. Indigenous women are routinely asked by health professionals questions such as 'How much have you had to drink?', 'What drugs have you done?' and 'You are a prostitute, are you not?', regardless of the reasons why they are seeking medical care.[157] What is at play is the intersection of racism and gendered discrimination, which translates into a lack of trust in the healthcare system and, ultimately, must be viewed as a determinant of the health of Indigenous women.[158] Sustained by the stereotypes used to validate the imposition of the Victorian model of family, which was premised on the disenfranchisement of Indigenous women, the delegitimization of Indigenous motherhood served in turn to justify the removal of Indigenous children from their families, cultures and nations, either by placing them in non-Indigenous families or by preventing their existence in the first place.[159] Therefore, today's violations of Indigenous women's sexual and reproductive rights must be understood as part of the historical efforts to eradicate Indigenous nations.

D. WITHOUT 'STRUCTURAL JUSTICE', BETTER IMPLEMENTATION WILL NOT SUFFICE

Settler colonialism is a system of exploitation and dispossession that relies on the exclusion and marginalization of Indigenous women as a key strategy to further the goal of the disappearance of Indigenous peoples as distinct political entities.

154 Eberts, 'Victoria's Secret', supra fn 12, p 149–150.

155 Rule, 'Seals, Selfies, and the Settler State', supra fn 66, 750.

156 M.-L. Josselin, 'Les dernières heure de la vie de Joyce Echaquan, selon les témoignages', *Espaces Autochtones*, *Radio Canada*, 3 June 2021, https://ici.radio-canada.ca/espaces-autochtones/1795382/enquete-mort-joyce-echaquan-temoins-hopital-joliette (last accessed 5 March 2023).

157 Y. Boyer and P. Kampouris, Trafficking of Aboriginal Women and Girls, Public Safety Canada, 2014, https://publications.gc.ca/collections/collection_2015/sp-ps/PS18-8-2014-eng.pdf (last accessed 5 March 2023).

158 Boyer and Bartlett, *External Review*, supra fn 134, pp 6–7. For further discussion on how racism impacts the health outcomes of Indigenous peoples, see Allan and Smylie, *First Peoples, Second Class Treatment*, supra fn 4.

159 Ibid.

Settler colonial laws, policies and practices premised on White/Male/Christian/European superiority and driven by the desire to gain uncontested sovereignty over the territory through the erasure of Indigeneity have deeply shaped the formation of the Canadian state and continue to be woven into its fabric today.[160] As the dramatic rupture of decolonization has not yet transformed Canada's settler colonial state, the foundational violence as well as its enduring structures remain.[161] An unbroken thread links the past to the present, such that historical harms have created a legacy of structural injustices that are today profoundly embedded in Canadian institutions, legislations and processes.

Settler colonialism is the root cause of today's epidemic of violations of Indigenous women's human rights. The state's systemic failure to adequately protect Indigenous women from violence, and to effectively prevent and investigate crimes committed against them is a product of its persistent refusal to remedy historical racist and sexist practices and policies. Because discrimination against Indigenous women is tightly entangled in the making of the settler state, to fully grasp this reality and to craft an adequate response, a historical outlook is essential. Systemic racism is the continuation of settler colonialism. In such a context, simply repealing discriminatory laws and correcting legislated inequities cannot and will never suffice to address this crisis.

As stated by Chickasaw scholar Elizabeth Rule, 'this context necessitates a rethinking of violence levelled against Indigenous women throughout Canada and demands a new conceptual framework in which such violence must be understood as both an immediate threat to Indigenous women's lives and a systematic attack on Indigenous nations and cultures'.[162] Colonialism relies on Indigenous dehumanization and oppression.[163] Hence, the task moving forward will necessitate dismantling the laws, policies and practices that justify, uphold and perpetuate the dispossession, subjugation and erasure of Indigenous peoples. Just as settler colonialism is a process of 'structural genocide',[164] addressing systemic racism and discrimination must be one of 'structural justice'.[165]

For Indigenous women, this means the rejection of the patriarchal colonial structures purposefully designed to marginalize them, with the ultimate goal of making Indigeneity and the challenges it poses to settler sovereignty and land appropriation vanish. What is required is a framework of Indigenous rights that 'not

160 P. Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling and Reconciliation in Canada* UBC Press, 2011, p 6.

161 P. Edmonds, *Settler Colonialism and (Re)Conciliation: Frontier Violence, Affective Performances, and Imaginative Refoundings*, Palgrave Macmillan, 2016, pp 1–2.

162 Rule, 'Seals, Selfies, and the Settler State', supra fn 66, 749.

163 J. Green, 'Honoured in Their Absence: Indigenous Human Rights' in Joyce Green (ed), *Indivisible*, supra fn 97, p 13.

164 Wolfe, 'Settler Colonialism and the Elimination of the Native', supra fn 13.

165 J. Balint, J. Evans and N. McMillan 'Rethinking Transitional Justice, Redressing Indigenous Harm: A Conceptual Approach',8 *International Journal of Transitional Justice* 2 (2014).

only simultaneously advances individual and collective rights, but also explicitly addresses gender-specific human rights violations of indigenous women in a way that does not disregard the continued practices and effects of colonialism.'[166] This is the 'absolute paradigm shift' that the National Inquiry called for.[167]

Under international human rights standards, Canada has obligations to fulfil, starting with one that it has repeatedly ignored: its duty to provide reparations for past and ongoing human rights violations. This is where international human rights monitoring bodies can play a key role. Notably, while Canada has maintained since 2020 that gender-based discrimination has been fully removed from the Indian Act regime, the UN Committee on the Elimination of Discrimination against Women concluded, once more, in 2022, that the state has yet to fully remedy the intergenerational harm caused by the discriminatory legislative scheme it maintained for over 150 years.[168] As such, in a context where discrimination against Indigenous women is so deeply entangled within the state's architecture, external oversight is necessary in order to assess Canada's actions in light of international standards and to hold the state accountable for the current failings of its legal and political system.

As Canada moves forward with implementing the UN Declaration on the Rights of Indigenous Peoples,[169] oversight by international human rights monitoring bodies will prove crucial to hold the state accountable for the institutions, policies and practices designed to achieve the systematic destruction of Indigenous nations, through the targeting of Indigenous women. As Métis legal scholar Brenda Gunn explains, 'providing greater external oversight is an important tool given the current failings of the Canadian legal system to protect Indigenous women'.[170] Ultimately, the aim is to develop legal cultures and institutions that respect rather than seek to extinguish Indigenous existence. International human rights monitoring bodies can contribute to this task by urging the Canadian state to act immediately and take all the necessary systemic measures to remedy the marginalization of Indigenous women and the delegitimization of Indigenous motherhood, including insisting on adequate, prompt and effective measures of reparations and guarantees of non-repetition specifically designed to tackle systemic racism and discrimination.

166 R. Kuokkanen, 'Self-Determination and Indigenous Women's Rights at the Intersection of International Human Rights', 34 *Human Rights Quarterly* (2012) 232.

167 National Inquiry, *Reclaiming Power and Place*, vol 1b, supra fn 119, p 174.

168 CEDAW Committee, *Jeremy Eugene Matson v Canada*, Comm no 68/2014, 18 October 2013, CEDAW/C/81/D/68/2014, 3 March 2022.

169 UNGA Res 61/295, 13 September 2007.

170 B. Gunn, 'Engaging a Human Rights Based Approach to the Murdered and Missing Indigenous Women and Girls Inquiry', 2 *Lakehead Law Journal* 2 (2017) 102.

7. NON-ISLAMIZED INDIGENOUS PEOPLES' RIGHT TO NON-DISCRIMINATION IN THE BANGSA-MORO AUTONOMOUS REGION IN MUSLIM MINDANAO

Lena Muhs[171]

A. INTRODUCTION

After decades of internal armed conflict and years of negotiations, the peace process between the Philippine Government and the Moro Islamic Liberation Front (MILF) achieved a major milestone in 2019 with the establishment of the Bangsamoro Autonomous Region in Muslim Mindanao (BARMM). While the creation of the autonomous region is intended as a remedy for decades of marginalization and historical injustices committed specifically against the Muslim population of the Philippines, the region is actually home to a multi-ethnic constituency consisting of 13 Islamized ethnolinguistic groups, six non-Islamized or non-Moro Indigenous peoples (NMIP) and several different, predominantly Christian, settler groups. This paper focuses on the right to non-discrimination of non-Islamized Indigenous peoples in this foundational moment of BARMM.

In addition to the prohibition of discrimination in international law, Philippine domestic law provides for the distinct rights of Indigenous peoples in its 1987 Con-

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stitution,[172] the 1997 Indigenous Peoples Rights Act (IPRA)[173] and the 2018 Bangsamoro Organic Law (BOL).[174] Despite the BOL's provision for Indigenous peoples' freedom to retain their distinct identity and prohibition of discrimination on the basis of identity, religion or ethnicity, areas of potential discrimination remain. Historically and throughout the peace processes, the non-Islamized Indigenous population of BARMM has experienced various forms of marginalization including frequent displacement from their ancestral lands, land grabbing committed by a variety of actors including the MILF and exclusion from decision-making processes.[175] With the creation of BARMM, current concerns include the dominance of the Moro majority in decision-making processes and the transitional authority's reluctance to delineate ancestral domains. In particular, the application of IPRA to the non-Islamized Indigenous peoples in the autonomous region has been a contentious issue in the peace negotiations. Indigenous peoples' organizations themselves have been divided on this issue with some lobbying for the full application of IPRA in the Bangsamoro region and others working towards a separate protection regime through BARMM's Ministry of Indigenous Peoples' Affairs (MIPA) and its yet to be established Indigenous Peoples Code.[176]

This paper explores the tensions between international and Philippine domestic legislation for Indigenous peoples' rights and the autonomous region's complex mandate of redressing historical injustices committed against Muslim Filipinos while also ensuring the rights of non-Islamized Indigenous peoples. In the context of decades of direct and structural violence, overlapping historical injustices committed against the different identity groups in BARMM and the complex dynamics between these groups taking on interchanging roles as victims and perpetrators of violence, it analyses the draft Indigenous Peoples Code as a critical opportunity to remedy grievances and create effective mechanisms for Indigenous rights protection. In doing so, it not only considers the existing and proposed legal frameworks for the protection of NMIP, but also the practice of officials and agencies in the newly created BARMM. Given the complex environment described above, it pays particular attention to the recognition of NMIP as a marginalized identity and to competing claims of self-determination.

172 Art II, Sect 22, Art VI, Sect 5(2), Art XII, Sect 5, Art XIII, Sect 6, Art XIV, Sects 2(4), 10, 17, Art XVI, Sect 12, The 1987 Constitution of Republic of the Philippines.

173 An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefor, and for Other Purposes, RA 8371, 1997 (IPRA).

174 Arts I, IV, V, VI, VII, IX, X, XII, XIII, XV, XVI, An Act Providing for the Organic Law for the Bangsamoro Autonomous Region in Muslim Mindanao, Repealing for the Purpose Republic Act No. 6734, Entitled 'An Act Providing for An Organic Act for the Autonomous Region in Muslim Mindanao,' As Amended by Republic Act No. 9054, Entitled 'An Act to Strengthen and Expand the Organic Act for the Autonomous Region in Muslim Mindanao', RA 11054, 2018 (BOL).

175 International Crisis Group, *The Philippines: Indigenous Rights and the MILF Peace Process*, Asia Report no 213, 22 November 2011, https://icg-prod.s3.amazonaws.com/213-the-philippines-Indigenous-rights-and-the-milf-peace-process.pdf (last accessed 1 March 2023); O. Paredes, 'Indigenous v Native: Negotiating the Place of Lumads in a Bangsamoro Homeland, 16 *Asian Ethnicity* 2 (2015).

176 C. O. Arguillas, 'Special Report (1): From RAG to ARMM to BARMM: The IP's Struggle for Ancestral Domain Continues', *MindaNews*, 7 August 2020, https://www.mindanews.com/special-reports/2020/08/special-report-1-from-rag-to-armm-to-barmm-the-ips-struggle-for-ancestral-domains-continues/; C. O. Arguillas, 'Special Report (2). From RAG to ARMM to BARMM: The IP's Struggle for Ancestral Domain Continues', *MindaNews*, 8 August 2020, https://www.mindanews.com/special-reports/2020/08/special-report-2-from-rag-to-armm-to-barmm-the-ips-struggle-for-ancestral-domains-continues/; C. O. Arguillas, 'Special Report (3). From RAG to ARMM to BARMM: The IP's Struggle for Ancestral Domain Continues', *MindaNews*, 9 August 2020, https://www.mindanews.com/special-reports/2020/08/special-report-3-from-rag-to-armm-to-barmm-the-ips-struggle-for-ancestral-domains-continues/.

B. METHODOLOGY

The research arises out of and is embedded in the conflict-transformation work of forumZFD, an international peacebuilding organization based in Mindanao, the Philippines. Focusing on the proposed law for the protection of Indigenous peoples in the Bangsamoro, the paper draws on a comparative analysis of three different draft versions of the law. While no official draft has been published, the three drafts have been made accessible through several Indigenous peoples' advocates. Subject to analysis, therefore, are drafts from 2019, 2020 and 2021. Given the general lack of transparency surrounding the development of the law, there are varying degrees of information available about the documents, which leaves some uncertainty regarding the exact dates and circumstances of their development. Nevertheless, a comparison of the drafts reveals changes made throughout the legislative process. The analysis controlled for alterations in the draft that did not reflect an actual textual evolution but rather resulted from developments in the overall legal framework such as the passing of the BARMM Administrative Code in 2020. It should be noted that further committee deliberations and public consultations are anticipated at the time of writing. Particularly considering that non-Moro Indigenous leaders are expected to use public consultations as their main opportunity to influence the text of the law and that the composition of lawmakers working on the draft law will likely change with new appointments to the Bangsamoro Transition Authority scheduled for July 2022, it is likely that the draft law will undergo further alterations. The analysis at hand is thus limited to the status of deliberations in May 2022.

In order to gain deeper insight into the protection needs and rights claims of NMIP, seven qualitative interviews were conducted with key informants among NMIP advocates and allies. Interviewees were selected through existing networks of forumZFD[177] and its partner organizations and particular attention was paid to the inclusion of different viewpoints and political affiliations. Four out of the seven interviewees self-identify as NMIP. The authors of the law, the two NMIP representatives in the Bangsamoro parliament, were contacted for interviews but did not respond. The qualitative interviews followed a semi-structured format and lasted between 30 and 60 minutes. Due to the geographic distribution of interviewees and COVID-19 related travel restrictions, four out of seven interviews were conducted remotely using digital platforms. The specific platform was chosen on the

177 Forum Ziviler Friedensdienst (forumZFD) is an international peacebuilding organization working on conflict transformation in 12 countries. Since 2007, forumZFD has been conducting projects in the Southern Philippine island of Mindanao with one of its project offices in Cotabato City, Bangsamoro Autonomous Region in Muslim Mindanao (BARMM). For more information on forumZFD see www.forumZFD.de/en (last accessed 15 March 2023).

basis of interviewees' preference and its feasibility, with a preference for secure, encrypted communication tools. Due to a lack of internet access, one interview was conducted via a phone call. Interviews were transcribed, anonymized and analysed for emerging patterns along three broad categories: issues faced by NMIP, protection needs and challenges in the implementation of rights protection programmes. Participation in the interviews was voluntary and not connected to any benefits. However, given the interviewer's affiliation with an international NGO, interviewees may have had expectations that their participation in the interviews would lead to further cooperation and support for their cause. The selection of diverse interviewees as well as the established partnerships with some of the interviewees are mitigating factors in this regard.

In line with the self-ascription of the interviewed NMIP advocates, the paper refers to the six non-Islamized ethnolinguistic groups located within the territory of BARMM as NMIP. It acknowledges, however, that this term is not universally adopted by all members of these communities.

C. VICTIMS OF WAR, VICTIMS OF PEACE: THE SITUATION OF NON-MORO INDIGENOUS PEOPLES

The situation of NMIP is very specific in the Philippine context. The Philippines is home to 40 to 95[178] distinct Indigenous peoples who are distributed throughout the country and comprise up to 22 percent of the population. In the context of the Philippines, Indigenous peoples are defined as those communities that have retained a distinct cultural identity and resisted Spanish and US colonialism by either withdrawing to hinterlands or otherwise maintaining a close tie to their ancestral past.[179] The term 'non-Moro Indigenous peoples' refers to a specific subset of Indigenous peoples that reside in BARMM. It is a collective term adopted by many but not all Indigenous peoples' advocates that contrasts the six distinct non-Islamized Indigenous peoples in BARMM – the Teduray, Lambangian, Dulangan Manobo, Erumanen ne Menuvu, Blaan and Higaonon – with the Moro majority. As such, the term has only developed with the peace process and the subsequent emergence of the autonomous region and is meant to acknowledge the specific needs and issues of non-Islamized Indigenous peoples within BARMM as compared to those outside BARMM.[180]

The word Moro, on the other hand, is a self-ascribed collective identity of 13 Islamized ethnolinguistic groups[181] and was coined by Spanish colonizers. Though originally considered a derogatory term, Muslim Filipinos started claiming it as their collective, political identity within the context of the Moro secessionist struggle. According to Oona Paredes, while qualifying as Indigenous peoples under the definition given above, the Moro made a strategic choice of not claiming that status for themselves as this would imply notions of small-scale tribal minorities. Instead, they self-ascribed as a people on a par with the Philippine people, therefore allowing them to advance their claims to self-determination, including secession.[182] A national minority making up about 5 percent of the predominantly Catholic Philippine population,[183] the Moro are territorially centralized in Central and Western Mindanao as well as the Sulu archipelago. In BARMM, they constitute a definite majority of approximately 90 percent. NMIP, by contrast, only constitute about 2 percent of the Bangsamoro population.[184] Shane Joshua Barter refers to minorities like NMIP, i.e. minorities that are situated within a region dominated by a group that constitutes a national minority itself, as 'second-order minorities'.[185] Apart from their self-ascription as Indigenous peoples, NMIP differ from Moro in that they are more geographically dispersed and the Moro have historically been bigger and more organized.[186]

Both identities – Moro and NMIP – are collective identities subsuming diverse ethnolinguistic groups within them, crossing ethnic and political splits and stressing common denominators such as their particular histories of repression, and Islamization or resistance to Islamization respectively.[187] The distinguishing feature, however, remains an ethnic one as some NMIP are in fact Muslims but are considered NMIP on the grounds of their ethnicity as one of the six non-Islamized Indigenous peoples such as the Teduray.[188]

1. THE BANGSAMORO CONFLICT

The creation of BARMM follows decades of secessionist conflict and is a result of the peace process between the Philippine Government and the MILF. The conflict itself arose out of the marginalization of the 13 ethnolinguistic groups that converted to Islam and resisted Spanish and later US colonization. The secessionist narrative builds on the distinct heritage of these ethnolinguistic groups including the historical establishment of powerful sultanates in Central Mindanao and Sulu. It also builds on the historical grievances experienced during colonial times as well as after Philippine independence such as massive displacements, interethnic

178 The discrepancies are due to different ways of defining Indigenous peoples and drawing boundaries between related groups.

179 J. M. Molintas, 'The Philippine Indigenous Peoples' Struggle for Land and Life: Challenging Legal Texts', 21 *Arizona Journal of International & Comparative Law* 1 (2004).

180 Personal communication, 9 June 2021.

181 The 13 Islamized ethnolinguistic groups making up the 'Moro' are: Maguindanao, Tausug, Iranun, Maranao, Sama, Badjao, Yakan, Kagan/Kalagan, Kalibugan, Jama Mapun, Molbog, Sangil, and Palawanon.

182 Paredes, 'Indigenous v Native', supra fn 5.

183 J. M. Perez, 'The Challenges of Moro and Lumad Power-Sharing in the Bangsamoro', 35 *Conflict Studies Quarterly* (2021).

184 International Crisis Group, *The Philippines*, supra fn 5.

185 S. J. Barter, '"Second-Order" Ethnic Minorities in Asian Secessionist Conflicts: Problems and Prospects', 16 *Asian Ethnicity* 2 (2015).

186 International Crisis Group *The Philippines*, supra fn 5; Paredes, 'Indigenous v Native', supra fn 5.

187 Paredes, 'Indigenous v Native', supra fn 5; Perez, 'The Challenges of Moro and Lumad Power-Sharing in the Bangsamoro', supra fn 13

188 Interviewee 4.

conflict and systematic mass migration of Christian settlers combined with discrimination in the distribution of land rights and concessions.[189] As a result, Muslim Filipinos are now a minority in Mindanao. The experience of marginalization gave rise to the secessionist movement and the mobilization of support through the self-ascribed Moro identity, Bangsamoro or Moro nation and the Moro homeland.[190] The secessionist struggle was initially advanced by the Moro National Liberation Front (MNLF), which was founded in 1972. After years of violent conflict, the 1996 peace agreement finally operationalized the Autonomous Region of Muslim Mindanao (ARMM), thereby formally implementing a prior peace agreement from 1976. Discontented with the concessions made by the MNLF, a breakaway faction, the Moro Islamic Liberation Front (MILF) continued the secessionist conflict. The renewed peace process with the MILF eventually led to the Framework Agreement on the Bangsamoro (FAB), which was signed in 2012. The FAB provided for the extension of autonomy, mandated the Philippine Government to pass an organic law laying out the basic structure of the autonomous government and arranged the creation of a new autonomous region through a two-part plebiscite.[191] After some delays, the Bangsamoro Autonomous Region in Muslim Mindanao (BARMM) officially replaced the now defunct ARMM in 2019.

2 . NON-MORO INDIGENOUS PEOPLES IN THE CONFLICT

While treated as a separate group, the non-Islamized Indigenous peoples share a similar story of marginalization, displacement and loss of control over land to the Moro. Non-Islamized Indigenous peoples have historically been the second biggest group on the island of Mindanao. While not having been explicitly targeted to the same extent as Islamized groups, NMIP also experienced exclusion and displacement, resulting from bureaucratic neglect, land grabbing and legal exclusion, leaving the current non-Islamized Indigenous population in Mindanao at under 10 percent.[192] The relationship between Islamized and non-Islamized Indigenous communities has been diverse, characterized both by harmonious coexistence and intermarriages as well as violence, including histories of NMIP enslavement by the Moro majority remembered by NMIP communities today.[193]

The explicit racialized distinction between the Moro and NMIP as two separate groups is a relic of colonial times when Islamized and non-Islamized Indigenous communities were treated differently by the colonial powers and later the central government.[194] During the Spanish colonial era, Muslim Filipinos were subject to conversion attempts and discrimination while non-Islamized Indigenous communities were largely permitted to retain their distinct identity while also being subjected to conversion to Christianity. The US colonial administration later granted limited authority to Muslim Filipinos, designated Indigenous peoples as wild tribes and established separate offices for the two. This separation was continued after independence in 1946, maintaining separate government entities for the two populations until now: the National Commission for Indigenous Peoples and the National Commission for Muslim Filipinos.[195]

The position of NMIP as a minority compared to the Moro majority and the fact that they are more geographically dispersed and less organized than the Moro has led them to experience an additional form of marginalization – the marginalization from Moro dominance.[196] This is most starkly manifested in the manifold land conflicts between NMIP and the Moro as well as the frequent exclusion of NMIP from decision-making processes. Land conflicts between the Moro and NMIP include overlapping claims to ancestral domains as well as the displacement of Indigenous communities as a result of the establishment of MILF camps within ancestral domains of NMIP.[197] These land conflicts are exacerbated by the lack of mechanisms to deal with them given the non-implementation of Indigenous rights protection laws in ARMM.

The marginalization of NMIP has been reinforced throughout the peace processes. During the initial peace process between the Philippine Government and the MNLF leading to the Tripoli Agreement of 1976, NMIP were not present in negotiations or the agreement itself.[198] The later peace process with the MILF provided for participation of NMIP but this was frequently perceived as mere token participation.[199] The thematic focus of the peace process remained on the relationship between the Philippine Government and the MILF and repeatedly deferred issues of minority protection, conflicting land claims and the overall situation of NMIP.[200] Both the national government and the MILF have made promises that NMIP will benefit from the peace agreement after the region is created.[201] When NMIP groups asserted their issues and positions, some of them were labelled as 'spoilers' of the peace agreement and at times faced the allegation that the Indigenous agenda was an instrument of the national government[202] to undermine the interests of the Moro.[203] Strategies of NMIP to articulate their needs and demands in the context of the

189 Perez, 'The Challenges of Moro and Lumad Power-Sharing in the Bangsamoro', supra fn 13.

190 Ibid.

191 Framework Agreement for the Bangsamoro, 15 October 2012 (FAB).

192 Paredes, 'Indigenous v Native', supra fn 5.

193 International Crisis Group, *The Philippines*, supra fn 5.

194 Paredes, 'Indigenous v Native', supra fn 5.

195 Perez, 'The Challenges of Moro and Lumad Power-Sharing in the Bangsamoro', supra fn 13.

196 Paredes, 'Indigenous v Native', supra fn 5; Perez, 'The Challenges of Moro and Lumad Power-Sharing in the Bangsamoro', supra fn 13.

197 International Crisis Group, *The Philippines*, supra fn 5; Paredes, 'Indigenous v Native', supra fn 5.

198 International Crisis Group, *The Philippines*, supra fn 5.

199 Paredes, 'Indigenous v Native', supra fn 5.

200 International Crisis Group, *The Philippines*, supra fn 5; Paredes, 'Indigenous v Native', supra fn 5.

201 Paredes, 'Indigenous v Native', supra fn 5.

202 According to Barter, '"Second-Order" Ethnic Minorities in Asian Secessionist Conflicts', supra fn 15, this is a common strategy of secessionist movements to write off minority claims as opportunists or militias without independent, legitimate motivation.

203 International Crisis Group, *The Philippines*, supra fn 5.

peace processes have differed between accommodating the Moro call for autonomy in hope of better treatment after the region is created, campaigning for full inclusion in the peace process, invoking historical narratives and pacts[204] of peaceful coexistence and attempting to prevent the inclusion of their territories in BARMM. The different approaches are in part due to the distinct situations of Indigenous peoples. In addition to the structural discrimination they experience, NMIP also continue to be affected by violent conflict and the presence of remaining armed groups, subjecting them to frequent evacuations, killings through stray bullets or aerial bombardment and other forms of violence and harassment. The detrimental effects of the violent conflicts and the considerable exclusion of NMIP and their issues from the peace process have led some NMIP leaders to conclude that NMIP are not only victims of the war, but also victims of the peace in the Bangsamoro.[205]

D. THE LEGISLATIVE FRAMEWORK FOR NMIP RIGHTS PROTECTION

NMIP organizations and advocates predominantly frame their advocacy in terms of Indigenous peoples' rights, the right to self-determination that they share with the Moro people as well as the special protection they are due on the basis of their status as an ethnic minority within BARMM. Similar to Indigenous peoples in other parts of the Philippines, NMIP are subject to both historical and contemporary structural discrimination and marginalization, requiring special legal remedies.

1. NON-DISCRIMINATION, MINORITIES AND INDIGENOUS PEOPLES

The principle of non-discrimination constitutes one of the basic and general principles of international human rights law.[206] It is enshrined in the International Covenant on Civil and Political Rights (ICCPR),[207] the International Covenant on Economic, Social and Cultural Rights (ICESCR)[208] as well as specialized treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) or the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). While the ICCPR and ICESCR do not contain a description of what constitutes discrimination, the ICERD defines racial discrimination as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'.[209] CEDAW contains a similar definition for discrimination on the basis of sex.[210] In its General Comment No. 18, the United Nations Human Rights Committee argues for this shared definition to also be applied to the prohibition of discrimination on other grounds than those specified in the ICERD and CEDAW. It elaborates that not only codified forms of discrimination are relevant to states' compliance with the prohibition of discrimination, but also de facto forms of discrimination that may result from discriminatory practices by officials, communities or individuals.[211]

The principle of non-discrimination is closely related to, albeit not the same as, the protection of minorities. While discrimination is generally prohibited, including on the basis of ethnicity, minorities are subjects of special protection measures aimed at their cultural, religious or linguistic survival. Non-discrimination and minority protection clauses as well as the right to self-determination have been applied to the specific case of Indigenous peoples, acknowledging the need for special measures to redress imbalances as a result of historical marginalization. Joshua Castellino and Jérémie Gilbert argue that, in the case of Indigenous peoples, self-determination should be applied as both a right and a principle by which to interpret remaining rights.[212] While non-discrimination and minority protection clauses are individual rights, they have been interpreted to presuppose collective, cultural survival as a precondition for the right to enjoy one's culture. In particular, Indigenous communities at risk of losing their identity are in need of specific positive measures to realize these rights.[213]

It is for this reason that many Indigenous peoples avoid designation as minorities, which they perceive as not reflecting their needs accurately.[214] It is important to acknowledge that while Indigenous peoples often suffer from (structural) discrimination, the principle of non-discrimination alone is not sufficient to remedy this situation.[215] Instead, the specialized regime for Indigenous rights protection recognizes that the history of colonization and nation building has left Indigenous peoples in a particularly vulnerable position that cannot be remedied by the traditional individual-focused human rights regime. Rather, specific characteristics such as the foundational role of land in Indigenous identity require special protec-

204 NMIP as well as the Moro often refer to the historical narrative of the pact between brothers Mamalu and Tabunaway, who agreed to live in peace and support each other after only Tabunaway converted to Islam, while Mamalu retained his customary beliefs. The pact is considered as legal fact by some NMIP groups who also attribute the delineation of boundaries to the pact and employ its moral and cultural imperative for the Moro to acknowledge the legitimacy of NMIP claims. Paredes, 'Indigenous v Native', supra fn 5; Interviewee 5.

205 Interviewee 6.

206 Human Rights Committee (HRCttee), CCPR General Comment No. 18: Non-Discrimination, 10 November 1989.

207 Arts 2(1), 26, International Covenant on Civil and Political Rights, 16 December 1966.

208 Art 2(1), International Covenant on Econmic, Social and Cultural Rights, 16 December 1966.

209 Art. 1(1), International Convention on the Elimination of all Forms of Racial Discrimination, 21 December 1965.

210 Art. 1, Convention on the Elimination of all Forms of Discrimination against Women, 18 December 1979.

211 HRCttee, CCPR General Comment No. 18, supra fn 36.

212 J. Castellino and J. Gilbert, 'Self-Determination, Indigenous Peoples and Minorities', 3 *Macquarie Law Journal* (2003).

213 S. Oeter, 'The Protection of Indigenous Peoples in International Law Revisited – From Non-Discrimination to Self-Determination', in H. P. Hestermeyer, D. König, N. Matz-Lück, V. Röben, A. Seibert-Fohr, P-T. Stoll and S. Vöneky (eds), *Coexistence, Cooperation and Solidarity*, Brill, 2012.

214 Oeter, 'The Protection of Indigenous Peoples in International Law Revisited', supra fn 43.

215 Ibid.

tion.[216] Control over Indigenous territories is not only essential for the economic and political self-governance of Indigenous peoples, it is integrally connected to Indigenous identity and the exercise of traditions and customary practices, and is often the site of sacred places and burial sites.[217] Indigenous territories and self-determination are therefore essential for the cultural and physical survival of Indigenous peoples – a view that is increasingly reflected in international legal norms. Until now, the only specialized binding treaty on Indigenous peoples' protection is Convention 169 of the International Labour Organization that was passed in 1989, entered into force in 1991 and has to-date been ratified by 24 countries. Subsequently, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) was developed with the inclusion of a number of Indigenous peoples' representatives and was finally passed by the UN General Assembly in 2002. The declaration presents a normative shift in the conceptualization of Indigenous peoples' rights that places the right to self-determination at the centre of Indigenous rights protection and makes Indigenous peoples subjects, not mere objects, of international law. However, there remains an area of disagreement regarding the precise definition of Indigenous peoples – a caveat that is not decisive in Philippine domestic law which has determined its own definition.

2. THE PHILIPPINE CONTEXT: PROGRESSIVE LEGISLATION, WEAK IMPLEMENTATION

The Philippines is a state party to 10 out of 11 human rights treaties including the main treaties containing non-discrimination clauses such as the ICCPR and ICERD. It also voted in favour of UNDRIP but has not ratified ILO Convention 169. Many rights including the right to non-discrimination, the right to self-determination and the rights of Indigenous peoples are specifically enshrined in Philippine domestic legislation.

The Philippine Constitution of 1987 provides for the equal protection of laws in Section 1 of its Bill of Rights.[218] While there is no comprehensive anti-discrimination law, the Philippine Government has passed specific laws targeting discrimination against women or, at least at the level of local government, against LGBTIQ populations. In terms of Indigenous peoples' rights, the 1987 Constitution sets out recognition of Indigenous peoples' rights 'within the framework of national unity and development' as a state policy[219] and specifically acknowledges Indigenous land rights as means to ensure Indigenous peoples' 'economic, social, and cultural well-being'.[220] It requires the preservation of Indigenous culture to be considered

216 Ibid.

217 F. Hirtz, 'It Takes Modern Means to be Traditional: On Recognising Indigenous Cultural Communities in the Philippines', 34 *Development and Change* 5 (2003).

218 Art III, Sect 1, The 1987 Constitution, supra fn 2.

219 Art II, Sect 22, ibid.

220 Art XII, Sect 5, ibid,

in national plans and policies[221] and, in the specific context of agrarian reform,[222] mandates Congress to ensure the applicability of customary laws with regard to ancestral domains.[223]

Philippine domestic law provides a comprehensive framework for the protection of Indigenous peoples' rights, which overlaps with the provisions laid out in ILO Convention 169 and UNDRIP to a large extent. In fact, drafts of UNDRIP influenced the development of IPRA, which was passed in 1997 and has been celebrated as one of the most progressive Indigenous rights laws.[224] Concurrent with developments in the international Indigenous rights regime at that time, the 1987 Constitution and IPRA signalled a shift in the state's approach to Indigenous peoples, replacing previous assimilationist policies with recognition of the inherent right to self-governance.[225] IPRA recognizes and operationalizes four bundles of Indigenous rights: the right to ancestral domains and lands, the right to self-government and empowerment, the right to social justice and human rights and the right to cultural integrity. For the implementation and enforcement of these rights, it has created the National Commission for Indigenous Peoples (NCIP).[226] However, despite comprehensive legislation and an agency specifically mandated with enforcing Indigenous peoples' rights, de facto rights protection is weak. Processing certificates of ancestral domain title, a prerequisite for exercising self-governance rights within ancestral domains, is notoriously slow and marred with irregularities. The UN Committee on the Elimination of All Forms of Racial Discrimination (CERD) has also noted that the fundamental idea of Indigenous self-determination as encapsulated in IPRA is undermined by the continued application of the Regalian Doctrine, particularly to subsoil resources, and the implementation of the Philippine Mining Code.[227] Additional shortcomings include non-participatory policy formulation, lack of cultural sensitivity in the NCIP's bureaucratic processes, continuing structural discrimination against Indigenous peoples and frequent manipulation of free, prior and informed consent (FPIC) processes.[228] Following CERD's concluding observations to that effect in 2009[229] and intense lobbying at the national level, the NCIP revised its FPIC regulations through the 2012 FPIC implementing rules and regulations. Lastly, IPRA's over-reliance on the NCIP for the

221 Art XIV, Sect 17, ibid.

222 Art XII, Sect 6, ibid.

223 Art XII, Sect 5, ibid.

224 C. Doyle, 'The Philippine Indigenous Peoples Rights Act and ILO Convention 169 on Tribal and Indigenous Peoples: Exploring Synergies for Rights Realisation', 24 *The International Journal of Human Rights* 2–3 (2020)

225 Ibid.

226 Ch 7, IPRA, supra fn 3.

227 UN Committee on the Elimination of Racial Discrimination (CERD), Concluding Observations of the Committee on the Elimination of Racial Discrimination: Philippines, UN doc CERD/C/PHL/CO/20 22, 23 September 2009.

228 Doyle, 'The Philippine Indigenous Peoples Rights Act', supra fn 55.

229 CERD, Concluding Observations, supra fn 58, §24.

implementation of its policies and the NCIP's inability to live up to this role have been identified as a factor of the continued structural discrimination experienced by Indigenous peoples in the Philippines.[230]

3. NON-MORO INDIGENOUS RIGHTS PROTECTION

In the Bangsamoro region this experience of structural discrimination is particularly strong due to the non-implementation of IPRA there. The status of IPRA in ARMM was unclear for many years with the NCIP insisting on the need for an enabling law and the implementing powers never being devolved to the region.[231] The only agency responsible for NMIP rights protection was the Office of Southern Cultural Communities which, however, did not have the power to grant land titles. It was only in 2013 that the applicability of IPRA in ARMM was determined and the NCIP officially claimed its jurisdiction over the region. However, since then, applications for the delineation of ancestral lands have stalled and no title has been processed to date.[232] As a consequence, NMIP have been de facto excluded from the Indigenous peoples' rights protection granted to Indigenous peoples outside the Bangsamoro region.[233] While the Moro majority has – by means of achieving autonomy – gained more complete control over the land than would even be possible under IPRA, NMIP continue to struggle for their self-determination through ancestral domain delineation.[234] NMIP have therefore suffered double discrimination by being excluded both from the self-determination rights the Moro have won for themselves as well as from the Indigenous peoples rights protection granted to Indigenous peoples outside ARMM. This precarious situation is meant to be remedied by the NMIP rights protection regime to be established in the newly created BARMM region.

The protection of NMIP in BARMM specifically is laid out in the 2012 FAB as well as in thirteen provisions of the 2018 BOL. Such inclusion of NMIP rights and interests in the legislative framework of BARMM is the result of years of NMIP campaigning and lobbying both within the context of the peace negotiations and in the congressional deliberations on the BOL. NMIP rights provisions in the BOL prescribe the recognition of the NMIP right to self-determination and mandates the Bangsamoro Transition Authority to pass the Indigenous Peoples Code within the transition period from 2019 to 2022.[235] The available drafts of the law reveal that one version was submitted to the Bangsamoro parliament as Cabinet Bill No. 40 in January 2020. Nevertheless, the legislative process did not pick up pace until July 2021 when the draft bill passed the first reading in parliament. Following the extension of the transition period until 2025 and the May 2022 elections, the deliberations and subsequent public consultations experienced further delays. At the time of writing, in May 2022, the draft bill continues to be pending in the inter-cabinet committee.

Apart from the yet to be established Indigenous Peoples Code, the BOL also provides for the establishment of an interim cabinet including MIPA.[236] MIPA was instituted with the establishment of the autonomous region in 2019 and its first minister, Melanio Ulama, appointed in February of the same year.[237] Its specific roles and functions are to be determined in the Indigenous Peoples Code.

E. THE INDIGENOUS PEOPLES RIGHTS ACT IN THE BANGSAMORO

The Indigenous Peoples Code presents a critical opportunity for creating a robust legal framework for the protection of the rights of NMIP. As such, it was widely awaited by Indigenous peoples' organizations with some well-connected organizations attempting to influence the drafting process or otherwise communicate their needs and demands. While not yet publicly available, some NMIP organizations have received copies of the draft law and have started formulating their comments and recommendations.

The draft law operationalizes Indigenous peoples' right to self-determination through a comprehensive set of provisions largely mirroring Indigenous peoples rights protection in IPRA, ILO Convention 169 and UNDRIP. Having been promised as an improvement to and extension of IPRA – as IPRA Plus Plus[238] – the draft Indigenous Peoples Rights Act in the Bangsamoro mostly takes up the rights already guaranteed under IPRA with a few notable exceptions such as the creation of Indigenous peoples local government units[239] and the creation of a tribal university.[240] Other additional provisions are specific to the context such as a standalone provision on local peace negotiators[241] or ancestral domain rights within the framework of camp-transformation processes.[242]

1. DETERMINING THE SCOPE

The main controversy regarding the draft law is related to the definition of the beneficiary population. While the BOL specifically mandates the protection of NMIP

230 Doyle, 'The Philippine Indigenous Peoples Rights Act', supra fn 55.

231 International Crisis Group, *The Philippines*, supra fn 5; Interviewee 5.

232 Paredes, 'Indigenous v Native', supra fn 5; Interviewee 5.

233 Interviewees 3, 7.

234 International Crisis Group, *The Philippines*, supra fn 5.

235 Art XVI, Sect 4(a), BOL, supra fn 4.

236 Art XVI, Sect 8(g), ibid.

237 C. O. Arguillas, 'Murad Vows a Government "Free of All the Ills of Governance;" Names 10 Ministers', *MindaNews*, 27 February 2019, https://www.mindanews.com/peace-process/2019/02/murad-vows-a-government-free-of-all-the-ills-of-governance-names-10-ministers/.

238 Interviewees 3, 5, 7.

239 Ch IV, Sect 22, An Act to Recognise, Respect, Protect, Promote, Preserve, and Support the Rights of the Indigenous Peoples, Empowering the Ministry of Indigenous Peoples' Affairs, Establishing the Implementing Mechanisms, and for Other Purposes, 2021 (Indigenous Peoples Rights Act in the Bangsamoro),

240 Ch VII, Sect 40, ibid.

241 Ch V, Sect 28, ibid.

242 Ch IX, Sect 69, ibid.

rights,[243] the draft law removes the qualifier 'non-Moro' and simply refers to Indigenous peoples and Indigenous cultural communities. Additionally, and in contrast to previous drafts, it explicitly extends the coverage of the law to Islamized ethnolinguistic groups such as the Yakan, the Sama or the Badjao[244] and grants authority to MIPA to designate additional groups as Indigenous peoples covered by the law.

NMIP advocates argue that this approach denies recognition of their distinct identity as non-Moro Indigenous peoples and thereby removes the primary precondition for enjoyment of their specific rights.[245] In fact, the recognition of their identity as an expression of self-determination has been a contentious issue throughout the peace process. The FAB merely provides for 'Indigenous peoples' rights' to be respected,[246] without further defining whether these are the same rights as enshrined in IPRA and potentially extending rights protection to Moros themselves.[247] Previous versions of the BOL or, as it was previously called, the Bangsamoro Basic Law included a provision of 'choice' for Indigenous peoples to either retain their special status under Philippine national law or become part of the autonomous region with the concomitant rights and protections. This provision thus did not allow for the possibility to retain the status of Indigenous people while also being part of the Bangsamoro autonomous region.[248] Such attempts at creating a homogenous Bangsamoro political identity disallow the presence of ethnic minorities and ignore the diversity already present in the region. Subsuming NMIP identities under the Bangsamoro identity or disallowing their coexistence denies NMIP's right to self-determination as distinct Indigenous peoples irrespective of their belonging or non-belonging to the Bangsamoro political identity or administrative entity.

It should be noted that national legislation grants the right to self-determination to individual Indigenous peoples, rather than a collective Indigenous identity and that individual Islamized ethnolinguistic groups making up the 'Moro people' qualify as Indigenous peoples under the definition of IPRA as well. In fact, some members of the Islamized ethnolinguistic groups mentioned in the draft law, such as the Badjao, have self-identified as Indigenous peoples rather than Moro, highlighting cultural differences and their status as minority compared to the dominant ethnolinguistic groups within the Moro collective identity.[249] It is thus not only the six identified NMIP that resist subsumption under the Bangsamoro political identity, but also members of smaller ethnolinguistic groups commonly identified as Moro.

243 Art IV, Sect 9, BOL, supra fn 4.

244 Ch I, Sect 2, Indigenous Peoples Rights Act in the Bangsamoro, supra fn 70.

245 Interviewee 5.

246 Art XI, Sect 3, FAB, supra fn 21.

247 Paredes, 'Indigenous v Native', supra fn 5.

248 Ibid.

249 Personal communication, 19 May 2022.

Nevertheless, the draft law fails to live up to the protection guarantees mandated by the BOL specifically for NMIP on account of their particular history of marginalization. The non-recognition of their identity as different from the Moro collective identity also raises fears of being subjected to assimilation attempts considering the overwhelming majority of Moro in the region.[250] Statements of MILF leaders that refer to NMIP as the Moro's 'smaller brother' reveal a tendency towards making NMIP a subsidiary identity to Moro.[251] According to Barter such denial of second-order minority identities is common in regions claimed by secessionist movements as the distinct identity poses an ideational threat to the secessionist narrative of representing a homogenous nation-state. In response, secessionist movements often claim Indigenous minorities as their 'ethnic cousins' thereby denying their unique distinctness.[252]

Consequentially, the draft Indigenous Peoples Code in its current form does not serve the objective laid out in the BOL to protect NMIP as a separate group. Instead, it denies the specific need of NMIP for special protection measures. By opening up the definition of Indigenous peoples to the Moro majority, the draft law discriminates against the specific concerns of NMIP which are made legally and culturally invisible by the narrative of one Bangsamoro political identity.[253]

2. ANCESTRAL DOMAIN RIGHTS, POLITICAL PARTICIPATION AND SELF-GOVERNANCE

As mentioned above, the draft law contains a plethora of progressive Indigenous peoples' rights protection clauses including control over natural resources, the right to practice and revitalize customs and traditions and the right to establish and practice own systems of education, healthcare and conflict resolution. However, considering the discussion above, these provisions cannot serve as an effective tool for Indigenous peoples' rights protection if they are applied to the dominant segment of the population as well, i.e. to the Moro regional majority. This dynamic is particularly apparent and raises most concerns with regard to the right to ancestral domain.

Despite reaffirmation of IPRA in the BOL[254] and the provision for ancestral-domain delineation processes similar to those of the NCIP in the draft Indigenous Peoples Code,[255] NMIP continue to express fear of further losing control over their ancestral domains. This fear has been exacerbated by previous articulations of ancestral domain rights in BARMM and by the non-delineation of ancestral domains in ARMM. In a concept paper submitted by the MILF in an earlier stage of the peace

250 Paredes, 'Indigenous v Native', supra fn 5; Interviewee 5.

251 Perez, 'The Challenges of Moro and Lumad Power-Sharing in the Bangsamoro', supra fn 13.

252 Barter, '"Second-Order" Ethnic Minorities in Asian Secessionist Conflicts', supra fn 15.

253 Perez, 'The Challenges of Moro and Lumad Power-Sharing in the Bangsamoro', supra fn 13.

254 Art IX, Sect 3, BOL, supra fn 4.

255 Ch IX, Indigenous Peoples Rights Act in the Bangsamoro, supra fn 70.

process, the term ancestral domain is used for a singular Bangsamoro homeland, thereby denying the plurality of ancestral domains of distinct Indigenous peoples.[256] This is not only problematic in that it, once again, denies the NMIP's distinct identities that are often closely connected to these lands, but also because it endangers the protection of sacred places or burial grounds within these lands.[257] Another factor confirming NMIP concerns is Bangsamoro Parliament Resolution No. 38 issuing a cease-and-desist order for the NCIP to stop delineating ancestral domains within BARMM. This is particularly significant considering that the applications for ancestral domains had been processed for several years starting under the ARMM administration and that, in contrast to ARMM, the application of IPRA was explicitly affirmed in the BOL as well as by MILF leaders who promised better implementation of Indigenous rights protection than under ARMM. Pointedly, IPRA was explicitly reaffirmed in previous versions of the Indigenous Peoples Code but not in the one currently discussed.[258] Nevertheless, for many NMIP advocates it is clear that the NCIP continues to have the mandate to delineate land in BARMM until the Indigenous Peoples Code is passed. For these NMIP, the cease-and-desist order confirmed their perception that their hard-earned gains in the BOL are not implemented by the BARMM authorities who appear to have no interest in delineating ancestral lands.[259] Such previous practice of BARMM officials and MILF representatives thus triggers fears among NMIP that the ancestral domain delineation process outlined in the draft Indigenous Peoples Code – despite requiring occupation of the ancestral domain since time immemorial – may be abused by the Moro majority to increase their control over land and resources.

NMIP representatives are also concerned about contradictions between their ancestral domain rights and the provisions regulating the transformation of former MILF camps as set out in the Normalisation Annex to the BOL. As mentioned above, land conflicts between NMIP and the Moro include the establishment of MILF camps within ancestral domains without the NMIP's free, prior and informed consent. NMIP advocates expressed their concern that the normalization process could be used to extend and solidify the control of Moro majorities over these ancestral domains as the inclusion of these territories in lands scheduled for camp transformation effectively removes them from the control of NMIP.[260] While interviewees reported NMIP representation in camp-transformation decision-making bodies, it was easily outvoted by the Moro majority[261] – a process that is antithetical to the special protection guarantees for minorities and Indigenous peoples

256 International Crisis Group, *The Philippines*, supra fn 5.

257 Interviewee 2.

258 Sect 2, An Act to Recognise, Respect, Protect, Promote, and Support the Rights of Non-Moro Indigenous Peoples, Creating the Ministry for Non-Moro Indigenous Peoples, Establishing the Implementing Mechanisms, Appropriating Funds Therefor, and for Other Purposes, 2019; Sect 3, An Act to Recognise, Protect, Promote, and Support the Rights of the Indigenous Peoples, Creating the Ministry of Indigenous Peoples Affairs, Establishing the Implementing Mechanisms, Appropriating Funds Therefor, and for Other Purposes, 2020; Sect 3, Indigenous Peoples Rights Act in the Bangsamoro, supra fn 70.

259 International Crisis Group, *The Philippines*, supra fn 5; Interviewees 5, 6.

260 Interviewee 5.

261 Interviewee 7.

specifically. In fact, the draft Indigenous Peoples Code addresses the issue of MILF camps within Indigenous lands providing for recognition of the ancestral domains while also prescribing that the camps must be transformed into 'productive areas',[262] a requirement in line with the normalization rationale but not with the Indigenous peoples' right to determine their own development priorities. While the inclusion of this provision is a welcome acknowledgement of the displacement of NMIP in these areas, implementation is dependent on the action of MIPA, which is at risk of being dominated by Moro interests. Further, there have been reports of additional sections of ancestral domains being declared as MILF camps as recently as October 2020, adding to NMIP suspicions that the camp-transformation process is used to increase the MILF's territorial control.[263]

This display of an apparent lack of political will in the context of ancestral domain delineation and Indigenous peoples' land rights protection reinforces pre-existing doubts as to the probability of a genuine implementation of the Indigenous Peoples Code. Despite a provision in the BOL prescribing mandatory representation in the Bangsamoro parliament and requirements for MIPA leading staff to be composed of Indigenous peoples, concerns about Moro dominance in decision-making bodies and implementing agencies remain. The fact that the omission of the 'non-Moro' qualifier in the draft law opens up the two mandatory representatives as well as positions in MIPA to Moro individuals reinforces this concern. Additionally, NMIP tend to face prejudiced allegations of being 'ungrateful' or 'spoilers of the peace process' when they voice critical positions or objections. According to one interviewee, this is particularly pronounced when it comes to clashing ideas of what constitutes 'development', with NMIP frequently labelled as 'hinderers of development', 'backwards' or 'primitive'.[264] In the past, these prejudiced allegations have led NMIP to modify or silence their criticism.[265] The lack of special measures specifically designed for NMIP and the overall climate of labelling criticism as 'spoiling' the peace process negatively affect NMIP's opportunities to participate in decision-making processes. It also disallows participation and expressions of self-governance in relation to the customary selection of leaders and governance structures.[266]

Rather than granting preferential treatment of NMIP as Indigenous peoples and ethnic minorities, the Indigenous Peoples Code – when read in light of the historical context – opens the way for the continued sidelining of NMIP's rights. While the granting of autonomy under BARMM means almost complete control over land and resources for the Moro – a degree of control going beyond the territorial self-determination guaranteed by IPRA – NMIP continue to struggle for their territorial self-determination through applications for ancestral domains.[267]

262 Art IX, Sect 69, Indigenous Peoples Rights Act in the Bangsamoro, supra fn 70.

263 Interviewee 5.

264 Interviewee 5.

265 Paredes 'Indigenous v Native', supra fn 5; Perez, 'The Challenges of Moro and Lumad Power-Sharing in the Bangsamoro'.

266 Interviewees 3, 4, 5.

267 Perez, 'The Challenges of Moro and Lumad Power-sharing in the Bangsamoro'.

F. CONCLUSION

BARMM is a complex terrain of competing claims of self-determination, marginalized peoples and overlapping needs to have historical grievances remedied. Both the Moro and NMIP invoke their rights to self-determination – the Moro as a people in an autonomous region and NMIP as Indigenous peoples within their ancestral domains. Considering the pronounced asymmetry between the two populations and the status of NMIP as second-order minorities, it is not surprising that the Moro right to self-determination is partially exercised at the expense of NMIP self-determination. In fact, the situation in BARMM has been described as conferring preferential rights on one kind of minority while derogating the rights of the other.[268] To address these imbalances, the BOL prescribes the development of an Indigenous peoples rights act that guarantees the rights of NMIP denied in previous administrative entities. However, instead of recognizing the distinct NMIP identities, the draft law continues trends of blurring identities to comply with the narrative of the Moro nation. Such a conceptualization of Indigenous peoples' rights and ancestral domains continues the marginalization of and structural discrimination against NMIP by attempting to subsume their distinct identity under the dominant Moro identity, as expressed in non-recognition of their separate land claims and assertions of self-governance.

As can be inferred from the discussion above, the main controversy surrounding the issue of NMIP's rights protection is not related to the actual provisions or articulation of rights but rather the very fundamental question of *who* has the right to claim special protection on the basis of their specific identity. The case study at hand highlights the often-overlooked situation of second-order minorities in secessionist conflicts. It showcases the important role that strategic expressions of identity – as people, Indigenous people or a minority – play with regards to the set of rights granted to an ethnic group and their bargaining power vis-à-vis the other. In a situation of transition that is naturally characterized by a redistribution of power, the special protections international law grants to peoples, Indigenous peoples and minorities become strategic tools for maximizing gains in the peace process. For BARMM, it remains to be seen whether NMIP will succeed at having their voices heard in the upcoming consultations on the draft Indigenous Peoples Code.

268 Paredes, 'Indigenous v Native', supra fn 5.

PART THREE:

DISCRIMINATION IN SPECIFIC SITUATIONS

8. UNVEILING CLAIMS OF DISCRIMINATION BASED ON NATIONALITY IN THE CONTEXT OF OCCUPATION UNDER INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW

George Dvaladze [1]

A. INTRODUCTION

International law unequivocally prohibits discrimination and other practices that contradict the principle of equality of persons "in dignity and rights", such as racism, xenophobia or other forms of intolerance. This rule is firmly established in treaty and customary law, and it is a general principle of international law.[2] It is even claimed to be a *jus cogens* norm.[3] With its inclusion in the Charter of the United Nations (UN Charter)[4] and the Universal Declaration of Human Rights (UDHR),[5] and in view of the fact that discrimination is prohibited at the consti-

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2 International Court of Justice (ICJ), *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment, 18 July 1966, Dissenting Opinion of Judge Tanaka, paras 293, 299–300. See also ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 of 1970*, Advisory Opinion, 21 June 1971 (South West Africa Advisory Opinion), Separate Opinion of Vice-President Ammoun, p. 76.

3 Inter-American Court of Human Rights (IACtHR), *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion No. OC-18/03, 17 September 2003, paras 100–101, 173; IACtHR, *Yatama v. Nicaragua*, Series C, No. 127, 23 June 2005, para. 184. According to the ICJ, certain forms of discrimination, such as racial discrimination, give rise to obligations *erga omnes*: see ICJ, *Case Concerning Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, Judgment, 5 February 1970, para. 34.

4 Charter of the United Nations, United Nations, 1 UNTS XVI, 24 October 1945 (UN Charter), Art. 1(3).

5 Universal Declaration of Human Rights, UNGA Res. 217 A(III), 10 December 1948 (UDHR), Art. 1.

tutional level in almost all States across the globe,[6] one can confidently speak of wide, if not universal, acceptance of the principle.

In spite of a clear prohibition, discrimination manifests itself in different forms and degrees in virtually all societies and cultures, and in various settings. Naturally, armed conflicts are no exception. As the International Committee of the Red Cross (ICRC) submits, discrimination on various grounds is among the most stressing issues of many contemporary armed conflicts, as often practices that directly contradict the norms of IHL either directly target or have a significantly more detrimental effect on certain segments of the population defined by characteristics such as gender, disability, religion, ethnicity or political opinion.[7] Discrimination based on nationality in the context of occupation – i.e., settings where a State exercises effective control over the territory of another State without the latter State's consent[8] – is the subject of this article.

Discrimination is prohibited in armed conflicts and occupation. In fact, virtually all international humanitarian law (IHL) instruments that predate the UN Charter and the UDHR expressly prohibited or at least alluded to the prohibition.[9] Today, the four Geneva Conventions of 1949 and their Additional Protocols of 1977 provide a number of rules expressly prohibiting adverse distinction – an IHL counterpart to the term "discrimination", to be understood as synonymous with discrimination in human rights law – against persons affected by armed conflict and occupation, and requiring equality of treatment of certain categories of persons.[10] The ICRC Customary Law Study has also identified relevant practice and *opinio juris* that confirm the existence of a customary rule prohibiting discrimination in armed conflict.[11] Besides, nowadays it is widely accepted that international law governs a wide range of humanitarian issues that arise in armed conflict, and occupation is not limited to IHL. Most notably, various international bodies have confirmed that human rights law does not cease to apply in such situations[12] and binds States even when they are operating extraterritorially, especially in (but not limited to) instances where they attain the level of control over a territory that is sufficient to qualify them as an Occupying Power.[13] The prohibition against discrimination and the obligation of equality

6 Human Rights Committee, General Comment No. 18, "Non-Discrimination", 10 November 1989, para. 9; Daniel Moeckli, *Human Rights and Non-Discrimination in the "War on Terror"*, Oxford University Press, Oxford, 2008, p. 55.

7 See the ICRC Challenges Reports: ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2003, p. 7; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2007, p. 4; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2015, p. 5. In the ICRC's 2019 Challenges Report, an entire chapter is dedicated to the prohibition of adverse distinction based on disability: see ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2019, pp. 41–43. See also ICRC, *Gendered Impacts of Armed Conflicts and Implications for the Application of IHL*, Geneva, 2022, pp. 22–32.

8 Regulations Annexed to the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land, 18 October 1907, Art. 42. Notably, a more functional approach that enables the applicability of certain rules of international law of occupation during the so-called "invasion phase" is also recognized: see Marten Zwanenburg, Michael Bothe and Marco Sassòli, "Is the Law of Occupation Applicable to the Invasion Phase?", *International Review of the Red Cross*, Vol. 94, No. 885, 2012.

9 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864, Art. 6; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 27 July 1929, Art. 1; Convention relative to the Treatment of Prisoners of War, Geneva, 27 July 1929, Art. 4.

10 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 12; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Art. 12; Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 16; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Arts 13, 27; Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Preamble, Arts 9, 10, 70, 75; Article 3 common to the four Geneva Conventions; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Arts 2, 4, 7.

11 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 88, available at: https://ihl-databases.icrc.org/en/customary-ihl/v1; Jean-Marie Henckaerts and Louise Doswald Beck, *Customary International Humanitarian Law*, Vol. 2: *Practice*, Cambridge University Press, Cambridge, 2005, pp. 2024–2061, available at: https://ihl-databases.icrc.org/en/customary-ihl/v2.

12 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996 (Nuclear Weapons Advisory Opinion), para. 25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004 (Wall Advisory Opinion), paras 105–106; ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, 19 December 2005, para. 216; Human Rights Committee, General Comment No. 31, "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", 26 May 2004, para. 11.

13 Among others, see ICJ, Wall Advisory Opinion, above note 11, paras 107–113; ICJ, *Armed Activities*, above note 11, para. 216; Human Rights Committee, above note 11, para. 10. For the case law of the European Court of Human Rights (ECtHR) on the matter, see ECtHR, *Al-Skeini and Others v. the United Kingdom*, Appl. No. 55721/07 (Grand Chamber), 16 September 2014, paras 131–150; ECtHR, *Al-Jedda v. the United Kingdom*, Appl. No. 27021/08 (Grand Chamber), 7 July 2011, para. 86; ECtHR, *Chiragov and Others v. Armenia*, Appl. No. 13216/05 (Grand Chamber), 16 June 2015, para. 186; ECtHR, *Hassan v. the United Kingdom*, Appl. No. 29750/09 (Grand Chamber), 16 September 2014, para. 75; ECtHR, *Georgia v. Russia (II)*, Appl. No. 38263/08 (Grand Chamber), Merits, 21 January 2021, paras 81–84. For detailed analysis, see Robert Kogod Goldman, "Extraterritorial Application of the Human Rights to Life and Personal Liberty, including Habeas Corpus, during Situations of Armed Conflict", in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law*, Edward Elgar, Cheltenham, 2013; Gloria Gaggioli and Jens David Ohlin, "Remoteness and Human Rights Law", in Jens David Ohlin (ed.), *Research Handbook on Remote Warfare*, Edward Elgar, Cheltenham, 2017; Marko Milanovic, "Al-Skeini and Al-Jedda in Strasbourg", *European Journal of International Law*, Vol. 23, No. 1, 2012; Ralph Wilde, "Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties", *Israel Law Review*, Vol. 40, No. 2, 2007.

of treatment of persons contained in virtually all human rights treaties[14] form part of the corpus of such rules.

With the strong stigma attached to it and in view of the universal acceptance of the principle of equality of persons, the notion of discrimination bears with it political and legal significance. Engaging with the Occupying Power to tackle discriminatory practices by insisting on discrimination as a violation in itself, as opposed to treating these as "ordinary violations" of other substantive rules of IHL, can have an added value. On the one hand, it enables tackling the systemic and collective pattern of violations of IHL practised against a given group of persons, and on the other, it "elevates" engagement on the humanitarian issues at stake, thereby increasing the chances of bringing about the end of such practices in humanitarian contexts. This has led to the increasing invocation of discrimination with respect to practices where particular segments of the population in an occupied territory have suffered hardship more than others. Admittedly, over-reliance on discrimination, even with good intentions, in instances where its constitutive elements are not met can risk diluting the notion and ultimately weakening the system of protection against discrimination. In fact, not so infrequently, claims about discrimination do generate a certain amount of pushback by the States concerned, among others.

Some instances of unfavourable treatment of persons based on an identifiable ground, such as ethnic cleansing practised by an Occupying Power through deportation of the inhabitants of an occupied territory of a given ethnicity and the destruction of their property, will rather uncontroversially be regarded as discrimination under international law. Cases where the alleged discrimination has to do with differentiations based on nationality, such as nationals of the occupied State and nationals of the Occupying Power, whereby the former are subjected to unfavourable treatment compared to the situation of the latter, are not as straightforward. As shall be discussed below, the IHL treaty regime – and the drafting history of those instruments – leaves room for arguing that such differentiations are not

14 UDHR, above note 4, Arts 2, 7; International Covenant on Civil and Political Rights, 171 UNTS 999, 16 December 1966 (ICCPR), Arts 2, 26; International Covenant on Economic, Social and Cultural Rights, 3 UNTS 993, 16 December 1966 (ICESCR), Art. 2. Universal human rights treaties devoted to the specific categories of persons also outlaw discrimination: International Convention on the Elimination of All Forms of Racial Discrimination, 195 UNTS 660, 21 December 1965 (CERD), Art. 2; Convention on the Elimination of All Forms of Discrimination against Women, 13 UNTS 1249, 18 December 1979 (CEDAW), Art. 2; Convention on the Rights of the Child, 3 UNTS 1577, 20 November 1989, Arts 2, 28; Convention on the Rights of Persons with Disabilities, 3 UNTS 2515, 24 January 2007 (CRPD), Art. 1; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 3 UNTS 2220, 18 December 1990, Arts 1, 7. All major regional human rights instruments include guarantees of equality and non-discrimination: African Charter on Human and Peoples' Rights, Organization of African Unity, 27 June 1981 (Banjul Charter), Arts 2, 3, 18(3–4), 28; American Convention on Human Rights, Organization of American States, 22 November 1969 (Pact of San Jose), Arts 1, 24; American Declaration on the Rights and Duties of Man, Ninth International Conference of American States, 2 May 1948, Art. II; Arab Charter on Human Rights, League of Arab States, 15 September 1994, Arts 2, 9, 35; Cairo Declaration of Human Rights in Islam, Organization of the Islamic Conference, 5 August 1990, Art. 1; ASEAN Human Rights Declaration, Association of Southeast Asian Nations,18 November 2012, Arts 1, 2, 3, 9; European Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, ETS 5, 4 November 1950, Art. 14; Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination, Council of Europe, ETS 177, 4 November 2000, Art. 1; European Social Charter (Revised), Council of Europe, ETS 163, 3 May 1996, Arts 15, 20, 27, E; Charter of Fundamental Rights of the European Union, European Union, 2012/C 326/02, 26 October 2012, Arts 20, 21, 23.

to be regarded as discrimination. A question then arises as to whether and to what extent such results under IHL influence the analysis of the same case under human rights law. The present article delves into this debate with the aim of providing an answer to the question of whether such instances are to be regarded as discrimination under international law. From the outset, the analysis is guided by the approach that the answer has to be practicable in a sense that IHL and human rights should not bring different results, whereby the same practice can be deemed as discrimination under human rights law and not IHL, or vice versa.

At first glance, analyzing the issue of discrimination based on nationality in the context of occupation may seem like a theoretical exercise due to the fact that the Occupying Power is not expected to be confronted with its own nationals in the occupied territory, at least not on a significant scale. Such an assumption presupposes that the Occupying Power has respected its other obligations under IHL and other international law, most notably the prohibition against transferring its own population to the occupied territory[15] and the prohibition against annexation.[16] Admittedly, this is not always the case, particularly in instances where the occupation is of a prolonged nature. Given that claims of discrimination based on nationality are more likely to be made in such contexts, this article will consider the factual and legal nuances relevant to those contexts.

In order to set the scene for the debate, this article starts by presenting the normative framework, first by looking at the notion of discrimination and its constitutive elements and then by analyzing the issue of applicability and contents of relevant IHL and human rights rules on non-discrimination, as well as their interplay. It then turns to the debate and provides several hypothetical scenarios to flesh out the matter at stake – namely whether discrimination exists, and what international law has to say about it, when an Occupying Power treats differently its own population and the enemy population present in the occupied territory. Finally, it proposes an answer to the question and provides some concluding remarks.

B. NORMATIVE FRAMEWORK

1. THE NOTION OF DISCRIMINATION AND ITS CONSTITUTIVE ELEMENTS

Under international law, equality and non-discrimination are considered to be the positive and negative expressions of the same principle – "two sides of the same coin".[17] However, there is a noticeable difference between the terminology used

15 GC IV, Art. 49.

16 UN Charter, above note 3, Art. 2(4); Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV), 24 October 1970.

17 Daniel Moeckli, "Equality and Non-Discrimination", in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law*, Oxford University Press, Oxford, 2014, p. 156; Anne Bayefsky, "The Principle of Equality and Non-Discrimination in International Law", *Human Rights Law Journal*, Vol. 11, No. 1–2, 2015, pp. 72–73; Dagmar Sheik, Lisa Waddington and Mark Bell, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Hart, Oxford, 2007, p. 26.

in IHL and human rights when it comes to the negative framing of the principle, and this divergence in terminology is even reflected in the codification of the relevant rules.[18] The term "adverse distinction" is – or rather, used to be – more commonly used in IHL, and "discrimination" in human rights law. With time, this divide is fading, and admittedly, the latter is dominating the political and legal language, even within the IHL domain.[19] For the purposes of this article, it is important to mention that this difference in terminology does not imply a difference in substance: both terms carry the same meaning and can be used interchangeably. This is also confirmed by the drafting history of the main IHL instruments: the term "discrimination" was actively used at the 1949 Diplomatic Conference, and no distinct meaning was attached to the term "adverse distinction" that was ultimately chosen to be used across the four Geneva Conventions.[20]

Importantly, although the term is mentioned in various provisions, the definition of discrimination is not provided either in IHL or in human rights instruments of general scope. Nevertheless, there is a widely accepted definition proposed by the United Nations (UN) Human Rights Committee:

> [T]he 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.[21]

The definition covers both direct and indirect discrimination: broadly speaking, the former implies *treatment* that is unfavourable to the person or group of persons concerned, while the latter is concerned with the *effects* of treatment that may not in itself be unfavourable.[22]

18 See the relevant provisions of the main IHL instruments, as listed in above note 9: namely, GC I, Art. 12; GC II, Art. 12; GC III, Art. 16; GC IV, Art. 13, 27; AP I, Preamble, Arts 9, 10, 70, 75; common Article 3; AP II, Arts 2, 4, 7. Compare to some of the main human rights instruments, such as UDHR, above note 4, Arts 2, 7; ICCPR, above note 13, Arts 2, 26; ICESCR, above note 13, Art. 2.

19 Most notably, see ICRC Customary Law Study, above note 10, Rule 88, which frames the customary rule as "non-discrimination".

20 *Final Record of the Diplomatic Conference of Geneva of 1949*, Federal Political Department, Berne, Vol. 2, Section A, 1949, pp. 821, 852. See also George Dvaladze, "Non-Discrimination under International Humanitarian and Human Rights Law", in Robert Kolb, Gloria Gaggioli and Pavle Kilibarda (eds), *Research Handbook on Human Rights and Humanitarian Law*, Edward Elgar, Cheltenham, 2022.

21 Human Rights Committee, above note 5, para. 7. The pronouncement of the Human Rights Committee builds upon the definition provided in the universal human rights instruments dealing with specific forms of discrimination, such as the CEDAW, above note 13; CERD, above note 13; and CRPD, above note 13. The same definition is adopted in UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 20, "Non-Discrimination in Economic, Social and Cultural Rights", 2 July 2009, para. 7.

22 See Human Rights Committee, above note 5, para. 8; CESCR, above note 20, para. 10; Human Rights Committee, *Althammer v. Austria*, Communication No. 998/2001, 2003, para. 10.2. See also D. Moeckli, above note 16, p. 163; Daniel Moeckli, "Anti-Terrorism Laws, Terrorist Profiling, and the Right to Non-Discrimination", in Ana María Salinas De Frias, Katja L. H. Samuel and Nigel D. White (eds), *Counter Terrorism: International Law and Practice*, Oxford University Press, Oxford, 2012, p. 600.

Not all differentiation of persons amounts to discrimination, and sometimes the application of a different standard might be not only justified but even required by international law. In order to distinguish prohibited discrimination from other types of differentiation, four cumulative elements outlined in the definition provided above need to be met, namely: (1) the treatment or its effects must be unfavourable to the persons concerned; (2) such disadvantage must be measurable by comparing their situation to those of others in a substantively similar situation (comparator); (3) such treatment must be based on an identifiable characteristic, such as nationality, age, disability, gender, ethnicity, language or any other similar criteria (basis/ground of discrimination); and (4) there must be *no* reasonable and objective justification for such a differentiation, which is to say that (i) it does not serve a purpose that is deemed legitimate under international law, or (ii) it is not necessary and proportionate for attaining such an aim. Whether or not a potential justification was reasonable and objective will be determined on a case-by-case basis, and the standard of scrutiny will vary depending on considerations such as the severity of the treatment applied and the ground of adverse distinction.[23]

2. INTERNATIONAL LAW RULES ON NON-DISCRIMINATION APPLICABLE IN THE OCCUPIED TERRITORY

In an armed conflict or context of occupation, the question of whether a given incident or practice meeting the elements set out above and thereby amounting to discrimination is to be governed by one or several rules of international law would depend on the scope and content of the rule at stake. In this respect, the temporal, geographical and material scope of the main rules of IHL and human rights law, as well as their interplay, needs to be considered. This article focuses mainly on the rules applicable to occupation.

a. Rules and principles in IHL instruments

IHL rules governing occupation are included, among other instruments, in the Regulations attached to Hague Convention IV respecting the Laws and Customs of War on Land (1907 Hague Regulations), Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (GC IV), and Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I). All these instruments expressly affirm, or at least allude to, non-discrimination.

The 1907 Hague Regulations do not contain a specific provision on non-discrimination or equality of treatment of persons. Nevertheless, given that the principle of non-discrimination is firmly established as international custom and as a gen-

23 For a more comprehensive analysis of the elements of discrimination see, among others, D. Moeckli, above note 16; A. Bayefsky, above note 16; Tufyal Choudhury, "Interpreting the Right to Equality under Article 26 of the International Covenant on Civil and Political Rights", *European Human Rights Law Review*, Vol. 8, No. 1, 2003; William A. Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary*, 3rd revised ed., N. P. Engel, Kehl am Rhein, 2019; Janneke Gerards, *Judicial Review in Equal Treatment Cases*, Martinus Nijhoff, Leiden, 2005.

eral principle of law,[24] it is safe to suggest that the rule is covered by the Martens Clause contained in the preamble to the Hague Regulations, which provides that

> the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

Two GC IV provisions of a general nature are particularly important for non-discrimination – namely, Articles 13 and 27.

Article 27 is contained in Part III ("Status and Treatment of Protected Persons"), Section I ("Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories"), and therefore, the rule applies within the "closed category" of protected persons as defined in Article 4 of GC IV – excluding, among others, persons of the nationality of the Occupying Power. Article 27 provides that

> [w]ithout prejudice to the provisions relating to their state of health, age and sex, all *protected persons* shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion [emphasis added].

The provision includes two important guarantees: treatment with the same consideration, and prohibition of adverse distinction. The two are interconnected but separate obligations; the former is broader, and arguably fully encompasses the latter.

Treatment with the same consideration, commonly understood as the obligation of equality of treatment (of protected persons), is comparable to the obligation of "alike" treatment of prisoners of war under Article 16 of Geneva Convention III relative to the Treatment of Prisoners of War (GC III). The drafting history of the Geneva Conventions confirms that both Article 16 of GC III and Article 27 of GC IV set substantively similar standards, and the difference in wording does not bear any significance.[25] As Pejic points out, these articles refer to "mandatory equality of treatment under IHL", and they seek to ensure consistency of treatment of protected persons.[26] Therefore, any deviation from the standard of treatment required, whether preferential (that is, more favourable) or unfavourable (prejudicial), will contradict this rule, unless there is a justification that can be deemed reasonable and objective, including differentiations that are not based on an identifiable status and characteristic (and therefore do not qualify as discrimination due to the absence of such a ground, as discussed above).

24 ICJ, *South West Africa Cases*, above note 1, Dissenting Opinion of Judge Tanaka, paras 293, 299–300. See also South West Africa Advisory Opinion, above note 1, Separate Opinion of Vice-President Ammoun, p. 76.

25 Given the similarity of those provisions, recently updated Commentary to Article 16 of GC III provides important clarifications: see ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2021.

26 Jelena Pejic, "Non-Discrimination and Armed Conflict", *International Review of the Red Cross*, Vol. 83, No. 841, 2001, p. 186.

The *prohibition against adverse distinction* covers various practices that may take different forms, such as direct and indirect discrimination, as explained above, as well as the remedial role of the Occupying Power to prevent and protect from discrimination.[27] The prohibition is autonomous in nature – i.e., it prohibits adverse distinction in any area, irrespective of whether the unfavourable treatment in question is expressly prohibited by other substantive rules of GC IV – as opposed to an accessory rule, which has no independent existence and simply requires that a rule expressly provided in a given treaty should be implemented without discrimination.[28]

Article 13 of GC IV is contained in Part II ("General Protection of Populations against Certain Consequences of War") and is applicable to all members of the civilian population (and therefore not limited to protected persons as defined in Article 4). It provides that

> [t]he provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.

Due to the broader personal scope of Article 13, Rona and McGuire suggest that the rule contained in this provision is a "general prohibition of discrimination without limitation" and that "all obligations regarding civilians function 'without adverse distinction'".[29] Nevertheless, it has to be pointed out that the prohibition is accessory in nature and only prohibits discrimination in areas covered by the provisions contained in Part II of GC IV. However, as far as distinctions in areas covered in Part II of GC IV are concerned, Article 13 prohibits unfavourable treatment of protected persons vis-à-vis any other person, including nationals of the Occupying Power and third-country nationals who are not protected persons.

Last but not least, Article 75 of AP I contains an accessory rule that also applies to all persons and prohibits discrimination in their enjoyment of fundamental guarantees while in the hands of a party to the conflict or the Occupying Power, by providing that

> persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the [Geneva] Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

27 ICJ, *Armed Activities*, above note 11, para. 209.

28 For the difference between accessory and autonomous rules on non-discrimination, see D. Moeckli, above note 16. See also G. Dvaladze, above note 19.

29 Gabor Rona and Robert J. McGuire, "The Principle of Non-Discrimination", in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 199.

b. Rules on equality and non-discrimination in human rights instruments

Virtually all human rights treaties – whether universal or regional, general or specific in scope – set out at least one provision on non-discrimination.[30] The International Covenant on Civil and Political Rights (ICCPR) contains five interrelated rules on equality and non-discrimination.[31]

It is widely accepted that human rights instruments, including the ICCPR and International Covenant on Economic, Social and Cultural Rights (ICESCR), continue to apply in cases of occupation, since the Occupying Power exercises a degree of control over the territory concerned that is sufficient to bring individuals present there within its jurisdiction.[32] While the provisions on non-discrimination are not listed among the non-derogable rights in Article 4 of the ICCPR, they are considered to be of such a nature. Article 4 requires that measures of derogation must not involve discrimination and must comply with other international obligations of the State concerned[33] – in a context of occupation, this includes IHL rules on equality of treatment and the prohibition of adverse distinction. The UN Human Rights Committee has also confirmed the non-derogability of guarantees of non-discrimination under the ICCPR in its General Comment 29, in which it observed that

> there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances. In particular, this provision of article 4, paragraph 1, must be complied with if any distinctions between persons are made when resorting to measures that derogate from the Covenant.[34]

The most important guarantees of non-discrimination are found in Articles 2 (accessory prohibition of discrimination) and 26 (equality before the law, equal protection of the law and general prohibition of discrimination by an autonomous rule) of the ICCPR.

c. General pronouncements on the interplay between IHL and human rights, and their relevance for the rules on non-discrimination

There are different theories on the relationship between IHL and human rights, such as separation, convergence, confluence, complementarity and cross-fertilization.[35] According to the International Court of Justice (ICJ),

30 See above note 13.

31 Bertrand Ramcharan, "Equality and Non-Discrimination", in Louis Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981, p. 250.

32 See above notes 11 and 12.

33 ICCPR, above note 13, Art. 4(1).

34 Human Rights Committee, General Comment No. 29, "Article 4: Derogations during a State of Emergency", 31 August 2001, para. 8. See also D. Moeckli, "Anti-Terrorism Laws, Terrorist Profiling, and the Right to Non-Discrimination", above note 21, p. 603.

35 For a detailed analysis of those theories, see e.g. Kubo Mačák, "The Role of International Human Rights Law in the Interpretation of the Fourth Geneva Convention", *Israel Yearbook on Human Rights*, Vol. 52, 2002; Nancie Prud'homme, "Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?", *Israel Law Review*, Vol. 40, No. 2, 2007.

> as regards the relationship between international humanitarian law and human rights law, there are three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.[36]

With its approach in the Nuclear Weapons Advisory Opinion interpreting "arbitrary deprivation of life" under Article 6 of the ICCPR in light of applicable IHL rules on the conduct of hostilities,[37] the ICJ seems to support the complementarity of the two regimes, at least as far as inherently qualified rights are concerned – that is, non-absolute rights that require a degree of performance which is situation- and context-specific, and that can accommodate the exigencies of the situation and other pertinent factors. A similar stance has been taken by the Human Rights Committee with respect to the right to life and the right to liberty and security, by proposing that IHL rules and principles can provide guidance in determining whether deprivation of life or liberty is to be deemed "arbitrary".[38] Some of the regional courts have followed the same path.[39]

International courts and tribunals have not clarified the exact interplay between IHL and human rights rules on non-discrimination, even if in some contexts they have insisted on the complementary nature of those provisions and have found violations in instances where the Occupying Power failed to fulfil its remedial role of tackling discrimination in the occupied territory.[40] Nevertheless, a few important observations can be made by drawing from the pronouncements made in respect of the right to life and right to liberty and security. Firstly, the notion of discrimination and the corresponding IHL and human rights rules are inherently qualified, and therefore, in domains where the two sets of rules overlap, there is room for harmonious interpretation whereby one set of rules can help interpret the other. Secondly, given that some of the most important rules on non-discrimination are accessory in nature, it would be difficult, if not impossible, to determine a single scheme through which IHL and human rights rules on non-discrimination interact. In other words, since such non-discrimination rules attach to other substantive rules that are significantly different (in that some are exclusively regulated by IHL, others are exclusively regulated under human rights law, and the rest are regulated by both), they reflect the nature of those rules with respect to the relationship. Consequently, the task of determining a single and general mode of interplay between IHL and human rights guarantees is difficult, and determination has to be made on a case-by-case basis, taking into consideration the practice area, ground of discrimination, and relevant rules of IHL and human rights on non-discrimi-

36 Wall Advisory Opinion, above note 11, para. 106; ICJ, *Armed Activities*, above note 11, para. 216.

37 Nuclear Weapons Advisory Opinion, above note 11, para. 25.

38 Human Rights Committee, General Comment No. 35, "Article 9 (Liberty and Security of Person)", 16 December 2014, para. 66; Human Rights Committee, General Comment No. 36, "Article 6 on the Right to Life", 3 September 2019, para. 64.

39 See, e.g., ECtHR, *Hassan*, above note 12, para. 107.

40 ICJ, *Armed Activities*, above note 11, para. 209.

nation. In the following section, this article will focus on the interplay between relevant IHL and human rights rules that are pertinent to the question at stake.

C. DEBATE: CAN THE OCCUPYING POWER DISCRIMINATE AGAINST PERSONS LIVING IN THE OCCUPIED TERRITORY ON THE BASIS OF NATIONALITY?

The subject of this article is the question of whether the Occupying Power discriminates based on nationality if it accords different standards of treatment to its own and enemy nationals who reside in the occupied territory, whereby the treatment accorded to the latter is unfavourable or less favourable in comparison to the situation of the former category of persons. A few examples of unfavourable treatment involving such a differentiation are deportation, destruction or confiscation of property or other impediment to the enjoyment of related property rights, failure to protect certain segments of the population from private persons and other threats, failure to provide proper administration of the occupied territory and ensure civil life for all, and, as one of the most stressing issues in light of the recent COVID-19 pandemic, failure to manage the spread of disease and to distribute vaccines to the population.

The debate has to do with the non-discrimination rule contained in Article 27 of GC IV, which does not mention nationality among the other listed grounds of discrimination and thereby leaves room to argue that that law applicable to occupation is not concerned with discrimination on the ground of nationality. Importantly, even when discrimination is not established under the black letter of the law, the treatment that underlies alleged discrimination could still be detrimental to the persons affected and, if it falls within the scope of relevant rules, could amount to a violation of IHL. On the other hand, in such instances the treatment will not bring about the legal (and political) consequences attached to the notion of discrimination.

1. ARTICLE 27 OF GENEVA CONVENTION IV AND ITS PERCEIVED LIMITS IN ADDRESSING DISCRIMINATION BASED ON NATIONALITY

Article 27 of GC IV is different from all the other provisions of the four Geneva Conventions dealing with non-discrimination – with the only other exception of common Article 3 – in not mentioning "nationality" among the listed grounds of discrimination. Importantly, Article 13 of GC IV *does* include it.

The absence of reference to "nationality" is not due to the drafters simply forgetting to include it. In fact, the ground was initially listed but was deliberately deleted during the negotiations at the 1949 Diplomatic Conference. The reason for the deletion was that the delegations found certain measures envisaged for "enemy aliens" by IHL to be precisely based on nationality.[41] For the same reason, the ICRC Commentary on GC IV suggests that nationality cannot be read under "any other similar criteria" under Article 27.[42]

The clarifications derived from the drafting history of the provision confirm that the *sole* intention of the rule on non-discrimination not mentioning "nationality" is to accommodate the prohibition with the status-based protection provided by the vast majority of rules contained in GC IV. The fear seems to have been that the inclusion of the term would give rise to claims of discrimination or otherwise create confusion that would dilute the protections of the Convention – and this is a relevant consideration. The non-discrimination clause under Article 27 of GC IV operates mainly within a closed category of persons, namely protected persons as defined in Article 4. As such, it does not seek to put an Occupying Power's own nationals and protected persons on an equal footing. References to nationality in the provision would not in themselves "open up" the closed category of persons.

While the idea of maintaining the structure of GC IV and its status-based protection is sound, the execution is somewhat problematic in terms of legal drafting. Article 4 of GC IV is sufficient to tackle the issue, and the extra effort of the drafters seems to have created a legal problem. If Article 27 of GC IV were not concerned with *any* discrimination on the basis of "nationality", it would mean that the Occupying Power is not prohibited under IHL from drawing unjustified distinctions between different categories of protected persons, namely between third-country nationals who are entitled to protected person status, stateless persons, and nationals of the occupied State. Such a reading of the law clearly contradicts the object and purpose of the provision. Instead, it is suggested that Article 27 must be understood – as a matter of principle – to prohibit discrimination based on nationality and should not automatically be dismissed on the premise explained above. This would allow a substantive analysis to be made on a case-by-case basis as to whether a differentiation between the inhabitants of the occupied territory who are protected persons based on nationality amounts to discrimination. The inherently qualified nature of the notion of discrimination would, in any event, accommodate the legitimate considerations mentioned above – namely, in the process of determining if for the differentiation at stake the enemy and third-State nationals or stateless residents of the occupied territory were in a substantively similar situation, and whether such differentiation had a reasonable and objective justification.

41 *Final Record*, above note 19, p. 641. See also ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (2016 Commentary on GC I), p. 200 fn. 333.

42 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, p. 206. In this respect the Commentary on Article 27 of GC IV takes a different stance than with respect to the same issue under common Article 3. According to the ICRC's initial Commentary on GC I, despite the decision of the Diplomatic Conference to omit this criterion in certain provisions of the Geneva Conventions on the prohibition of adverse distinction, nationality should be still read as a subsumed protected ground under the category "any similar criteria", at least as far as common Article 3 is concerned: see Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, p. 56. This position was reaffirmed in the ICRC's 2016 Commentary on GC I, above note 40, p. 200, para. 572.

2. THE IMPACT OF ARTICLE 27 OF GENEVA CONVENTION IV ON OTHER INTERNATIONAL LAW RULES THAT ARE CONCERNED WITH INSTANCES OF UNJUST DIFFERENTIATIONS BETWEEN OWN AND ENEMY NATIONALS

In light of its object and purpose of prohibiting discrimination and ensuring treatment with the same consideration of *protected persons*, Article 27 is a specific rule. Differentiations between own nationals and protected persons are not covered by the material scope of this rule, and therefore, it has no direct relevance in assessing claims about practices amounting to discrimination. Nevertheless, the Occupying Power might be inclined to invoke Article 27 of GC IV in order to automatically dismiss claims concerning discrimination based on nationality when it comes to differentiations between own and enemy nationals in the occupied territory. This section seeks to clarify the relationship between the rules affirmed in this provision and other relevant provisions of IHL and human rights instruments.

As far as IHL instruments are concerned, non-discrimination rules contained in Article 13 of GC IV and Article 75 of AP I – both of which mention nationality as a protected ground[43] – are broader in their respective personal and material scopes, and are not limited to distinctions within the "closed category" of protected persons. Admittedly, these are accessory rules, as explained above. Nevertheless, as far as discrimination based on nationality and involving difference in treatment of own and other nationals – including protected persons – is concerned, rules contained in these provisions will apply. And they do cover a wide range of areas, including fundamental guarantees of all persons. For example, Article 13, read in conjunction with Article 17 of GC IV, would prohibit drawing arbitrary differentiations between own and enemy nationals in the evacuation of persons from besieged or encircled areas. Similarly, Article 75 of AP I would require humane treatment and fundamental guarantees to be accorded to all persons irrespective of "national ... origin", and would prohibit as discrimination all unfavourable treatment – including collective punishment – of persons compared to the treatment of persons with different nationality (including own, enemy or third-country nationals) that has no reasonable and objective justification.

As for the interplay between Article 27 of GC IV and human rights instruments, in particular the virtually all-encompassing autonomous prohibition against discrimination contained in Article 26 of the ICCPR, the relationship is not singular.

Discrimination among the closed category of protected persons in the occupied territory belongs to the category issues that fall within the personal and material scopes of *both* Article 27 of GC IV and Article 26 of the ICCPR, the former being the more specific rule and the latter being the more general one. In this respect, and following the approach of international courts and tribunals, the more special rule can help interpret and give content to the latter, and the inherently qualified nature of the notion of discrimination will allow this. However, as explained above, this issue is not at the heart of the question addressed by this article.

43 Article 75 of AP I mentions "national origin", which is not identical but a related notion: see 2016 Commentary on GC I, above note 40, p. 199 fn. 330; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, p. 259.

With regard to differentiations between own nationals and protected persons residing in the occupied territory, if Article 27 of GC IV is not applicable, it is not capable of influencing the analysis under the relevant provisions of the ICCPR, including its Article 26. While technically such matters are not *exclusively* governed by human rights law, at least as far as differentiations covered by the accessory rules contained in Article 13 of GC IV and Article 75 of AP I are concerned,[44] Article 27 of GC IV will not suffice to dismiss claims about the applicability and relevance of human rights provisions that have no corresponding limitation regarding the personal and material scope of the rule.

D. WHY INSIST ON DISCRIMINATION BASED ON NATIONALITY, AND HOW TO DRAW THE LINE BETWEEN THESE AND OTHER DIFFERENTIATIONS THAT ARE PERMITTED?

Without pronouncing on the legality of the situation under *jus ad bellum*, IHL regulates the behaviour of the Occupying Power in the occupied territory under the premise that the factual and legal situation of the occupation is temporary. It further provides additional legal safeguards that seek to maintain the *status quo* which existed prior to the commencement of the occupation. Among other things, it recognizes as void, for the purposes of the protections that IHL provides for the inhabitants of the occupied territory, any *de facto* or *de jure* annexation of the territory, and it prohibits demographic changes in the occupied territory.[45] While it is expected that the Occupying Power will be confronted with its own nationals in the occupied territory, IHL does not presuppose that the concentration of nationals of the Occupying Power will be so significant as to give rise to humanitarian concerns in respect of differentiations between own and enemy nationals. Such differentiations will become challenging from the humanitarian and legal standpoint precisely where the Occupying Power has failed to comply with the above-mentioned obligations.

The interrelatedness of discrimination and the Occupying Power's lack of respect for the prohibition against annexation and demographic changes in the occupied territory is significant in that it can have a spiralling effect, ultimately undermining the protection of the inhabitants of the occupied territory. Firstly, the scarcity of resources in the occupied territory – be it in housing, property, employment, health care, or other services or goods – would mean that whatever is given to own nationals would be taken away or diverted from protected persons. Secondly, the discontent tied to such distribution of resources or changing of the demographic of the occupied territory in disregard of international law by the Occupying Power is likely to aggravate the security situation on the ground, giving the factual and legal prerogative to the Occupying Power to use more restrictive measures. It would be difficult to ignore

44 In any event, save for their accessory nature as explained above, Article 13 of GC IV and Article 75 of AP I do not deal with discrimination in a substantively different manner to human rights instruments, including Article 26 of the ICCPR.

45 GC IV, Arts 47 and 49 respectively.

the fact that the use of such prerogatives to the detriment of protected persons ultimately serves the purpose of maintaining the continued breach of the IHL violation of allowing own nationals to reside in the occupied territory.

Lack of resources and the security and safety of others are commonly deemed to be legitimate aims that can render differentiations non-adverse, provided that they are proportionate. In such situations, however, a systematic reading of international law would require that the Occupying Power not be allowed to rely on factors that emanate from or are closely connected to its continued breach of international obligations – namely, to alter the *status quo* or to make permanent demographic changes in the occupied territory. It is suggested that in such instances, not only must nationality *not* be dismissed as a ground of discrimination under IHL and human rights, but it must instead be seen as a suspect classification that necessitates an even higher, if not the highest, standard of scrutiny for determining whether the differentiation between persons has reasonable and objective justification. This would mean that justifications proposed by the Occupying Power to rebut claims about discrimination must be particularly strong and convincing.

E. CONCLUSION

This article has addressed claims about discrimination based on nationality in the Occupying Power's treatment of persons in the occupied territory. It has provided an overview of the applicable international law framework by focusing on IHL and human rights guarantees of non-discrimination and their interplay. Having analyzed the specificity of relevant provisions of key instruments and their interplay, the article has concluded that the merit of such claims cannot be dismissed on the premise that certain rules of IHL do not govern distinctions drawn between own and enemy nationals in the occupied territory. Instead, the determination has to be made on a case-by-case basis, and the reasonable and objective nature of justifications, or lack thereof, must be assessed in light of legal and factual realities pertaining on the ground. At the same time, the determination of whether the differentiation at stake serves a legitimate purpose must take into account, among other aspects, the compatibility of such an aim with general international law. Differentiations between own and enemy nationals, where protected persons are treated unfavourably in connection with the Occupying Power's effort to maintain or facilitate a continued breach of an IHL obligation involving demographic changes in the occupied territory, cannot be deemed legitimate; if coupled with other elements, such practices will amount to discrimination.

Arguments based on a narrow reading of Article 27 of GC IV, which seek to transpose the logic of the provision to more general rules on non-discrimination applicable to occupation, are not grounded in law – and besides, such arguments are not sustainable. Even if the claims regarding discrimination based on nationality were to be readily dismissed, since in such contexts other characteristics, such as ethnicity, religion, culture or political opinion, often appear as the dividing factor between the populations at stake, comparable claims can easily be formulated on those grounds in order to engage the responsibility of the Occupying Power for the same practices, and the analysis would, in any event, need to be made on a case-by-case basis.

Lastly, this article has mainly dealt with the interplay between IHL and human rights guarantees under the relevant instruments, since the discussion on the interplay primarily arises in respect of treaty regimes. Nevertheless, it is suggested that the conclusions drawn from this analysis should be deemed to be fully aligned with the relevant customary rule and general principle of non-discrimination, since these do not establish two distinct (IHL and human rights) standards of performance for the same act occurring in a given context or situation,[46] *in casu* in the treatment of persons in the context of occupation.

46 Marco Sassòli, "The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts", in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law: Pas de Deux*, Oxford University Press, Oxford, 2011, p. 72.

9. NON-DISCRIMINATION – ENABLING HUMAN RIGHTS IN ALGORITHMIC DECISION MAKING

Dominika Iwan-Sojka[47]

A. INTRODUCTION

More and more examples are now arising that reveal various negative impacts of tools driven by algorithmic decision making (ADM) on the prohibition of discrimination on certain protected grounds, such as race or sex. These sources of discrimination include, for example, data collection, data generation, system design, the origin and scope of training data, biases of developers and the structure and implementation of a system. The amplification of algorithmic biases results from the under-representation of non-dominant groups, including women, in those sectors responsible for developing ADM. This can perhaps most clearly be seen in the predictive policing that has proved to exacerbate existing racial inequalities in the policing system of the United States. ADM systems (like voice recognition) challenge equality in the area of language, since they operate, among other things, on sociolinguistics. Additionally, a United Nations Special Rapporteur on freedom of religion or belief, Ahmed Shaheed has indicated that 'the current age is one of unprecedented opportunity for human expression and interaction driven by unparalleled human mobility and developments in information and communication technologies'.[48] At the same time, the use of tools such as facial recognition risks reinforcing societal prejudices against the vulnerable. These tools, primarily designed to combat stigmatization, are not guaranteed to be free from human bias. All these examples make technology a tool designed to strengthen the domination of a privileged group, leading to the exclusion of a non-dominant one.

On the one hand, big technology companies operate in almost every area of human rights, from medical assistance, education, social benefits, digital life and elections to surveillance, justice, immigration and detention. For example, Prometea software is used in Venezuela to automate judicial decision making in simpler cases, by proposing which complaint is to be heard by the Constitutional Court. The list of super platforms includes Microsoft, Apple, Amazon, Google, Facebook, Tencent and Alibaba, with a significant number of them representing values of the Global North.[49] On the other hand, it has finally been noticed that these companies remain in 'a virtually human rights-free zone', mainly because any regulation is considered to be an enemy of progress.[50]

The consequences of ADM deployment can be addressed from the perspectives of ethics and of human rights. Ethics depends on the specific situation within states, and even within state regions. Due to its contextual nature, it cannot and does not have to be universally preprogrammed into ADM systems. Unlike ethics, human rights law offers a binding, universal and neutral paradigm[51] for effectively addressing technology's civil, political, social, cultural and economic consequences in order to achieve goals in a more sustainable but pragmatic way. Governments, decision makers, leaders, civil society and businesses, while performing their duties and responsibilities, should consider human rights to find principled solutions to the complexities of the modern world.

For the purposes of this paper, ADM is defined as an output of a computational procedure that uses computer code in instructions (an algorithm) to translate data into a specific outcome.[52] ADM systems differ in autonomy, and sometimes the autonomy is reduced to delivering an assessment of input data. ADM can be based on traditional statistical techniques or machine-learning algorithms. Machine learning is a process by which algorithms are trained to improve performance over time, and the process is possible thanks to increased access to data.[53]

The paper consists of three parts. Firstly, it presents the significance of the prohibition of discrimination for ADM systems and analyses fundamental causes of discriminatory algorithms. Then, it establishes how ADM impacts the four chosen grounds of discrimination, namely race, gender, religion and language. Finally, it includes recommendations concerning discriminatory ADM that relate to states

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48 Report of the Special Rapporteur on Freedom of Religion or Belief, Ahmed Shaheed, UN doc A/HRC/40/58, 5 March 2019, §4.

49 C. Arun, 'AI and the Global South: Designing for Other Worlds', in D.M. Dubler, F. Pasquale and S. Das (eds), *The Oxford Handbook of Ethics of AI*, Oxford University Press, 2020.

50 Report of the Special Rapporteur on Extreme Poverty and Human Rights, UN Doc A/74/493, 11 October 2019, §35.

51 Although human rights, as reflecting universal values, are applicable to all human beings, implementation of international human rights law frequently depends on cultural and political relativist arguments. See M. Lower, 'Can and Should Human Rights Be Universal?', *E-International Relations*, 1 December 2013, https://www.e-ir.info/2013/12/01/can-and-should-human-rights-be-universal (last accessed 8 March 2023).

52 F. J. Zuiderveen Borgesius, 'Strengthening Legal Protection Against Discrimination by Algorithms and Artificial Intelligence', 24 *The International Journal of Human Rights* 10 (2020) 1573.

53 V. Marda, 'Introduction', in Association for Progressive Communications (APC), Article 19 and Swedish International Development Cooperation Agency (SIDA), *Global Information Society Watch 2019: Artificial Intelligence: Human Rights, Social Justice and Development*, 2019, p 10, https://giswatch.org/sites/default/files/gisw2019_artificial_intelligence.pdf (last accessed 8 March 2023).

and private entities developing or deploying ADM tools. The methodology used was desk research, supported by a theoretical approach, into human rights treaties and the jurisprudence of human rights bodies, demonstrating the role of non-discrimination in an increasing digitalized world. Additionally, the comparative method led to differentiation of discriminatory impacts of state and business uses of ADM. It is assumed that when the principle of non-discrimination is given a central role in a digitalized world, it contributes to enabling other human rights while developing new tools, as well as to creating inclusive and equal technology, both digitally and in a tangible reality. In this sense, developers (private and public) and users of ADM systems should not only address the question of what a particular system does, but, first and foremost, why they create or use a particular system. A proactive approach towards any technology contributes to an increase in awareness about the purposes and functioning of the system, and subsequently to human rights implementation.

B. HOW ADM COULD DISCRIMINATE AND WHY IT MATTERS

The principle of non-discrimination remains at the heart of international human rights law. Its interpretation in the human rights framework is twofold. Firstly, it acts as a general principle in the enjoyment of human rights, and secondly, it is intertwined with the right to equality before the law and equal protection of the law. For many years, the accepted interpretation of the prohibition of discrimination indicated that the prohibition could not be individually violated, and that discriminatory factors occurred in conjunction with the violation of another human right only. Nowadays, the prohibition of discrimination is considered an enabler of other human rights. This means that a violation of this prohibition affects or aggravates how an individual is treated in all spheres of their social interaction, such as education, employment, civil service and the administration of justice. Furthermore, the prohibition of discrimination is in some instances referred to as a customary or even peremptory rule of international law from which no derogation is permitted.[54]

Therefore, a fundamental safeguard against new technologies, and against ADM in particular, may be found in anti-discrimination law. However, legal research is mostly centred on qualitative (non-numerical) methods'[55] Anti-discrimination law may be deemed to be useless in addressing the quantitative (numerical) methods of ADM.[56] Subsequently, digital welfare states should care more about the vulnerable, who are forced to forgo other human rights, including non-discrimination, in order to receive social benefits. The private entities involved in delivering ADM services have tended to pay too little attention to weighing up commercial interests and human rights implications.[57] Among scholars, discrimination resulting from ADM has been labelled a 'technological redlining' that relates directly to digital data discrimination and longstanding practices of discrimination far preceding the rise of the Internet.[58] It may seem that human rights cannot be enforced in new technologies, and only a systematic change or a total prohibition of ADM systems would leave human rights untouched.

States bear the duty to respect, protect and fulfil the right to non-discrimination. International human rights law constitutes an important tool for addressing domestic cases of discrimination. Human rights treaties not only provide for states' duties to respect, protect and fulfil human rights,[59] but directly deal with relations between the public and private spheres. Accordingly, non-discrimination clauses oblige states not to enact any laws or procedures that discriminate against a person according to any of the protected characteristics (a negative duty to respect[60]). States must further take affirmative action to prevent and react to discriminatory acts by third parties (both a negative and positive duty to protect). Finally, states must provide everyone with access (allocate resources) to their human rights (a positive duty to fulfil).[61] Subsequently, every state obligation (to respect, protect and fulfil) concerning non-discrimination applies to ADM systems that are used by the state, or under whose jurisdiction the private entity develops or deploys any ADM systems. Non-compliance with any of these obligations gives rise to state responsibility, which can be invoked directly by individuals or another state before universal or regional human rights bodies. Nevertheless, a significant part of an effective implementation of international human rights law lies with public authorities, including the judiciary, in the context of the private sector. When this happens, it contributes to addressing the discriminatory impacts of ADM, particularly by states where no international court or tribunal has jurisdiction to review human rights compliance.

The first and foremost challenge of ADM to non-discrimination relates to designers usually coming from the private sector and consequently facing hardly any direct obligations regarding the system's compliance with human rights. Human rights

54 Inter-American Court of Human Rights, *Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos n° 14: Igualdad y no Discriminación*, 2019, p 6. https://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo14.pdf (last accessed 8 March 2023).

55 Wing Hong Chui, 'Quantitative Legal Research, in M. McConville and W. H. Chui, *Research Methods for Law*, 2nd edn, Edinburgh University Press, 2017, p 49.

56 A. Rieke, M. Bogen and D.G. Robinson, *Public Scrutiny of Automated Decisions: Early Lessons and Emerging Methods*, Upturn and Omidyar Network, 2018, p 25, https://luminategroup.com/storage/231/Public-Scrutiny-of-Automated-Decisions.pdf (last accessed 8 March 2023).

57 M. Isaac, 'Facebook's Decisions Were "Setbacks for Civil Rights," Audit Finds', *The New York Times*, 8 July 2020, https://www.nytimes.com/2020/07/08/technology/facebook-civil-rights-audit.html; M. Walker, 'Upheaval at Google Signals Pushback Against Biased Algorithms and Unaccountable AI', *The Conversation*, 10 December 2020, http://theconversation.com/upheaval-at-google-signals-pushback-against-biased-algorithms-and-unaccountable-ai-151768 (last accessed 8 March 2023).

58 E. Bulut, 'Interview with Safiya U. Noble: Algorithms of Oppression, Gender and Race', 5 *Moment Journal* 2 (2018) 295, https://dergipark.org.tr/en/download/article-file/653368 (last accessed 8 March 2023).

59 Human Rights Committee (HRCttee), General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN doc CCPR/C/21/Rev.1/Add.13, 26 May 2004.

60 Understood as a universal duty to do no harm, which requires individuals and institutions not to harm the human rights of others.

61 Committee on Economic, Social and Cultural Rights, General Comment 12: The Right to Adequate Food (Art. 11), UN doc E/C.12/1999/5, 12 May 1999, §15.

treaties are binding only on state parties to a treaty, while horizontal human rights compliance applies where a state takes effective steps in its domestic legislation. Similarly, the UN Guiding Principles on Business and Human Rights (UNGPs) underpin the state's duty to protect human rights, including non-discrimination.[62] This is followed by an obligation to prevent violations from other entities;[63] so domestic judicial systems remain at the frontline of these efforts.[64] An interpretative guide to the UNGPs indicates that, by providing a blueprint for businesses to manage adverse impacts on human rights, the UNGPs have gained significant support from states, business and civil society.[65] However, the human rights framework in relation to corporate responsibility consists also of the business responsibility to respect human rights. This responsibility framework presents businesses with the need to consider the adverse human rights impacts of their activities, avoid breaching human rights, as well as address effective remedies for adverse human rights impacts. The corporate responsibility to respect human rights is focused on three pillars – policy commitment, due diligence and remediation.[66] It also covers the prohibition of discrimination, as set out, for example, in Article 26 of the International Covenant on Civil and Political Rights (ICCPR).[67] The activities of a company involving ADM systems can, and do, interfere with this prohibition in relation to the company's employees, partners and, most importantly, customers. This is why it is crucial to implement the UNGPs in relation to states' obligations, business responsibility and remediation. Recommendations for the private sector are therefore inherently linked to the UNGPs, and particularly with the Business and Human Rights in Technology Project (B-Tech Project).[68] The Project applies the Guiding Principles to digital technologies and stresses the role of preventive human rights due diligence in designing and using new products.

Scholars distinguish several causes for ADM-related discrimination. Researchers

62 Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights. Implementing the United Nations 'Protect, Respect and Remedy' Framework*, 2011, GuidingPrinciplesBusinessHR_EN.pdf (ohchr.org) (last accessed 8 March 2023).

63 This obligation reflects the obligation set forth by Art 2(1) of the International Covenant on Civil and Political Rights (ICCPR), according to which a state shall ensure to all individuals the respect for their human rights.

64 European Commission for Democracy Through Law (Venice Commission), Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts, 8 December 2014, §32, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)036-e (last accessed 8 March 2023); OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, 2012, p 10, https://www.un-ilibrary.org/content/books/9789210541176/read (last accessed 8 March 2023).

65 OHCHR, *The Corporate Responsibility to Respect Human Rights*, supra fn 18, p 2.

66 Castan Centre for Human Rights Law, Monash University, *Human Rights Translated 2.0: A Business Reference Guide*, 2017, p 3, https://jmarketing.agency/monash/Monash_HRT_Final.pdf (last accessed 8 March 2023).

67 Ibid, p 75.

68 OHCHR, *UN Human Rights Business and Human Rights in Technology Project (B-Tech): Applying the UN Guiding Principles on Business and Human Rights to Digital Technologies*, November 2019, https://www.ohchr.org/Documents/Issues/Business/B-Tech/B_Tech_Project_revised_scoping_final.pdf (last accessed 8 March 2023).

from the NoBIAS project search for socio-technical reasons for algorithmic discrimination at the level of data generation, data collection and institutional bias.[69] ADM systems rely on a large amount of data generated by the user or collected by the system itself. This 'dirty data' problem deals with data intentionally manipulated or distorted by biases (known as sampling bias), which leads or can lead to discrimination.[70] Therefore, one explanation for discriminatory algorithms is that ADM systems originate in a discriminatory world and exacerbate existing inequalities. At the other end of the spectrum is an algorithmic failure to account for vulnerabilities, including language, race, religion and gender.[71] Naturally, there is less information about minority groups in input data, and the system can only make assumptions based on the majority. This is due to under-representation in data collection, meaning that there are individuals in ADM systems who are voiceless (for example, children or adults in villages from the Global South) and under-sampled.[72] Consequently, these systems are misaligned. In this sense, ADM reinforces discrimination because the system simply reproduces the existing data. Discrimination further reflects institutional inequalities when an institution operates in a particular way in which some groups are being disadvantaged.[73] Some discriminatory practices result from inadequate responses at the level of decision making, but certain inequalities originate in institutional discrimination, which need not be intentional and explicit. Consequently, data-mining processes are not necessarily neutral and become an artefact of discriminatory practices existing in societies.[74] All these discriminatory causes can be reflected in sensitive data (discriminatory grounds), poor representativeness of data or data modalities (data sources).[75] The UN Special Rapporteur on freedom of opinion and expression, in a 2018 report, divides human-specific data into objective features (e.g. visa status or criminal history) and subjective assessments (e.g. ethnicity, age or religion), both of which are considered bias-prone.[76] The reason for bias is that algorithmic data evaluation usually identifies correlation rather than causation.[77]

69 E. Ntoutsi, P. Fafalios, U. Gadiraju et al, 'Bias in Data-Driven Artificial Intelligence Systems – An Introductory Survey', 10 *Wiley Interdisciplinary Reviews: Data Mining and Knowledge Discovery* 3 (2020) 3, https://wires.onlinelibrary.wiley.com/doi/epdf/10.1002/widm.1356 (last accessed 8 March 2023).

70 Opposing data fundamentalism, K. Crawford notes that data is not objective because humans are responsible for designing it. K. Crawford, J. Schultz and R. Richardson, 'Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice', 94 *New York University Law Review Online* (2019) 195–96.

71 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, UN doc A/73/348, 29 August 2018, §37.

72 This is a mis-sampling problem which assumes that one size fits none, and not everybody is the same. As a consequence, developers marginalize people from certain communities.

73 Ntoutsi, Fafalios, Gadiraju et al, 'Bias in Data-Driven Artificial Intelligence Systems', supra fn 23, 3–4.

74 S. Barocas and A. D. Selbst, 'Big Data's Disparate Impact', 104 *California Law Review* 3 (2016) 674.

75 Ntoutsi, Fafalios, Gadiraju et al, 'Bias in Data-Driven Artificial Intelligence Systems', supra fn 23, 4–5.

76 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, supra fn 25, §6.

77 Ibid, §7.

Solon Barocas and Andrew Selbst further correlate unintentional discrimination with the data-mining process.[78] Data mining is a form of statistical operation aimed at providing a rationale for distinguishing between individuals based on their statistical similarities, hence being a form of (not necessarily unlawful) differential treatment. The result of data mining is discovering a model, based on correlation among the data, that then allows for processing and speeding up the ADM. Existing laws and strategies propose how to mitigate discriminatory risks at the design level, but little attention has been paid to the origins of structural discrimination exacerbated in ADM because of data mining.[79] While target variables specify objectives of data-mining processes, class labels divide pieces of data into categories.[80] By defining expected objectives, data miners translate a problem into a computer-friendly question and grant a target variable with a specific value. The valuation is a subjective process that can unintentionally lead to systemic discrimination. Since data mining is trained by examples, the outcome of ADM depends on the quality of training data. It is also the case that training data may not necessarily cover a grey zone of big data, namely information on those who are less datafied (and consequently under-represented) due to living on the margins of data flow.[81] Furthermore, indirect and intersectional discrimination can frequently occur in redundant encodings that derive a protected characteristic from other data, because the latter is correlated with the protected ground.[82]

Discrimination in ADM need not be an outcome of the developer's biases (their will to discriminate) but can result from a lack of information.[83] Even if developers do not use protected characteristics deliberately, ADM systems can still have discriminatory effects if they use variables correlated with both the output variable and the variable for the protected category. Therefore, ADM systems themselves can produce a discriminatory outcome without any clear explanation for it. A system free from predictive bias may still cause indirect discrimination based on the way and environment in which it is used.[84] For example, Kate Crawford mentions Street Bump, which supported decisions on funding location for repairing public roads based on incidents reported via smartphone accelerometers. The result was that poorer areas with less smartphone access could have been excluded from road-repairing supply.[85] The Google Ad delivery system was the object of another experiment. It turned out that the system more frequently showed criminal

78 Barocas and Selbst, 'Big Data's Disparate Impact', supra fn 28, 694.

79 Barocas and Selbst 'Big Data's Disparate Impact', supra fn 28, 675.

80 Ibid, 678.

81 J. Lerman, 'Big Data and Its Exclusions', 66 *Stanford Law Review Online* (2013) 61.

82 M. Hardt, E. Price, N. Srebro, 'Equality of Opportunity in Supervised Learning', Advances in Neural Information Processing Systems 29 (2016) 1, *https://proceedings.neurips.cc/paper/2016/file/9d2682367c3935defcb1f9e247a97c0d-Paper.pdf* (last accessed 8 March 2023).

83 Barocas and Selbst 'Big Data's Disparate Impact', supra fn 28, 690.

84 A. Chouldechova, 'Fair Prediction With Disparate Impact: A Study of Bias in Recidivism Prediction Instruments', 5 *Big Data* 2 (2017) 153.

85 K. Crawford, 'The Hidden Biases in Big Data', *Harvard Business Review*, 1 April 2013, https://hbr.org/2013/04/the-hidden-biases-in-big-data.

history for black-identifying names than for white ones.[86] The research revealed that Google algorithms initially weighed all pieces of data the same, but, based on search history, the weightings changed over time.[87] Therefore, the structure of the ADM system can be discriminatory.

In anti-discrimination law concerning ADM, there are flaws in the definition of indirect discrimination and the burden of proof, which usually lies with the victim of the violation. The black box of ADM impedes this proof. At the moment, the data-governance approach lacks transparency and accountability,[88] whereas data sharing has become the major topic in the collective dimension of personal data protection and human rights. In this respect, Philip Dawson and Grace Abuhamad propose a twofold perspective on data governance, namely information fiduciaries (improving the accountability of data controllers) and data trusts (a flexible governance tool complementing the management of data rights from the data subjects' perspective).[89] The contemporary data-governance models grant individuals hardly any measure of control over their personal data. Therefore, the only possibility focuses on the consent-based approach towards data privacy (enabling the individual to either consent or decline to the conditions of delivering a product or service).[90] Data trusts aim at balancing data privacy and the need to share data. They enable the minimization of risks of scarcity of varied data in AI applications by setting up a fiduciary for the data providers. The new data governance models of data trusts encourage transparency and contribute to detecting data bias while sharing data,[91] while also being innovation-friendly by accounting for benefits of the public and private sectors.[92] The mis-sampling problem should be solved more globally by understanding that, before any invention, science has to decide which values it wants to adhere to and serve.

Nonetheless, algorithms can positively impact the burden of proof. Jon Kleinberg et al argue that proving discrimination will be more straightforward when ADM is

86 L. Sweeney, 'Discrimination in Online Ad Delivery', *arXiv preprint arXiv:1301.6822*, 28 January 2013, https://arxiv.org/ftp/arxiv/papers/1301/1301.6822.pdf (last accessed 8 March 2023) 34.

87 Ibid, 34.

88 P. Dawson and G. Abuhamad, 'Towards Data Governance That Empowers the Public', in APC, Article 19 and SIDA, *Global Information Society Watch 2019*, supra fn 7, p 14.

89 Ibid, p 15.

90 ElementAI and NESTA, *Data Trusts: A New Tool for Data Governance*, 2021, p 9, https://hello.elementai.com/rs/024-OAQ-547/images/Data_Trusts_EN_201914.pdf (last accessed 8 March 2023).

91 G. Zarkadakis, '"Data Trusts" Could Be the Key to Better AI', *Harvard Business Review*, 10 November 2020, https://hbr.org/2020/11/data-trusts-could-be-the-key-to-better-ai; K. Gloria, *Power & Progress in Algorithmic Bias*, Aspen Institute, July 2021, p 9, https://www.aspeninstitute.org/wp-content/uploads/2021/07/Power-Progress-in-Algorithmic-Bias-July-2021.pdf (last accessed 8 March 2023)."plainCitation":"Kristine Gloria, 'Power & Progress in Algorithmic Bias' (Aspen Institute 2021

92 Data trusts have been set forth in Canada's Digital Charter as well as the OECD AI Principles. OECD.AI, 'Fostering a Digital Ecosystem for AI (Principle 2.2)', https://oecd.ai/en/dashboards/ai-principles/P11 (last accessed 8 March 2023). They also have been proposed in the European Commission communication on the Data Governance Act. European Commission, Proposal for a Regulation of the European Parliament and of the Council on European Data Governance (Data Governance Act), 25 November 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020PC0767&from=EN (last accessed 8 March 2023). See also ElementAI and NESTA, *Data Trusts*, supra fn 44, p 12.

involved, assuming that detailed record-keeping requirements are introduced.[93] This requires storing all data given to training algorithms and, if necessary, making it available for proceedings. The examination would also require access to a screening rule that led to a particular outcome of an ADM system.[94]

C. GROUNDS FOR DISCRIMINATION IN AN ADM ENVIRONMENT

This section examines four grounds of discrimination, namely race, gender, religion and language. Whereas current literature on the subject focuses on race and gender issues, it is insufficient to limit state practice to the inclusion of women and racial minorities in the development and use of ADM. Religion and language equally broaden compliance with the principle of non-discrimination, with both of them allowing new technologies to be perceived from other (also inclusive) perspectives. These grounds are only exemplary and selected based on their repeated appearance in treaties. Although they are the four grounds primarily challenged by the development and deployment of ADM tools, the implications of ADM may be equally broadened to other grounds. Since the adoption of the UN Charter, the dynamics of international human rights law have led to differentiated protection against discrimination, including on other discriminatory grounds such as colour, political or other opinion, national or social origin, property, birth, etc.[95] However, the so-called constitutional treaty of the international community in Article 1(3) indicates the four grounds, all of which then appear in both universal and regional human rights treaties. Therefore, prohibiting discrimination on the basis of those four grounds constitutes a fundamental obligation imposed on all UN Member States.

1. RACE

Race is a social construct mystified by biological classifications to which other groups have attributed a significant meaning. Racial discrimination contributes to wider inequalities among minorities. Therefore, the importance of the prohibition of racial discrimination cannot be underestimated in ADM.

The International Law Commission's commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts of 2001 considers a prohibition of racial discrimination[96] to be a peremptory norm of international law,[97] as well as

93 J. Kleinberg, J. Ludwig, S. Mullainathan and C. R. Sunstein, 'Discrimination in the Age of Algorithms', 10 *Journal of Legal Analysis* (2019) 114.

94 Ibid,118.

95 HRCttee, CCPR General Comment No. 18: Non-Discrimination, 10 November 1989, §1.

96 The prohibition of racial discrimination usually appears together with the prohibition of apartheid. See Fourth Report on Peremptory Norms of General International Law (*jus cogens*) by Dire Tladi, Special Rapporteur, UN Doc A/CN.4/727, 31 January 2019, §91.

97 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries, *Yearbook of the International Law Commission*, *2001*, vol II, Part Two, commentary to Art 26, §5, p 85, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last accessed 8 March 2023).

an obligation *erga omnes*.[98] Pursuant to Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), racial discrimination means 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'.[99] The primary aim of prohibiting racial discrimination is to eliminate differences and make the law and society 'colour blind'.[100]

However, the 'colour-blind' state approach to regulation of ADM would be ineffective as it would not account for the marginalization of racial minorities and would exacerbate existing inequalities. Global lockdowns, aimed at preventing the COVID-19 pandemic, have amplified indirect discriminatory practices against racial and ethnic groups, mainly because of their exclusion from access to digital technologies.[101] Discrimination resulting from 'colour-blind' ADM systems was revealed in systems used by US hospitals to qualify a patient's eligibility for specialized programmes. Through unintended but systematic discrimination, the systems had an adverse impact on the right to health because decisions were based on a patient's healthcare costs.[102] As a result, black patients were assigned lower risk scores, which gave them inadequate access to the intervention programmes.[103] Not surprisingly, developers initially considered the ADM system to be race-blind, since it did not collect data relating to race at all. However, it was still discriminatory[104] because the actual reason for granting lower scores to black patients was that they usually spend less on healthcare and the system relied on these data, demonstrating that racial discrimination against patients has broader historical and social roots.[105]

98 The International Court of Justice, in the *Barcelona Traction* judgment did not assess the prohibition of racial discrimination as peremptory. However, it referred to the *erga omnes* character of the obligation. ICJ, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Second Phase, Judgment, 5 February 1970, §34. In the *South West Africa* advisory opinion, the ICJ described the violation of the prohibition of discrimination as a denial of fundamental human rights and a flagrant violation of the purposes and principles of the UN Charter. ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, §131). The differentiation between peremptory and *erga omnes* rules is that *jus cogens* substantiate the content, while *erga omnes* obligations pinpoint addressees of the obligation to cooperate in eliminating the legal consequences of breaches of the prohibition of racial discrimination. See also Fourth Report on Peremptory Norms of General International Law, supra fn 50, §92.

99 International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965.

100 W. Kälin and J. Künzli, *The Law of International Human Rights Protection*, Oxford University Press, 2019, p 355.

101 Racial Discrimination and Emerging Digital Technologies: A Human Rights Analysis: Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, UN doc A/HRC/44/57, 18 June 2020, §5.

102 S. Gupta, 'Bias in a Common Healthcare Algorithm Disproportionately Hurts Black Patients', *ScienceNews*, 24 October 2019, https://www.sciencenews.org/article/bias-common-health-care-algorithm-hurts-black-patients.

103 Z. Obermeyer, B. Powers, C. Vogeli and S. Mullainathan, 'Dissecting Racial Bias in an Algorithm Used to Manage the Health of Populations', 366 *Science* 6464 (2019).

104 Ibid.

105 Unequal access to medical services, lack of trust towards healthcare providers and longstanding denial of treatment are among the reasons for that disparity. See Gupta, 'Bias in a Common Healthcare Algorithm', supra fn 56.

Focusing on design while searching for reasons for errors in ADM does not suffice in complying with the prohibition of racial discrimination. This is because related racial discrimination has long been rooted in society, policies and the economy, that is, outside the system.[106] Consequently, the outcomes of ADM reflect what has been longstanding practice in societies. The design and use of ADM can, directly and indirectly, discriminate against race and deprive individuals of access to a range of human rights.[107] For example, caste discrimination against the Dalits in India prioritized this community (especially women) in performing sanitation services. The introduction of a smart sanitation system would lead to mass job losses and exacerbate existing social inequalities between castes.[108] London's police intelligence system uses a risk-assessment tool – Gangs Violence Matrix – to identify and share data about suspected gang members.[109] Data sharing engages other government agencies, such as immigration agencies, job centres, housing associations and educational institutions. In 2016, it was revealed that 78 percent of people labelled as 'gang nominals' were black men.[110] Through race discrimination, the tool further interferes with the right to privacy and plenty of social and economic rights of these individuals. These are only a few examples of how ADM systems are being deployed in the field and severely impacting certain groups.

2. GENDER

Until recently, classifying persons in a binary way as being either female or male was never questioned,[111] whereas gender[112] is probably the most frequent discriminatory factor in ADM systems. Also, women and girls are exposed to the risk of abuses in spaces enabled by Artificial Intelligence (AI) – inclusion, privacy, safety

106 Racial Discrimination and Emerging Digital Technologies, supra fn 55, §14.

107 Ibid, §26.

108 Ibid. See also A. Finlay, 'Country and Regional Reports Introduction', in APC, Article 19 and SIDA, *Global Information Society Watch 2019*, supra fn 7, p 57.

109 Amnesty International, *Trapped in the Matrix: Secrecy, Stigma, and Bias in the Met's Gangs Database*, May 2018, p 6, https://www.amnesty.org.uk/files/reports/Trapped%20in%20the%20Matrix%20Amnesty%20report.pdf (last accessed 9 March 2023).

110 Ibid, p 2.

111 M. K. Scheuerman, J. M. Paul and J. R. Brubaker, 'How Computers See Gender: An Evaluation of Gender Classification in Commercial Facial Analysis Services', 3 *Proceedings of the ACM on Human-Computer Interaction* CSCW (2019) 17–19, https://dl.acm.org/doi/pdf/10.1145/3359246 (last accessed 9 March 2023).

112 The UN Charter's prohibition of discrimination based on sex (Art 1) aimed to ensure the equality of women and men. See C. Chinkin, 'Women, Rights of, International Protection', 2010, *Max Planck Encyclopedia of Public International Law (MPEPIL)*. Consequently, sex refers only to the biological differences between men and women (a binary distinction). Sex is distinguished from gender, which describes 'socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men'. Council of Europe, Convention on Preventing and Combating Violence Against Women and Domestic Violence, 11 May 2011. Although Art 1 of the UN Charter refers to sex, for the purpose of this paper, gender and sex are interchangeable terms since in ADM systems these issues are interrelated. Protection against gender discrimination focuses primarily on LGBTI people, and their status under international human rights treaty law remains highly unsettled. There are only the Yogyakarta Principles developed by civil society. See The Yogyakarta Principles, March 2007, as adopted in 2006 and extended on 10 November 2017, http://yogyakartaprinciples.org/principles-en/official-versions-pdf/ (last accessed 9 March 2023).

and accountability are only a few examples of the challenges faced. Crawford argues that unquestioned discrimination becomes 'part of the logic of everyday algorithmic systems'.[113] Gender discrimination is the sometimes unintentional effect of a developer's work, but there are systems intended to discriminate against women directly. Stereotypes and discrimination against women limit their aspirations for careers in science, technology and engineering.[114] The amplification of algorithmic biases results from the under-representation of women in sectors responsible for creating AI-enabled tools.[115] This means that technology is designed to empower the male-dominated world.[116] However, efforts have been made to increase diversity in big-tech companies. For example, the latest audit report on Facebook proves that the company's hiring force has increased the representation of women.[117]

At the other end of the spectrum are ADM systems devoted to regulating or manipulating issues linked to gender directly. Several Latin American states have purchased the Technological Platform for Social Intervention. Developed by Microsoft Azure, the platform aims to prevent teenage pregnancy through monitoring and censoring teenagers.[118] As a result, its datasets consist of females only. Initially, the platform was set up in Salta Province, Argentina, by the Ministry of Early Childhood. Interestingly, when preparing the system, the Ministry cooperated with an NGO, the CONIN Foundation, which is in favour of prohibiting abortions. Gender discrimination, operationalized by conservative public policies in this respect, allows for further breaches of reproductive and sexual rights, including abortion. According to Paz Peña and Joana Varon, the platform and similar systems have been used to mask and support potentially discriminatory public policies and monitor women directly.[119]

Foad Hamidi et al stress that there is a difference between a person's identity and identification, and the ADM system can only identify a person in the latter

113 K. Crawford, 'Artificial Intelligence's White Guy Problem', *The New York Times*, 25 June 2016, https://www.nytimes.com/2016/06/26/opinion/sunday/artificial-intelligences-white-guy-problem.html.

114 Women's Human Rights in the Changing World of Work: Report of the Working Group on Discrimination Against Women and Girls, UN doc A/HRC/44/51, 16 April 2020.

115 Since women constitute up to 15 percent of the AI researchers, a diversity crisis in the sector significantly touches upon gender discrimination. See Report of the Special Rapporteur on Extreme Poverty and Human Rights, supra fn 4, §81.

116 M. Klimowicz, 'Czy nowe technologie muszą dyskryminować kobiety?', Centrum Cyfrowe, 20 March 2020, https://centrumcyfrowe.pl/czytelnia/czy-nowe-technologie-musza-dyskryminowac-kobiety/ (last accessed 9 March 2023). See also V. Hunt, D. Layton and S. Prince, 'Why Diversity Matters', McKinsey & Company, 2015, https://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters# (last accessed 9 March 2023).

117 Facebook, *Facebook's Civil Rights Audit – Final Report*, 8 July 2020, p 63, https://about.fb.com/wp-content/uploads/2020/07/Civil-Rights-Audit-Final-Report.pdf (last accessed 9 March 2023).

118 P. Peña and J. Varon, 'Decolonising AI: A Transfeminist Approach to Data and Social Justice', in APC, Article 19 and SIDA, *Global Information Society Watch 2019*, supra fn 7, p 28.

119 Ibid., p 29.

sense.[120] According to the authors, identity is something that a person considers she or he is, therefore it is subjective and personal. On the other hand, identification tends to be objective and comes from the outside world. Consequently, while researching automatic gender recognition, Morgan Klaus Scheuerman et al have distinguished between a self-identified gender and computer-classified gender.[121] Identifying a person through ADM takes place through classifiers that label a person based on their characteristics. The authors suggest that multiple gender classifiers can be problematic in labelling both binary and non-binary genders. Consequently, they offer two-step measures at the design and policy level that increase inclusive standards of understanding potential gender-related harms and transparency about the system's limitations. A fundamental step is to inform users on how they may be gendered and allow them to communicate their real gender identity or opt out of a prechosen gender. For example, although the registration process on Facebook requires choosing a gender (in a binary sense), a user can change the option at later stages of using the platform.[122]

Last but not least, gender discrimination by algorithms does not occur solely at the design level. Decision making is first and foremost responsible for determining what is to be created and for which purposes the system will be used. Like those designed by leading big-tech companies, personal assistants relying on ADM take female names (Siri, Cortana, Alexa, Robin, Alice). As a result, final users, including younger generations, are used to giving orders to a female-like assistant that is created to obey only. This points to a challenge not only inside the system, but also at the system's conceptualization and implementation.

3. RELIGION

In connection with international human rights law, religion is often referred to in conjunction with belief.[123] The protection of the freedom of religion is a crucial factor in tolerant and diverse societies, especially in the approaching digital age of AI and ADM systems.[124] As the then UN Special Rapporteur on freedom of religion or belief pointed out in 2003, diverse religions share many moral values that

120 F. Hamidi, M. K. Scheuerman and S. M. Branham, 'Gender Recognition or Gender Reductionism? The Social Implications of Automatic Gender Recognition Systems', *Proceedings of the 2018 CHI Conference on Human Factors in Computing Systems* (2018) 1.

121 Scheuerman, Paul and Brubaker, 'How Computers See Gender', supra fn 65, 20.

122 Hamidi, Scheuerman and Branham, 'Gender Recognition or Gender Reductionism?', supra fn 74, 10.

123 The term 'religion' refers to theistic, non-theistic and atheistic beliefs. At the same time, the definition is not limited to traditional or institutionalized religions and beliefs. See HRCttee, General Comment No. 22 (Art. 18), 30 July 1993, UN docs CCPR/C/21/Rev.1/Add.4, §2.

124 Center for Religious Studies of Foundazione Bruno Kessler, *Engaging Religious and Belief Actors in the European Approach to Artificial Intelligence*: *Response of the Center for Religious Studies of Fondazione Bruno Kessler to the European Commission's Public Consultation on the White Paper 'On Artificial Intelligence – A European Approach to Excellence and Trust'*, June 2020, https://isr.fbk.eu/wp-content/uploads/2020/06/Response-Paper-1.pdf (last accessed 9 March 2023).

are universal in nature.[125] Therefore, any violation of the prohibition of discrimination against religion firmly undermines the values of plural and democratic societies. The interrelationship between freedom of religion and combating discrimination in general means that the former facilitates the latter.[126] At the same time, there is barely any research on how ADM interrelates directly with discrimination against religion.[127] In 2019 the then UN Special Rapporteur on freedom of religion or belief noted that 'the current age is one of unprecedented opportunity for human expression and interaction driven by unparalleled human mobility and developments in information and communication technologies'.[128]

At the same time, the use of ADM systems risks reinforcing societal prejudices against religious minorities. This is a particularly burning issue in states where freedom of religion has already been threatened and religious minorities are persecuted regularly.[129] The Chinese authorities use a biometric identification system to track and control Uyghurs, allowing this Muslim minority group to be repressed through ADM systems.[130] The government is also testing an ADM system that analyses facial expressions to detect negative or anxious emotions of Uyghurs.[131]

Another potential area of discrimination on religious grounds in ADM systems is content moderation. These tools, primarily designed to combat such stigmatization, are not guaranteed to be free from human bias. OpenAI, based on an ADM model, was found to be making biased associations between words like 'terrorism' or 'violence' and Islam.[132] Algorithms are also used to influence human decision making by manipulating content online. Tools developed to detect illegal content online rely on text recognition and are less effective in addressing an abstract piece

125 Civil and Political Rights, Including Religious Intolerance: Report Submitted by Mr. Abdelfattah Amor, Special Rapporteur on Freedom of Religion or Belief, in Accordance With Commission on Human Rights Resolution 2002/40, UN doc E/CN.4/2003/66, 15 January 2003, §119.

126 C. Ashrad, 'Exploring the Impacts of Artificial Intelligence on Freedom of Religion or Belief Online', 26 *International Journal of Human Rights* 5 (2021), https://doi.org/10.1080/13642987.2021.1968376 (last accessed 9 March 2023).

127 See, e.g., ibid.

128 Report of the Special Rapporteur on Freedom of Religion or Belief, supra fn 2, §4.

129 Access Now, *Human Rights in the Age of Artificial Intelligence*, November 2018, https://www.accessnow.org/cms/assets/uploads/2018/11/AI-and-Human-Rights.pdf (last accessed 9 March 2023), pp 22–23.

130 Human Rights Watch, *China's Algorithms of Repression: Reverse Engineering a Xinjiang Police Mass Surveillance App*, 1 May 2019, https://www.hrw.org/report/2019/05/01/chinas-algorithms-repression/reverse-engineering-xinjiang-police-mass (last accessed 9 March 2023). See also P. Mozur, 'One Month, 500,000 Face Scans: How China Is Using A.I. to Profile a Minority', *The New York Times*, 14 April 2019, https://www.nytimes.com/2019/04/14/technology/china-surveillance-artificial-intelligence-racial-profiling.html.

131 J. Wakefield, 'AI Emotion-Detection Software Tested on Uyghurs', *BBC News*, 26 May 2021, https://www.bbc.com/news/technology-57101248.

132 Francesca, 'Is GPT-3 Islamophobic?', *Towards Data Science*, 3 February 2021, https://towardsdatascience.com/is-gpt-3-islamophobic-be13c2c6954f (last accessed 9 March 2023).

of information.[133] According to the former UN Special Rapporteur on freedom of religion or belief, countering online hate speech, including against religious minorities, accompanied by human judgement is the only way to increase the effectiveness of ADM systems and human rights compliance.[134]

Last but not least, sometimes discrimination on religious grounds occurs only in relation to women (for instance, they do not have access to complaint mechanisms for religious discrimination[135]) and results from gender bias in the legal system. In such cases, intersectional discrimination amplifies even more inequalities resulting from the deployment of ADM systems.

4. LANGUAGE

Language discrimination occurs when language preferences unreasonably or arbitrarily disadvantage individuals.[136] It is based solely upon the characteristics of an individual's speech, such as accent, vocabulary, modality or ability to use one language instead of another.[137] The prohibition of this discrimination contributes to the protection of minorities (including linguistic minorities).[138] Although language is an essential factor in determining the accessibility and efficiency of a service (i.e. while delivering instructions or education via ADM tools in a minority language), concerns for linguistic minorities raise constant controversies and contain potential conflicts. Linguistic groups are so diverse in different states that it is sometimes impossible and impractical to recognize all their languages as official.[139] At the same time, there is a difference between preventing discrimination against language and protecting linguistic minorities. Non-discrimination aims to suppress or prevent any action denying or restricting equality of treatment (negative obligations). In contrast, the protection of minorities focuses on protecting non-dominant groups through both equality of treatment and differential treatment that enables the preservation of the minority's basic characteristics (a positive obligation).[140] Therefore, the protection of minorities implies measures in favour of members of a minority group.

Communication between a human and a computer has been of interest to computer science since the very creation of the first computers. Scientists have developed increasingly subtle languages through which this communication is more accessible, but these are all utilized for different purposes. It is not surprising that voice recognition has become one of the most common applications of ADM systems nowadays. Algorithms rely heavily on language and also operate using sociolinguistics, which examines how languages function in society.[141] Nonetheless, language discrimination is a complicated and yet unexplored area in the field of ADM, even though language and technology, either separately or combined, are powerful tools for excluding a person.

D. RECOMMENDATIONS

Since ADM systems are utilized in both the public and private sectors, measures against discrimination should be twofold. States are obliged to respect, protect and fulfil the prohibition of discrimination. The first recommendation for states is to gather and analyse data relating to discriminatory grounds. Article 2(1)(a) ICERD imposes an obligation to take positive steps to eliminate racial discrimination in all its forms. Direct and indirect racial discrimination can be combated through the transparent and diverse collection and storage of data. For example, despite its shortcomings, the UK Race Disparity Audit (launched in 2016) publishes data held by the government on ethnicity differentiations in public services, including racial inequalities.[142] Under Article 7 ICERD, the private sector should also be informed and educated by the state about combating prejudices and racial discrimination. These efforts would contribute to assessing systems' discriminatory outcomes.

The 'duty to respect' element of state obligations can be found, for example, in the Dutch court ruling concerning risk models used by the Government of the Netherlands. The court stated that an analysis pursued by the models may result in discriminatory effects due to insufficient transparency and verifiability.[143] Re-

133 Countering Islamophobia/Anti-Muslim Hatred to Eliminate Discrimination and Intolerance Based on Religion or Belief: Report of the Special Rapporteur on Freedom of Religion or Belief, Ahmed Shaheed, UN doc A/HRC/46/3, 13 April 2021, §58.

134 Ibid, §59.

135 T. van Boven, 'Racial and Religious Discrimination', 2007, *MPEPIL*.

136 R. Izsák-Ndiaye, 'Protection of Linguistic Rights of Linguistic Minorities', in I. Ulasiuk, L. Hadîrcă and W. Romans (eds), *Language Policing and Conflict Prevention*, Brill, 2018, p 209.

137 O. Levitina, 'Is Language Discrimination Still a Thing?', *The TedX Vienna Magazine*, 21 February 2020, https://www.tedxvienna.at/blog/is-language-discrimination-still-thing/ (last accessed 9 March 2023).

138 Art 1(3) of the UN Charter uses 'language' while referring to national minorities only. Although Art 27 of the ICCPR differentiates between ethnic and linguistic minorities, language is one of the main indicators of an ethnic group as well. See A. Muś, 'Regional Politics and Ethnic Identity: How Silesian Identity Has Become Politicized', 49 *Nationalities Papers* 5 (2020) 928. Therefore, there is a huge space for intersectionality in this sphere. According to General Comment No. 23 of the HRCttee, members of linguistic minorities have the right to use their language among themselves, either in private or in public, but this right is distinct from other language rights under the ICCPR, including non-discrimination. See HRCttee, General Comment No. 23(50) (Art. 27), UN doc CCPR/C/21/Rev.1/Add.5 6 April 1994, §5.3. See also, Council of Europe, Explanatory Report to the European Charter for Regional or Minority Languages, 5 November 1992, §3; K. Henrard, *Equal Rights Versus Special Rights: Minority Protection and the Prohibition of Discrimination*, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, 2007, p 16; UNGA Res 47/135, 3 February 1993.

139 F. Capotorti, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, UN doc E/CN.4/Sub.2/384/Rev.11979, §230.

140 *Study on the rights of persons belonging to ethnic, religious and linguistic minorities, by Francesco Capotorti, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Geneva 1979, UN Docs E/CN.4/Sub.2/384/Rev.1: §230.*

141 D. Carbonell, 'Are You a Victim of Language Discrimination?', *Huffpost*, updated 18 March 2017, https://www.huffpost.com/entry/language-discrimination-i_b_9491452.

142 UK Cabinet Office, Race Disparity Audit: Summary Findings from the Ethnicity Facts and Figures Website, October 2017, revised March 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/686071/Revised_RDA_report_March_2018.pdf (last accessed 9 March 2023).

143 The Hague District Court, *NJCM c.s. vs De Staat der Nederlanden (SyRI)*, Judgment, 5 February 2020.

straints on regulating ADM are rooted in the diffusion of actors, the different locations of design and deployment, the variety of applications and the opaqueness of ADM systems to most potential regulators. On the other hand, legislative measures contribute to human rights compliance in all three areas of state obligations. Diverse domestic frameworks have been developed to address AI in general, through either comprehensive or sectoral legislation. The regulation of new technologies has been compared to 'the tortoise and the hare problem'.[144] It reflects a phenomenon whereby technology develops faster than the corresponding regulation and the latter hopelessly falls behind. At the same time, any regulation is an enemy to innovation. Therefore, a governance model must balance between competitive rules as well as the interests of the private and the public sectors and individuals.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[145] as a vital act concerning the prohibition of this form discrimination, also applies to ADM systems. There are three ways to eliminate discrimination against women, namely symmetrical, asymmetrical and special.[146] The symmetrical approach aims to protect any gender, including women and men, against discrimination. Asymmetrical protection focuses exclusively on women and gives them the right to genuine equality with men. This is what CEDAW is devoted to achieving. In ADM systems, this protection would engage in the increased diversity of the teams developing the systems. The special way is a rather selective approach that complements the previous two, through state obligations to take positive action and measures, focused on trafficking in women, the gender pay gap, forced marriage and genital mutilation. The gender pay gap is particularly exacerbated in ADM systems. This type of discrimination has been tracked in Google's job advertising when women were shown ads for lower-paid jobs.[147]

144 D. M. Bowman, 'The Hare and the Tortoise: An Australian Perspective on Regulating New Technologies and Their Products and Processes', in G. E. Marchant, K. W. Abbott and B. Allenby (eds), *Innovative Governance Models for Emerging Technologies*, Edward Elgar Publishing, 2013.

145 The UN Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979.

146 Kälin and Künzli, *The Law of International Human Rights Protection*, supra fn 54, p 346.

147 Crawford, 'Artificial Intelligence's White Guy Problem', supra fn 67.

However, it is crucial to realize that one size does not fit all, so the differentiated regulatory approach is preferable in order not to hamper innovation.[148] Kraft et al note that the key question for any regulatory model is how to address agency losses. ADM systems make decisions either for or about individuals who act as principals that hold different but legitimate interests/expectations regarding ADM systems. These legitimate interests in ADM systems making decisions for individuals upon the individual's request should be fulfilled in the outcome of the ADM. On the other hand, there are ADM systems making decisions about individuals, such as citizen scoring or fraud detection, which should fulfil legitimate expectations (for example, not to be discriminated against).[149] Therefore, regulation cannot be the same for both of these ADM systems, because interests and expectations differ from to the another.

A relevant characteristic of anti-discrimination law that should be expanded in ADM-related cases is the burden of proof. A normal evidentiary rule states that a party making the claim must prove a fact to a required standard of proof. Accordingly, the burden usually rests on the alleged victim of discrimination.[150]

148 T. D. Krafft, K. A. Zweig and P. D. König, 'How to Regulate Algorithmic Decision Making: A Framework of Regulatory Requirements for Different Applications', 16 *Regulation & Governance* 1pre-empt or substitute for human decisions in manifold areas, with potentially significant impacts on individuals' lives. Achieving transparency and accountability has been formulated as a general goal regarding the use of these systems. However, concrete applications differ widely in the degree of risk and the accountability problems they entail for data subjects. The present paper addresses this variation and presents a framework that differentiates regulatory requirements for a range of ADM system uses. It draws on agency theory to conceptualize accountability challenges from the point of view of data subjects with the purpose to systematize instruments for safeguarding algorithmic accountability. The paper furthermore shows how such instruments can be matched to applications of ADM based on a risk matrix. The resulting comprehensive framework can guide the evaluation of ADM systems and the choice of suitable regulatory provisions.","container-title":"Regulation & Governance","DOI":"10.1111/rego.12369","ISSN":"1748-5991","language":"en","note":"_eprint: https://onlinelibrary.wiley.com/doi/pdf/10.1111/rego.12369","page":"18","source":"Wiley Online Library","title":"How to regulate algorithmic decision-making: A framework of regulatory requirements for different applications","title-short":"How to regulate algorithmic decision-making","author":[{"family":"Krafft","given":"Tobias D."},{"family":"Zweig","given":"Katharina A."},{"family":"König","given":"Pascal D."}],"issued":{"date-parts":[["2020",10,20]]},"locator":"2"}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"} (January 2022), https://onlinelibrary.wiley.com/doi/10.1111/rego.12369 (last accessed 9 March 2023).

149 Ibid.pre-empt or substitute for human decisions in manifold areas, with potentially significant impacts on individuals' lives. Achieving transparency and accountability has been formulated as a general goal regarding the use of these systems. However, concrete applications differ widely in the degree of risk and the accountability problems they entail for data subjects. The present paper addresses this variation and presents a framework that differentiates regulatory requirements for a range of ADM system uses. It draws on agency theory to conceptualize accountability challenges from the point of view of data subjects with the purpose to systematize instruments for safeguarding algorithmic accountability. The paper furthermore shows how such instruments can be matched to applications of ADM based on a risk matrix. The resulting comprehensive framework can guide the evaluation of ADM systems and the choice of suitable regulatory provisions.","container-title":"Regulation & Governance","DOI":"10.1111/rego.12369","ISSN":"1748-5991","language":"en","note":"_eprint: https://onlinelibrary.wiley.com/doi/pdf/10.1111/rego.12369","page":"18","source":"Wiley Online Library","title":"How to regulate algorithmic decision-making: A framework of regulatory requirements for different applications","title-short":"How to regulate algorithmic decision-making","author":[{"family":"Krafft","given":"Tobias D."},{"family":"Zweig","given":"Katharina A."},{"family":"König","given":"Pascal D."}],"issued":{"date-parts":[["2020",10,20]]},"locator":"5"}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}

150 ECtHR, *D. H. and Others v Czech Republic*, Grand Chamber, Judgment, App no 57325/00, 13 November 2007, §§187–88.

For example, in a case concerning risk-assessment tools used on Indigenous persons, the Canadian Supreme Court noted that it was up to the applicant 'to raise a reasonable challenge to the reliability of the assessment tools'.[151] The burden of proof is a significant procedural obstacle for victims, and this is where international human rights law is far from perfect. However, General Recommendation No. 30 of the Committee on the Elimination of Racial Discrimination stipulates that civil proceedings involving racial discrimination should rely on the prima facie establishment of discrimination on the victim's side, and deliver an objective and reasonable justification for the differential treatment of the respondent.[152] Therefore, the alleged perpetrator can only release themselves from responsibility by providing objective and reasonable justification for the practice.[153] The difficulty in applying normal evidentiary rules in cases concerning discrimination has been noted by the Court of Justice of the European Union. This has led to a partial reversal in the burden of proof in favour of the victim of discrimination.[154] The EU Equality Directives have stressed the significance of adopting rules on the burden of proof in prima facie cases of discrimination and have established an obligation to introduce the shifted burden of proof into domestic legislation of the EU Member States. The question of the burden of proof in ADM cases requires more work at the level of domestic procedural laws.[155]

Nonetheless, updates to anti-discrimination laws to address ADM have already been or are being processed in some states. In 2019, Canada adopted the Directive on Automated Decision-Making.[156] This regulates the deployment of ADM systems in public service (though outside of the judiciary) and requires reducing the system's adverse outcomes by assessing procedural fairness. The Canadian Government further prepared an Algorithmic Impact Assessment Tool applicable to the development and implementation phases of ADM systems.[157] Other legislation is planned in the US (the Algorithmic Accountability Act[158]) and the EU (the Artificial Intelligence Act[159]), but these apply to the private sector and across sectors. The EU is taking a regulatory approach that is risk-based and accommodates various ADM applications at the same time. The proposal categorizes AI systems based on the risks they pose and determines obligations accordingly. The Artificial Intelligence Act, if adopted, would have an extraterritorial application, so that not only entities registered in any of the EU Member States would have to comply with the legislation. The act would cover every product or service that is put on the EU market. The proposal also takes into account the human rights perspective in performing due diligence and accountability.[160]

States should also engage in spreading knowledge, deepening an interdisciplinary understanding of discrimination in ADM. Taking a step back should not be shamed, meaning that once a state identifies the harm of an ADM system, it should not hesitate to abstain from using it (for example, San Francisco decided to prohibit using facial recognition software). It would also be necessary to develop the question of the burden of proof in cases concerning ADM discrimination through domestic laws in order to envisage equal arms of the parties to a case.

As specialized organs of society, private entities are also bound to respect the prohibition of discrimination. In the development phase, inclusive design ensures that discrimination is reduced or eliminated. Negative stereotyping and bias, deeply rooted in society, become easily, usually unconsciously, translated into data upon which algorithms base their decisions. Therefore, the diversity of teams leverages a variety of perspectives. Additional measures should be taken to ensure the quality and quantity of data delivered to ADM systems. This can be achieved by increasing the representation of civil society in data collection and data generation. Discrimination can be further prevented in the evaluation phase by thoroughly considering feedback received from final users. Without necessarily resigning from a particular ADM system, developers and operators should search for ways to reduce discriminatory ADM.[161] The given measures are merely examples, but reveal that, when non-discrimination is given a central place in ADM, other human rights can be complied with in this mass technology.

Academia also plays an important role in increasing the human rights compliance of ADM systems. The purpose of any scientific explanation of a problem is to search for its place in the context of already existing regularities (including norms)

151 Supreme Court of Canada, *Ewert v Canada*, Case no 37233, Judgment, 13 June 2018, §47.

152 Committee on the Elimination of Racial Discrimination, General Recommendation 30: Discrimination Against Non-Citizens, UN doc CERD/C/64/Misc.11/rev.3, 1 October 2002, §24.

153 ECtHR, *Biao v Denmark*, Grand Chamber, Judgment, App no 38590/10, 24 May 2016, §§91–92.

154 ECJ, *Handels-og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening*, Judgment, Case 109/88, 17 October 1989.

155 Burden of proof in discriminatory ADM cases has already been analysed from the perspective of US but not EU law. See Barocas and Selbst, 'Big Data's Disparate Impact', supra fn 28, 671."plainCitation":"Solon Barocas and Andrew D Selbst, 'Big Data's Disparate Impact' (2016 See also S. Bornstein, 'Antidiscriminatory Algorithms', 70 *Alabama Law Review* (2019).because algorithms are "facially neutral," they pose no problem of unequal treatment. As a result, algorithmic discrimination cannot be challenged using a disparate treatment theory of liability under Title VII of the Civil Rights Act of 1964 (Title VII

156 Government of Canada, Directive on Automated Decision-Making, 1 April 2019, https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32592 (last accessed 9 March 2023).

157 Government of Canada, Algorithmic Impact Assessment Tool, https://www.canada.ca/en/government/system/digital-government/digital-government-innovations/responsible-use-ai/algorithmic-impact-assessment.html (last accessed 9 March 2023).

158 Y. D. Clarke and House, Energy and Commerce, Algorithmic Accountability Act (not in force), 2019.

159 European Commission, Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts 2021.

160 As of 20 July 2021, the Parliament of the EU adopted a resolution with recommendations on corporate due diligence, requesting the European Commission to take legislative steps in this regard. See European Parliament Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability.

161 G. Barton, N. Turner Lee and P. Resnick, 'Algorithmic Bias Detection and Mitigation: Best Practices and Policies to Reduce Consumer Harms', Brookings, 22 May 2019, https://www.brookings.edu/research/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-to-reduce-consumer-harms/ (last accessed 9 March 2023).

and adjust it to the current state of knowledge.[162] This is why the problem of discriminatory ADM is and should be followed in academic discussions across sciences. For example, only recently, due to the growing social applications of ADM systems, a new subfield of computer science devoted explicitly to algorithmic fairness has emerged.[163] This proposes ways through which one can achieve algorithmic fairness when designing a system.[164]

Nevertheless, there is no single discrimination test that could be adopted for a statistical user, because there is and never will be any universal test in cases of alleged discrimination. Each case involving discriminatory practices should examine the alleged violation individually. This does not mean that states, business and academia should be ignorant and dormant in mitigating algorithmic discrimination. Civil society plays an important role here. NGOs act as early-warning providers and spread information on actual human rights violations and the adverse impacts of ADM systems. By raising awareness, civil society can reach local communities, as well as engage with various stakeholders, decision makers and, above all, users. The role of the latter is not limited to being mere bystanders or victims of discriminatory ADM. Users contribute to revealing how products or services are understood.[165] By providing feedback on how ADM systems operate, individuals therefore help increase improvements in the system. Thus, feedback delivery should be accessible to users, who can also be encouraged provide feedback.

E. CONCLUSIONS

The non-discrimination clause is equally central to the digitalized and tangible worlds. It enables human rights and opens the door to inclusive and equal technology for all. In this sense, private and public actors should address the question of how and why they create or use a particular system. Reasonableness in any technology contributes to an increase in awareness of the purposes and functioning of the system, and subsequently to the enforcement of human rights for all, irrespective of race, gender, language or religion. It is essential to understand that we will never create unbiased ADM systems, but that not all biases are inherently wrong. Thus, ADM systems can successfully support the inclusion of the vulnerable. The principle of non-discrimination is a starting point for any technology to be implemented in society.

The variety of actors involved in ADM systems reveals that there are various roles to be played. States and policymakers specifically should engage in discussions about and, if necessary, changes to their anti-discrimination laws. Human rights bodies can identify and stress the human-centric approach to designing and deploying these technologies. The private sector bears a responsibility of non-discrimination that should be fulfilled throughout the whole process of developing and deploying ADM systems. This can be achieved by involving academia, civil society and individuals in an open, accessible and diverse dialogue. It would lead to increasing, at least, the possibility of technology that leaves no one behind.

162 I. Bogucka, *Funkcje prawa: analiza pojęcia*, Kantor Wydawniczy 'Zakamycze', 2000, p 124.

163 Leading researchers in algorithmic fairness are, e.g., C. Dwork, S. Barocas and M. Hardt.

164 These are statistical parity, equalized odds, equality of opportunity, human in-the-loop, and algorithmic transparency. See M. Stewart, 'Programming Fairness in Algorithms', *Towards Data Science*, 2 July 2020, https://towardsdatascience.com/programming-fairness-in-algorithms-4943a13dd9f8 (last accessed 9 March 2023).

165 Barton, Lee and Resnick, 'Algorithmic Bias Detection and Mitigation', supra fn 115.

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