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**Internship Report: Embassy of Portugal to Austria and Mission of  
Portugal to the UN and Other International Organizations in Vienna**

**Sexual Orientation and Gender Identity in International Law:  
The UN and the ICC approaches**

Internship report presented to  
NOVA School of Law  
for the purpose of obtaining the  
Master's Degree in international and European Law

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“We should all be outraged when people suffer discrimination, assault and even murder – simply because they are lesbian, gay, bisexual or transgender. We should all speak out when someone is arrested and imprisoned because of who they love or how they look.

This is one of the great, neglected human rights challenges of our time.”<sup>1</sup>

- Ban-Ki-Moon, 7th Secretary-General of the United Nations, 2013

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<sup>1</sup> UNITED NATIONS - Secretary-General's video message to the Oslo Conference on Human Rights, Sexual Orientation and Gender Identity.

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A Viena, uma cidade, um sonho e um estado de espírito enraizados no meu ser.

### **Referencing and Citation Remarks**

The following work uses the Portuguese Norms 405-1 and 405-4 by the Portuguese Quality Institute as the referencing and citing style.

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### **List of Abbreviations**

AHRCA - Association for Human Rights in Central Asia

APA - American Psychological Association

CCPCJ - Commission on Crime Prevention and Criminal Justice

CEDAW - Convention on the Elimination of All Forms of Discrimination Against Women

COPUOS - Committee on the Peaceful Uses of Outer Space

COSP - Conference of the States Parties to the United Nations Convention Against Corruption

CTBTO - Comprehensive Nuclear-Test-Ban Treaty Organization

ECHR - European Convention on Human Rights

ECOM - Eurasian Coalition on Health, Rights, Gender, and Sexual Diversity

ECOSOC – Economic and Social Council of the United Nations

ECtHR - European Court of Human Rights

EU - European Union

FPÖ - Austrian Freedom Party

GRID - Gay Related Immunodeficiency

IAEA - International Atomic Energy Agency

ICC - International Criminal Court

ICCPR - International Covenant on Civil and Political Rights

ICESCR - International Covenant on Economic, Social and Cultural Rights

ICMPD - International Centre for Migration Policy Development

IOM - International Organization for Migrations

IPHR - International Partnership for Human Rights

LGBTQIA+ - Lesbian, Gay, Bisexual, Queer/Questioning, Asexual/Aromantic, Others

MNE - Ministry of Foreign Affairs of Portugal (*Ministério dos Negócios Estrangeiros de Portugal*)

NEOS - Neo-Liberal Party of Austria

NGO - Non-Governmental Organization

OHCHR – Office of the United Nations High Commissioner for Human Rights

OSCE - Organization for Security and Co-operation in Europe

ÖVP - Austrian People's Party

PECMNE - Curricular Studies Programme of the Ministry of Foreign Affairs of Portugal (*Programa de Estágios Curriculares*)

SDG - Sustainable Development Goals

SOGI - Sexual Orientation and Gender Identity

SPÖ - Social Democratic Party of Austria

TFEU - Treaty on the Functioning of the European Union

UDHR - Universal Declaration of Human Rights

UN - United Nations

UNCAC - United Nations Convention Against Corruption

UNCITRAL - United Nations Commission on International Trade Law

UNDRIP – United Nations Declaration on the Rights of Indigenous People

UNHRC – United Nations Human Rights Council

UNIDO - United Nations Industrial Development Organization

UNODC - United Nations Office on Drugs and Crime

UNOV - United Nations Office at Vienna

USA - United States of America

VIC - Vienna International Centre

WHO - World Health Organization

YP+10 - Yogyakarta Principles Plus 10



## **Resumo**

O trabalho seguinte consiste num relatório do estágio curricular realizado com a Embaixada e Missão de Portugal junto das Nações Unidas (ONU) e outras Organizações Internacionais em Viena. O relatório é seguido de uma investigação académica subordinada a um tópico que surgiu no contexto do estágio: o enquadramento das questões de orientação sexual e de identidade de género no Direito Internacional. Indivíduos que se identificam fora das normas estabelecidas para estas categorias são alvo de graves violações de direitos humanos. Contudo, o direito interacional dos direitos humanos e o direito criminal interacional parecem ficar aquém na provisão de enquadramentos legais adequados à salvaguarda desses direitos humanos e de responsabilização das violações cometidas. Nesta investigação, aferimos o potencial da ONU e do Tribunal Penal Internacional (TPI), enquanto instituições-guia na proteção de direitos humanos internacionalmente, através de uma análise das abordagens que têm feito ao assunto ao longo dos anos, e de quais as mais-valias, lacunas e potencial dessa postura. A conjuntura observada durante o estágio permite retirar conclusões acerca da ligação entre a perspetiva de direitos humanos e direito criminal internacional, e as dinâmicas da esfera diplomática envolvidas.

**Palavras-chave:** Representação diplomática, Organização das Nações Unidas, Tribunal Penal Internacional, Orientação Sexual, Identidade de Género, Direitos Humanos.

## **Abstract**

The following work consists of a report of the curricular internship taken with the Portuguese Embassy and Mission with the United Nations (UN) and other International Organizations in Vienna. This report is followed by an academic investigation under a topic framed within the context of the internship: the framework of sexual orientation and gender identity matters in international law. Individuals identifying outside the established norms for these categories are targets of severe human rights violations. Nonetheless, international human rights law and international criminal law seem to fall short in providing adequate legal frameworks for the safeguard of these human rights and for the accountability of the violations. In this investigation, we observe the potential of the UN and the International Criminal Court (ICC), as leading organizations on human rights protection internationally, through an analysis of the approaches these institutions have been making to the subject over the years, and where the strengths, shortcomings and potential of the observed situation lie. The conjuncture observed during the internships allows for the drawing of conclusions on the connection between the human rights and the criminal perspectives of international law, and the involved dynamics of the diplomatic field.

**Keywords:** Diplomatic representation, United Nations, International Criminal Court, Sexual Orientation, Gender Identity, Human Rights.

## **I. Introduction**

The following work consists of a report of the internship taken with the Portuguese Embassy and Mission with the United Nations (UN) and other International Organizations in Vienna, and a subsequent research on a topic that emerged during the internship. It is presented as part of the procurement of the Master's Degree in International and European Law by NOVA School of Law.

From October 2021 until April 2022, the internship opened the doors to the workings of the Portuguese Embassy to Austria, as well as the Portuguese representation to the UN in Vienna, in addition to the other International Organizations seated in the city. This opportunity to get in contact with both the bilateral and multilateral spheres of diplomacy made the experience even more exceptional.

During the internship, while observing the work of several UN agencies, the issue of the approach of international law and the UN itself to gender equality matters elicited reflection on the subject. Within the global leading institution on human rights, the matters of gender equality are scarcely a focus of work, and when they are approached, it is done so mainly through a view and a theoretical base which has become obsolete in academic legal settings. Mentions of the LGBTQIA+ community were even more scarce. This topic, however, raises growing attention and concern due to the violence and human rights violations it generates and to the contrasting legislation alterations going on throughout the world, with some countries liberalizing and legalising LGBTQIA+ rights, and others setting progress back with restrictive approaches. This context incited the questioning of how Sexual Orientation and Gender Identity (SOGI) matters are framed and handled in international law, and what action are the leading International Organizations and institutions such as the UN and the International Criminal Court (ICC) carrying out to address the violations that individuals are undergoing due to this subject. This investigation seeks to apprehend whether there is an adequate framework on these issues, and what is its pertinence to the reality of LGBTQIA+ individuals, assessing critically which steps are working, whether there are shortcomings, which are those and why is that the case.

Thus, this work consists of two main parts, with the first one being dedicated to the report, with a contextualization of the organization and a description of the carried-out

activities; and a second segment of academic investigation of the issue which arose from the internship.

Likewise, in the following investigative work, we will analyse how SOGI issues are approached on the international stage. After scrutinizing the object of our study, SOGI matters, we have a look at the wider background context of international human rights law, before turning to the criminal perspective. We conclude by making a connection between the observed legal landscape and the status perceived during the course of the internship activities.

Accordingly, to carry out our investigation, we will resort to literature review, in order to assess the outline of SOGI matters and the framework through which they have been approached by the academic and legal fields. When undergoing our international law focus, we will use literature inputs to complement our analysis of legislation, resorting briefly to case-law as well, to illustrate the circumstances and points of view encountered.

Similarly, some limitations establish themselves to this study. Firstly, the central object of our study, which consists of Sexual Orientation and Gender Identity, is a complex reality. The wide range of our object of study is added to the difficulty of dealing with highly personal and subjective matters. While the length of the present work does not allow for an extensive consideration of each and every side line of this prism in their full extension, we resort to both literature and legislation to attempt to have a more comprehensive approach to the subject. Moreover, we expect to make a valuable insight into the emerging trends in queer theory and legal practices and their application to international law through a critical approach.

## II. The Internship with the Portuguese Mission in Vienna

NOVA School of Law provides its students with the possibility of taking an internship and presenting its report together with an associated academic research for the obtainment of the master's degree. The present report is, thus, presented as part of the procurement of the Master's in International and European Law by NOVA School of Law.

The Ministry of Foreign Affairs of Portugal (*Ministério dos Negócios Estrangeiros – MNE*) holds a program, through its Diplomatic Institute (*Instituto Diplomático*) that provides university students with such an opportunity in the diplomatic environment. Under the Curricular Studies Programme (*Programa de Estágios Curriculares – PECMNE*), university students may apply to take an internship of either three or six months of duration with one of the Foreign Ministry's services, either internally in those located in Lisbon or externally, with the Portuguese foreign diplomatic representation services.<sup>2</sup>

The personal choice to undertake an internship came from a wish to enjoy this unique opportunity to experience the practical side of international law, especially in the distinctive environment of diplomacy. Not only does it provide for the observance of the practical employment of the theoretical and academic learnings acquired during the first year of the master's degree, but it also unveils the intricacies and complexities to which we are not usually aware during our theoretical learning. Moreover, it enables the exceptional attainment of professional experience in the diplomatic field still during the process of academic training, constituting a massive moment of personal and professional development.

The Embassy and Mission of Portugal to the United Nations and other International Organizations in Vienna was a first choice due to a few reasons. Firstly, its distinctive nature as a diplomatic mission. During the six months of the internship, between the 15<sup>th</sup> of October 2021 and the 15<sup>th</sup> of April 2022, it opened the doors to the workings of the Portuguese Embassy to Austria, as well as the Portuguese representation to the UN in Vienna, in addition to the other International Organizations seated in the city. The internship experience was, therefore, even more exceptional owing to this opportunity to

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<sup>2</sup> The Diplomatic Institute's website with further information on PECMNE is available for consultations at: <https://idi.mne.gov.pt/pt/atividades/estagios-pec-mne>.

get in contact with both the bilateral and multilateral spheres of diplomacy. Additionally, the personal interest in the work of International Organizations played a central role in this choice. Given the training in international relations and the connection to human rights which permeates my academic background, this setting gains special relevance. The case of International Organizations, especially the UN, has been a constant throughout my studies. Likewise, this opportunity presented an enthusiastic years-long aspiration.

The report, which constitutes the first section of this work, is divided into two main sections. The first corresponds to an introduction to the mission – a description of its general characteristics, sectors and nature. Subsequently, the second portion of the report covers a description of the activities developed, learnings and a framing of the investigation which follows.

## **1. The Portuguese Mission in Vienna**

In this first section of the internship report we present the mission, in its constitution and organization, while also explaining the relevant context by resorting to historical and political context.

### **a) Bilateral Relations between Portugal and Austria**

Austria is a federal parliamentary republic, made up of nine federal states or provinces: Vienna (*Wien*), Upper Austria (*Oberösterreich*), Lower Austria (*Niederösterreich*), Styria (*Steiermark*), Tyrol (*Tirol*), Carinthia (*Kärnten*), Salzburg, Vorarlberg and Burgenland. Vienna is the capital city and the headquarters of the official institutions.<sup>3</sup>

There are five political parties in the Austrian Parliament - the Austrian People's Party (ÖVP), the Social Democratic Party of Austria (SPÖ), the Austrian Freedom Party (FPÖ), the Greens and the Neo-Liberal Party (NEOS).<sup>4</sup> The current Chief of State is President Dr. Alexander Van der Bellen, former leader of the Greens party, and the Chief of Government is Chancellor Karl Nehammer, a member of ÖVP. The position of Minister

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<sup>3</sup> MINISTÈRIO DOS NEGÓCIOS ESTRANGEIROS - **Embaixada de Portugal na Áustria.**

<sup>4</sup> AUSTRIAN EMBASSY IN WASHINGTON - **Political Parties.**

of European and International Affairs is held by Alexander Schallenberg, from ÖVP. At the date of beginning of the internship, Alexander Schallenberg was the Austrian Chancellor.

Austria has been a member of the European Union (EU) since 1995.<sup>5</sup> Currently, the country holds a position of relevance within the EU and in the international scenario, as an important food, vehicle and luxury items producer, with industry dominating the national economy. It counted a Gross Domestic Product of 477,082,467.45 US\$ in 2021, ranking at 29<sup>th</sup> worldwide, with a competitive banking system.<sup>6</sup> Its location in Central Europe highlights its role in the European scenario as a transit country for energy, namely natural gas. It retains further relevance as a hub for international conferences and high-level politics.

Portugal and Austria have a history of great relations. The formation of a diplomatic relation between them can be traced to the 15<sup>th</sup> century, with the establishment of a Portuguese delegation in Vienna in the 17<sup>th</sup> century. Since the entrance of both countries to the EU, the bilateral relation has gained new depth, complimented by an also good multilateral one. Portugal and Austria are very distinct countries, which have found common-ground in their status as medium-sized EU Member States. Although the economic and trade exchanges are not massive, social and cultural relations hold particular value.<sup>7</sup> In the aftermath of World War II, Portugal accommodated around 5000 children from Austria. This gesture remains very present in the consciousness of the Austrian people and politicians, reflecting the good terms of the bilateral relations between the two countries.<sup>8</sup> Austria holds an Embassy in Lisbon.

The Embassy and Mission of Portugal to the United Nations and other International Organizations in Vienna is located in Opernring 3/1, A-1010, in Vienna. The representation of Portugal to the UN and other International Organizations located in Vienna is assured by the delegation at the embassy, responsible for the representation with Austria as well. Hence, the same delegation holds this twofold charge of representing the country. The Ambassador of Portugal to Austria was, at the initial time and throughout

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<sup>5</sup> FEDERAL MINISTRY OF LABOUR AND ECONOMY OF AUSTRIA - **Austria in the European Union.**

<sup>6</sup> THE WORLD BANK - **GDP (current US\$) – Austria.**

<sup>7</sup> PORTUGUESE GOVERNMENT PORTAL - **Countries – Austria.**

<sup>8</sup> EMBAIXADA DA ÁUSTRIA EM LISBOA - **A Áustria em Portugal.**

most of the internship, Ambassador António Almeida Ribeiro. On the 22<sup>nd</sup> of March 2022, Ambassador Miguel Maria Simões Coelho de Almeida e Sousa was nominated the new Portuguese diplomatic representative to Austria. The mission counts with two Embassy Counsellors, Dr. Mafalda de Oliveira Dias, who acts simultaneously as head of the Consular Section, and Dr. João Bezerra da Silva, who acted as mentors and supervisors during the internship.

### **b) The UN at Vienna**

The United Nations counts four headquarters, namely in New York, Geneva, Nairobi, and Vienna. In 1979, the Vienna International Centre (VIC) was established in Vienna, Austria. It employs around 5000 people from more than 125 countries.

The VIC harbours a series of offices and bodies from the UN, managed by the UN Office at Vienna (UNOV). The government of Austria had already invited the IAEA and the United Nations Industrial Development Organization (UNIDO) to be set in Vienna, which happened in 1957 and 1967, respectively. In the decade of 1970, those headquarters became permanent. The VIC was inaugurated on the 23<sup>rd</sup> of August 1979, and several UN agencies were moved from New York to Vienna. The premises known as “UNO-City” are rented for a period of 99 years, for the symbolic yearly value of one Austrian schilling, measuring up to 0,07€ today.<sup>9</sup>

The VIC holds the significance of being a hub of UN agencies and a nuclear arena for international cooperation and diplomacy, where delegations from UN member countries from around the world meet. It is the main UN centre regarding the combat of crime, drug abuse and terrorism. Its impact on the Austrian economy is massive, generating thousands of job posts and more than 500 million euros annually.

## **2. Internship activities**

The following section provides a description of the activities carried out during the internship, as well as contextualizing the emergence of the research topic.

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<sup>9</sup> UNITED NATIONS OFFICE AT VIENNA - **History of the Vienna International Centre.**



Throughout the six-month-duration of the internship, I had the opportunity to work within both the bilateral and multilateral contexts. Until January, the Mission hosted four interns, and three after that and until the end of the internship, in April. The bulk of the internship's work consisted of attending meetings and events according to the schedule and as they were scheduled, and reporting on the occurrences which took place during such engagements. These reports took the shape of "*telegramas*", the standard form of communication to and from the Mission.

The first area I had contact with was migrations. The Vienna Migration Conference was organized by the International Centre for Migration Policy Development (ICMPD). It took place on the 19<sup>th</sup> and 20<sup>th</sup> of October 2021, under the theme "Re-imagining migration partnerships". I attended the conference virtually, as it took place in Vienna through hybrid format with limited attendance. Through a series of talks and debates, the event gathered politicians and experts in the field. Director General Michael Spindelegger welcomed the newest member of the organization, Greece, and Austrian Federal Chancellor, Karl Nehammer, drew attention to the possible implications of Europe not controlling refugee flows and overreaching its capacity. The situation in Afghanistan was on spotlight throughout the event.

With respect to the bilateral scene, many occurrences took place. The Austrian political stage is characterized by an eventful and vigorous dynamic and fluidity. At the date of beginning of the internship, Alexander Schallenberg was the Austrian Chancellor, who resigned the position for personal reasons. Karl Nehammer, former Interior Minister, was then sworn into the position, on the 6<sup>th</sup> of December 2021. The national political scene was also shaken by the mitigation and control measures of the Covid-19 pandemic. Austria imposed nationwide lockdown measures in the autumn, beginning on the 22<sup>nd</sup> of November, as the country registered high numbers of infections. The government distinguished between vaccinated and non-vaccinated people on the application of the measures. Non-vaccinated individuals were mandated into lockdown from the 15<sup>th</sup> of November 2021, which was conceded a break during the Christmas period due to a drop in the number of cases but was only lifted only in January. On the 20<sup>th</sup> of January 2022, the parliament approved compulsory vaccination, with monitoring from March and fines up to 3600€. <sup>10</sup> This generated great controversy throughout the nation and lead to a wave

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<sup>10</sup> BBC NEWS - **Coronavirus: Austrian parliament approves mandatory vaccination order.**

of protests, with particular expression in Vienna. The measure was, however, suspended at the beginning of March, as the government considered the Omicron variant less dangerous and, therefore, saw the legislation as disproportionate.

In the bilateral context, we were also tasked with the preparation of minutes regarding relevant encounters and visits of Austrian statespersons to foreign countries and politicians, and vice-versa. One of such events covered was the visit of Foreign Affairs Minister Alexander Schallenberg to Armenia, where he discussed with Armenian Prime Minister Nikol Pashinyan the situation between Armenia and Turkey, later announcing negotiations between these two countries would take place in Vienna.

The last task I conducted under the bilateral context was the update of the country card (*Ficha-país*) regarding Austria. This consisted of reviewing and updating the file which the Mission keeps, with data on general information of Austria, as well as the state of the bilateral, economic, and cultural relations between Portugal and Austria. There is also a dedicated section with advice to Portuguese residents and nationals travelling to Austria, which was still of high relevance, as the Covid-19 restrictions were undergoing a phase of great modification in both countries, with more liberal measures being approved, but very different specifications and requirements depending on the vaccination and previous infection status of each individual.

When it comes to the multilateral aspect of the mission's work, it allowed me the participation in the tasks of several of the UN's agencies, namely the United Nations Commission on International Trade Law (UNCITRAL) and the Commission on Narcotic Drugs (CND). One of the areas under which I developed a big portion of the internship work was Space Law. The 61<sup>st</sup> session of the Legal Subcommittee of the Committee on the Peaceful Uses of Outer Space (COPUOS) took place from the 28<sup>th</sup> of March to the 8<sup>th</sup> of April 2022. Delegations debated national regulations as well as the application of the international treaties regarding space law, with a focus on outer space resources and sustainability.

Regarding the criminal sphere, the United Nations Office on Drugs and Crime (UNODC) has great expression at the UN in Vienna. This agency acts on prevention of varied facets of crime, namely cybercrime, narcotics drugs, and human trafficking. The United Nations Convention Against Corruption (UNCAC), which works under the

UNODC, was one of the agencies which held considerable relevance during the internship period. The Conference of the States Parties (COSP) to the UN Convention Against Corruption is the oversight body of this document and holds meetings every two years. Its latest meeting, COSP's 9<sup>th</sup> session, took place in Sharm el-Sheikh, in Egypt, from the 13<sup>th</sup> to 17<sup>th</sup> of December 2021. These events are mostly devoted to the adoption of resolutions developed by the States Parties, as well as decisions. COSP's 9<sup>th</sup> session adopted eight resolutions and two decisions. This meant many preparations beforehand. The previous months were permeated with many meetings, known as informal consultations, in which States Parties gathered to debate and negotiate the text of each resolution. In these meetings, I had the chance to witness high level negotiating and the interplays of international geopolitics and diplomacy in the drafting and shaping of international legal instruments. Still relating to crime control, between the 14<sup>th</sup> and the 18<sup>th</sup> of March 2022, the 65<sup>th</sup> session of the Commission on Narcotic Drugs occurred in Vienna, where the status of drug prevention and the implementation of international drug control treaties were debated. There were many side events taking place, with the participation of experts and organizations from civil society, which revealed the advantages of taking multiple areas of expertise and points of view into consideration to enable a more accurate approach that takes into its design the proficiency of legal and technical experts, as well as the perspectives of those working on the field.

Regarding other International Organizations, I got the opportunity to sit in on a few meetings of the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO). The meetings were focused on rather technical aspects regarding nuclear energy but, similarly to the other organizations, reflected the views and priorities moving diplomacy. This revealed even more in the context of the events which emerged in international geopolitics.

The final part of the internship was marked by the events prompted by the war in Ukraine. On the 24<sup>th</sup> of February 2022, Russian forces invaded Ukrainian territory, initiating a period of great turmoil and repercussions in international politics, which extends to present day. Austria condemned the Russian invasion immediately, appealing for peace, while recalling its position as a neutral State. Chancellor Karl Nehammer was the first European chief of government to hold a meeting with the Russian President Vladimir Putin, on the 11<sup>th</sup> of April 2022. Nehammer approached the issue of war crimes and pushed for the establishment of humanitarian corridors. This visit was an important

first bridge with the EU. In this context, the UN at Vienna became a vivid platform of international law and politics. The aforementioned geolocation of Austria as a corridor for energy between Russia and Europe highlighted the country's relevance in this scenario. In the multilateral context, on several events, there were statements by most delegations condemning Russian action, declaring it a violation of international law, and walkouts when the Russian delegation took the floor. This also resulted in the non-acceptance of a resolution which was being sponsored by the Russian delegation.

Throughout my participation in the setting of these various entities, one component stood out to me, and led me to choose the topic for the academic research which follows this report. Having had a special interest in gender equality throughout my academic path, I kept attentive to mentions of the subject during the internship. The only task carried out on the bilateral sphere which involved gender issues was related to the 8<sup>th</sup> Barbara Prammer Symposium. This event takes place annually, in memory of the former President of the Austrian National Council, around gender issues. The focus of this edition was the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, also known as Istanbul Convention. Likewise, the event was denoted with the focus on women's rights and gender equality based on the dual conception of sex and gender as binaries. On the multilateral realm, despite it being one of the Sustainable Development Goals (SDGs) and proclaimed a priority for the UN and others International Organizations in the defence of human rights, gender issues were not as present as I would have expected. And when present, they were dominated by a focus on women's rights, leaving implicit the framework of the gender binary as a basis for this work on gender equality. Throughout the internship, I recall only a couple mentions to the LGBTQIA+ community. Bearing in mind the importance and urgency of women's rights and empowerment for gender equality, given that the UN is a favoured forum for the highest level of international diplomacy and holds the bastion for human rights advocacy and protection, I had awaited not only more often mentions to the topic, but also a more wide-ranging perspective to permeate its work. Regarding events on the subject on the multilateral sphere, the Commission on Crime Prevention and Criminal Justice (CCPCJ) of UNODC held, on from the 10<sup>th</sup> to the 12<sup>th</sup> of November 2021, the "Thematic Discussions on the Implementation of the Kyoto Declaration". This event gathered experts to discuss the Kyoto Declaration on Advancing Crime Prevention, Criminal Justice, and the Rule of Law: Towards the Achievement of the 2030 Agenda for

Sustainable Development. This edition of the event was focused on the first pillar of the Kyoto Declaration, entitled “Advancing Crime Prevention”. The last task carried out under the internship was the production of a summary of the 2020 Results-Based Annual Report by UNODC. The document informs the UNODC Member States on the developments and achievements of the agency’s programmes and offices around the world. It contains one chapter dedicated to crime prevention and criminal justice, where gender issues are mentioned, by explaining UNODC’s actions on the prevention and combating of gender violence, from the perspective of eradicating violence against women. There is one single mention to the LGBTQIA+ community, on the chapter dedicated to transnational organized crime. In the context of trafficking in persons and smuggling of migrants, the report highlights the need to consider LGBTQIA+ victims in the context of trafficking in persons and smuggling of migrants, for the vulnerability that undocumented migrants and unemployed people face as targets of forced labour. Therefore, in the context above mentioned, surged the topic of how gender equality issues are approached in the international law scenario, namely on criminal law. Giving the observed approached by UN agencies, it led me to question how sexual orientation and gender identity matters are encompassed in international law, through the perspectives of human rights and the UN, and also the international criminal law sector. These issues will be developed and addressed in the following sections of this work.

The internship not only allowed for the observation of the scenarios studied throughout the theoretical part of the master’s degree, but it also provided a unique opportunity to participate in the multifaceted and dynamic environment and work of the Portuguese Mission in Vienna. Besides the workings of an Embassy with its bureaucratic, cultural, and diplomatic realms, I could witness the way diplomacy shapes the work of an International Organization and how it is, in turn, shaped by the ongoing events in world politics. Furthermore, the internship was carried out during a very particular and even historical moment in international politics and diplomacy, with the context of the Covid-19 pandemic shaping decision making and reconfiguring working methods, and the beginning of the armed conflict in Ukraine, with all its implications for Austrian, European and international politics, law, and human rights. Therefore, this internship constituted a moment of great learning and acquirement of practical knowledge and skills, as well as networking through the contact with people from various fields and backgrounds, and of personal growth.

### III. Sexual Orientation and Gender Identity

In this first section of our investigation, we will resort to literature review by analysing relevant academic work on the subject. In doing so, we intend to look at the general framework of gender identity and sexual orientation to better determine the object of our study. Following conceptual clarifications, this chapter gives an overview of the societal and legal approaches to gender and sexual matters into current day.

One idea that we would like to leave present from an early stage is that dealing with sexuality and identity, some of the axes of humanity, is a delicate task. It is an object of astronomic complexity, which the theories and notions we will analyse next try to grasp at. However, to try and classify and conceptualize such a reality means simplifying and reducing its intricate nature to enable its theoretical study. Sexuality and gender identity do not occur in linear aspects or in a vacuum and cannot be put into containers. Rather, they are the product and part of the immensely varied human condition and experience, which makes them so challenging for law to approach and regulate. The following study must, therefore, be understood accordingly.

On a primary stage of our approach, several essential concepts and terms require attention. The central focus of our study are Sexual Orientation and Gender Identity (SOGI). The language around this theme has been evolving for several decades, its constant advancement and transformation reflecting the historical and cultural changes around the LGBTQIA+ community. The Yogyakarta Principles on the application of international human rights law to sexual orientation and gender identity constitute a milestone in this context. Drafted and published in 2007 by a group of 29 international human rights experts, this set of principles, which we further explore later on, is a central document on this subject in the international sphere. In 2017, an update was published, the Yogyakarta Principles plus 10 (YP+10), building on the original document. These documents provide us with useful theoretical definitions which we take as a starting point in our conceptual task. The original 2007 principles take sexual orientation

“(…) to refer to 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 (…).”

Regarding gender identity, the Yogyakarta Principles define it 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 (...).”<sup>11</sup>

These are broad definitions, which provide an inclusive approach and a good basis for our investigation. Something stands out visibly when observing both these descriptions: the clear separation of the notions of sex and gender. Such a view has been explored largely by several fields of study such as psychology and the feminist and queer movements. It will also reveal of crucial importance in our legal approach and analysis of SOGI issues. While these notions have been considered as synonyms and even used interchangeably, that line of thought was challenged by developments occurring throughout a wide span of areas, from academic and medical research to social movements and activism, namely feminist and queer movements.

Throughout the 20<sup>th</sup> century, medical and biological scientific research have deconstructed many of the assumptions regarding human sexuality. Neurobiology, physiology and even heritability have provided relevant inputs and answers regarding sexual characteristics of the human body. Some such advances include findings from neuroscience and behavioural endocrinology which contradict and refute the previous existing understanding of gender and sex dimorphism in the human brain and hormonal systems, thus opposing the gender binary idea.<sup>12</sup>

Despite the developments in the direction of a distinction between sex and gender, this perspective also has its opposers. Many argue that such a division has outlived its utility. Authors such as Anne Edwards consider that the drawing of a clear line and conceptual definition of sex and gender as separate was an important task in the process of gender equality. However, after enabling the deconstruction of gender prejudices and roles,

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<sup>11</sup> INTERNATIONAL COMMISSION OF JURISTS (ICJ) - Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity (2007).

<sup>12</sup> HYDE, J. [et. al.] - The Future of Sex and Gender in Psychology: Five Challenges to the Gender Binary, p. 172-174.

Edwards questions its usefulness in bringing new dimensions to the gender equality movement.<sup>13</sup> Drawing on this author's work, Denise Thompson goes on to condemn its use by certain branches of the feminist movement, which take this distinction between sex and gender to mean that gender roles are "superficial" and less deeply ingrained than physiological ones, dismissing its responsibility in subjugating women. However, the employment of only the word "sex", though acknowledging and clarifying previously that it is used containing its varied meanings, as the author suggests, seems to us dismissive of all the nuances we have been analysing. Considering the usage by feminist branches in the sense of clarifying that distinction between biological and societal constraints, which Thompson recognizes, played an important role in the early task of gender equality, and one may argue it does still, given the difficulties still faced by this activism.

Renowned feminists such as Judith Butler and Simone de Beauvoir pitched in with their own contributes. Recalling the latter's input to queer theory, Beauvoir's statement "one is not born, but rather becomes, a woman" significance is central. It disassociates the binaries of gender from sex, being a woman from being female. Judith Butler evaluates this notion through the dangers of creating a "radical heteronomy of natural bodies and constructed genders."<sup>14</sup> Judith Butler goes further by contesting the nature of the term "sex" itself, arguing it can be as much a social construct as gender, and therefore holds no natural character in itself.<sup>15</sup> Butler also critiques the attempt to delimitate sex and gender at all, which the exercise of distinction does by enunciating the features of each one to determine their differences. Rather, the author considers that these categories may only be understood as continuous and dynamic, subject to changes and reinventions, as Simone de Beauvoir had already suggested.<sup>16</sup> One other relevant aspect in Butler's discourse is the connection with heteronormativity. To truly comprehend sex and gender means to abandon the conceptions of the socially imposed notions of heterosexuality as the natural category and a compulsory one too, therefore opening the way for homosexuality, as well as transsexuality and the notion of a gender spectrum.

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<sup>13</sup> EDWARDS, Anne - The sex/gender distinction: Has it outlived its usefulness?, p. 1.

<sup>14</sup> BUTLER, Judith - Sex and Gender in Simone de Beauvoir's *Second Sex*, p. 35.

<sup>15</sup> BUTLER, Judith - **Gender trouble: Feminism and the subversion of identity**, p. 25.

<sup>16</sup> BUTLER - **Gender trouble: Feminism ...**, p. 59.



The experience of transexual and intersex people also provides an important input to this discussion. The notion that sex and gender are not coinciding is an essential vector for all those whose gender identity does not align with the sex attributed at birth. In this line, the logic that gender is the expression of one's sex is also incongruent. It further sustains the claim above explored that not only gender, but sex is also a construct imposed by society, which only serves to categorize people and create divisions. Myra J. Hird explains this by recalling how the abandonment of the gender binary and the recognition of gender fluidity was not accompanied by a deconstruction of the fixated sex categories. By keeping part of the structure, we are not posing an effective challenge to the real constraints of the sex/gender system.<sup>17</sup>

Notwithstanding the amount of work developed around this problematic of distinguishing sex and gender, it stays very much controversial and unsettled. Although we cannot in the present work thoroughly and exhaustively dissect this problematic in all its dimensions, what merits highlight is the matter of perspectives and experiences. Xine Yao draws attention to the limited and reductive character of this thinking as an Eurocentric white perspective on feminism. In line with what is expressed by Denise Thompson, Xine Yao deems the distinction between sex and gender as "more a political convenience than an accurate account."<sup>18</sup> Yao considers it a simplification of a complex reality of only a few, which is dismissive of cultural and historical experiences other than the Eurocentric one. In this context, the author highlights the importance of the work of Indigenous and feminists of colour bringing a realistic view of true-to-life representativeness of the underrepresented to the literary field. The debate on gender and sex often left out the way these are experienced throughout cultures. Several cultures and societies outside the Western world illustrate this, as is the case of the Two-Spirit. Like Xine Yao highlights, that racism and colonialism must be taken into consideration when approaching visions of gender and sex. The Two-Spirit notion cannot be simply translated to our Western concept of the LGBTQIA+ community, but rather must be understood against its cultural and historical background.<sup>19</sup> Xine Yao further considers that addressing sex and gender as abstract and isolated concepts dismisses the role played by politics, which have been the main force regulating private life, including sexuality.

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<sup>17</sup> HIRD, Myra J. - Gender's nature: Intersexuality, transsexualism and the "sex"/"gender" binary, p.356.

<sup>18</sup> XINE, Yao - Feminist Theory, Feminist Criticism, and the Sex/Gender Distinction, p. 135.

<sup>19</sup> JOURIAN, T. J. - Evolving Nature of Sexual Orientation and Gender Identity, p. 12.

Additionally, the association of sex exclusively with the body is a fault in feminist thinking, by simplifying something which is not a common experience. Likewise, Indigenous and Black feminism call out the imposition of Western considerations and assumptions regarding biological and physical aspects of the human body, urging for a demoralization of those Western standards. Those visions merit a voice alongside other sectors of feminism, proving the need for an analytical framework based on an integrative approach.<sup>20</sup> In relation to this, intersectional feminism must also be mentioned, as a means to widen the perspective aimed at gender and sex, by making space for and incorporating the realities of all those marginalized by multiple structures of inequality and discrimination, forming a better tool for the accomplishment of real justice and equity.

It is also pertinent to note that, given the above analysis, we will not be using the terms sex and gender interchangeably in this study, nor will we exclude either one of them. Despite the challenges and limitations of this approach, it still maintains its relevance due to several circumstances, as explored above. Moreover, it allows us to simplify our terminology, which is crucial for the furtherance of our study. Discussions around the sex/gender significance are ongoing, as different interpretations continue to emerge. Likewise, as afore mentioned, we will not attempt to resolve the issue in the present investigation, but rather intend to keep all these viewpoints and ongoing deliberations, as well as the subjective and varying nature of the subject, in our consideration.

While we have been analysing society's considerations of sex, gender, and sexuality in general, although its categorization has been longstanding and restrictive and only recently began deconstructing and expanding, LGBTQIA+ people have existed long before these notions even formed. As seen, cultures outside the Western focus present different ways of experiencing and manifesting SOGI. The same is true for different periods of time – accounts from Greek society and mythology included same-sex relations, which though having complex political power interplays, were in that period natural. Identities deviating from the social norm were not merely created when expressions emerged to refer to them.<sup>21</sup> In this context of deconstruction of the sex/gender relation, comes the turning point of the third sex and the transition to the post-binary world, where the queer movement gains significance, as it represents the rupture with the

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<sup>20</sup> XINE - Feminist Theory, Feminist ..., p. 135-147.

<sup>21</sup> HALL, Donald E. - **Queer Theories (Transitions)**, p. 21.

established norms. As Hall expounds, the word “queer” describes something transversal, which crosses categories, defying static structures and ideas.<sup>22</sup> This defying and transcending established sexual and gender norms can be traced back several decades. In “Genealogy of Queer Theory”, William Turner traces its markers and evolutions.<sup>23</sup> Throughout the years, the LGBTQIA+ community conquered its space in public notice through its own force and by other activist movements, such as feminism and the civil rights movement. Turner describes how the great legal conquerors of these two movements created the favourable moment for homosexual liberation activism, which sprung from their practices. The Stonewall Riot which took place in 1969 is an indisputable milestone for the community and its modern activism. From then onwards, the path of queer activism was met with many obstacles and setbacks. The community fell back on academic and medical research developments, as we have previously seen, to sustain and further its activism.<sup>24</sup> In the 1990s, several works emerged rejecting heteronormativity and the perceived “normality” of sexuality, with the article “Queer Theory: Lesbian and Gay Sexualities” from a feminist journal signifying a milestone on the use of the term.<sup>25</sup>

Despite the path being drawn by such studies and activism, one aspect that permeates it is the centrality of the perception of a prevalent identity. When it comes to SOGI, heterosexuality and cisgender identity have been taken as the norm, constituting imposed assumptions from society. The concept of heteronormativity refers to “the dominant social norms that regulate identities, sexualities and relationships.”<sup>26</sup> Being cisgender means there is an alignment between one’s biological sex and their gender identity. This thinking creates an idea of dichotomy, where heterosexuality and cisgender identity are the norms, against which all else constitutes the “otherness” and is measured in comparison to those norms. The danger of this oversimplification and bipolarization lies in the ostracization of all the other identities. In the early stages of the LGBTQIA+ community’s history, besides ostracization it meant, as we will explore further on, criminalization, and pathologizing. Once more, the medical field’s role is highlighted. Oppression and violence materialized too in the nature of medical treatment, particularly in the form of treatments of the LGBTQIA+ community’s then perceived “disorders”.

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<sup>22</sup> HALL - **Queer Theories (Transitions)**, p. 12.

<sup>23</sup> TURNER, William B. - **A genealogy of queer theory**, p. 3.

<sup>24</sup> TURNER - **A genealogy of ...**, p. 12-16.

<sup>25</sup> HALL - **Queer Theories (Transitions)**, p. 55.

<sup>26</sup> NARRAIN, Arvind; CHANDRA, Vinay - **Nothing to Fix: Medicalisation of Sexual Orientation and Gender Identity**, p. VX.

Conversion therapies for homosexuals, medical interventions on intersex children and the dismissal of transsexual people's experience further humiliated such individuals, by pathologizing their very own identity and considering it a disease in need of repair. Such medical perspectives were, as Narrain and Chandra expose, a reflection of the existing legal frameworks. The move from curing sexualities and gender identities other than the cis and heteronormative ones to its depathologization was a crucial step.<sup>27</sup> This was made possible by research and empirical studies, in connection to the developments on human rights going on at the time, driven by the feminist and queer movements. In culmination of all these forces, in 1973 the American Psychological Association (APA) removed homosexuality from its list of mental disorders, which marks the shift from focusing on curing homosexuality as a pathology to a mental health approach aimed at supporting the LGBTQIA+ community. This change in the medical community's approach and discourse furthered the decriminalisation of homosexuality, supporting the move from violating the LGBTQIA+ community's human rights to respecting and fulfilling them.<sup>28</sup>

The history of the LGBTQIA+ community is one of struggle, difficulties and violation of rights and liberties, with a long path of marginalization and denunciation of the limitations of the gender binary and the cisgender-heteronormative norms. The various labels and tags reflect such a fight as well as the individual's personal experience with SOGI. Therefore, linguistic terms and concepts are of great importance for the community to feel respected, and its correct usage is, as defended by Jourian, an ethical matter.<sup>29</sup> Likewise, we would like to briefly touch on the terminology around the LGBTQIA+ community.

The queer activism in the decade of the 1990s popularized the acronym LGB, which referred, respectively, to lesbian, gay and bisexual individuals. Since then, more letters have been added, accompanying, and reflecting the expansion of the movement. The term expanded in the 2000s to include transsexual people, adding the letter "T" to the acronym. The letter "Q" was only more recently added, standing for queer, but also questioning, meaning those who are in the process of exploring their SOGI. The letter "I" was added as signifying intersex people, and the plus sign as a mean of encompassing all the other

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<sup>27</sup> NARRAIN; CHANDRA - **Nothing to Fix ...**, p. XV-XXIV.

<sup>28</sup> NOGUEIRA, Conceição; MANUEL DE OLIVEIRA, João - Introdução: um olhar da psicologia feminista crítica sobre os direitos humanos de pessoas LGBT, p. 10.

<sup>29</sup> JOURIAN - *Evolving Nature of ...*, p. 20-22.

identities contained within the community.<sup>30</sup> There are variations of the term, according to preferences, as the struggle of inclusivity in the context of human sexuality is a difficult one to overcome with flawless precision. The LGBTQIA+ acronym has its imperfections, such as not stating more unknown categories to the wide public such as non-binary gender identities. Additionally, the label used should be the one each person is more comfortable with.<sup>31</sup> Nevertheless, this form of the acronym poses a representation of broad categories while providing for wide inclusivity with the plus sign. Having to use a term to refer to the community, these are our motivations to use this one in our investigation, while keeping in mind that this terminology is flexible, due to the complex and mutable nature of human sexuality which leads the community to reinvent and adapt itself constantly.

Likewise, the LGBTQIA+ community refers to the group of people who identify in SOGI matters as different from what have been the established cisgender and heteronormative standards. As mentioned before, these categories are not stagnated or isolated. It is key to note that all the dimensions encompassed by the LGBTQIA+ community – sex, gender identity, gender expression and sexual orientation - are spectrums. Likewise, sex and gender identity correspond to the notions we have now analysed. As to gender expression, it corresponds to the way one expresses, through their perceived gender identity. Regarding sexual orientation, according to the American Psychological Association, the term alludes to the sex of the people one feels attracted to, sexually and/or romantically. If we take the sexual orientation spectrum, having the heterosexual and homosexual categories on each of its extremes, all the points in between have been considered as pertaining to the group of bisexuality. More recently, researchers have developed other subcategories such as bi-heterosexual and bi-bisexual. Although such categorization may prove useful in clarifying the broadness of bisexuality, as mentioned by Galupo et al., it is not all encompassing of pansexual, queer, bisexual and experience sand individuals. Through a practical study, these authors identify measurements of sexual orientation, namely social and bodily identity, detecting patterns in sexual orientation - monosexual, plurisexual and asexual – and in gender identity – cisgender and transsexual -. The task, however, was based on the Kinsey Scale, a method intended at rationalizing bisexuality and its categories, not considering other classification and systematization methods, and overlooking the point which we have

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<sup>30</sup> BLAKEMORE, Erin - **From LGBT to LGBTQIA+: The evolving recognition of identity**

<sup>31</sup> MCEWING, Evan - Building Awareness of the LGBTQIA+ Community, p. 245.

already seen – categorization of SOGI is a complex, reducing and unrewarding task. The participants of the study, however, emphasized self-identification as the main mechanism. Being that SOGI experiences are deeply personal and individual, no external entity has the authority to determine one’s identity.<sup>32</sup>

Another aspect that needs mentioning in the depiction of these spectrums, is that identity, be it regarding gender or sexual orientation, is similarly non stagnant. An individual’s SOGI may be fluent and change over time. Not only do people change from one category within the LGBTQIA+ community to another, as may be the case of those questioning their SOGI when they move to another category, but there also those individuals whose identity is more fluctuating. For these fluid-identifying people, sexuality and sexual attraction may vary over time and depending on circumstances. Those who do not experience any romantic or sexual attraction (aromantic/asexual) or only do so after developing an emotional connection to someone (demiromantic/demisexual) are also an important part of the community’s representativeness. This does not constitute an extensive list, but rather a small example of how SOGI identities are diverse and multifaceted in their nature and interactions with each other.

The above outline provides us with an overview of the conceptual and historical dimensions of the concepts of SOGI, expounding their multifaceted nature. As mentioned before, we do not aim with this exercise to provide clear definitions or answer the complicated questions surrounding human sexuality, but rather chose to highlight points we consider relevant for our investigation. Moreover, the LGBTQIA+ community is a heterogenous group of people who have very different experiences with SOGI issues as well as with inequality. As a community suffering oppression, the repercussions are not the same towards every member of the community, as we must keep in mind the interplay with other marginalized groups. More layers impose themselves, as racial, socioeconomical and other factors overlay with each other. Bearing in mind the need to address human sexuality as a complex situation, with many dynamic categories and patterns, by changes in self-identification but also shifts in society’s paradigm approaches to sexuality and sex/gender, we now look into how these dimensions have been influenced

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<sup>32</sup> GALUPO, M. Paz [et al.] - Conceptualization of Sexual Orientation Identity Among Sexual Minorities: Patterns Across Sexual and Gender Identity, p. 436-448.

and approached by the legal sphere. Considering all the perspectives analysed above, history and the evolution of law itself also provide a valuable input to the discussion.

The aspects of sexual and gender identity are present from the first moments of life. The very first juridical act to usually take place directly after birth is a public identification register, in which sexual and/or gender identification is required, such categories being determined by physiological aspects. Regarding this, Cannoot and Decoster argue that gender identity does not need to be endorsed by the State. The authors consider that the Western notions and norms of sex and gender stem from structural inequalities and perpetuate them namely through legal means such as this. Furthermore, they see the mandatory registration of a person's gender under the gender binary categories of male and female as a violation of the right to gender identity autonomy. By upholding the gender binary, this registration practice upholds the binary as the only approach to gender and upholds heteronormative standards, being accomplice to the perpetuation of the systemic violence and discrimination it creates. The authors advocate for the abolition of this system which they consider an obstacle to human rights and consider this will benefit not only transsexual and non-binary people, but also cisgender individuals. Recalling our analysis on sex and gender matters, sex and gender identity are, as seen, distinct categories. A civil register does not account for or consider personal experiences of gender. It does, however, uphold the idea of a natural identity based on physiological characteristics limited to two categories. Cannoot and Decoster measure this practice against the legal principle of proportionality used in human rights, arguing that such a restriction of an individual's identity and self-determination is based on no existing relevant social necessity. Yet, the idea of abolishing such a system gives rise to the question of how then to reformulate this registration in a way that is encompassing and inclusive of such a complex and diverse matter as gender identity, providing it is needed to have some sort of classification for various reasons, namely public health policies. The authors reframe the issue, highlighting the difference between the State mandating that everyone undergoes such a form of binary registration, and the possibility of instead recognizing the identity self-proclaimed by the individual. As seen in the study carried out by Galupo et al., this is the form of identification that LGBTQIA+ people have expressed to be more comfortable with, and which leads to less restrictions of personal freedom and right to self-determination. Cannoot and Decoster suggest this would shift the power dynamics, putting people in charge of their identity instead of the State. Given

the pros and cons, their analysis outweighs classification as the disadvantage for over restriction and disproportionality.<sup>33</sup> In line with this, there is an emerging trend in the academic legal setting which regards personality rights and the right to non-identification by gender categories. Steaming from the principal of human dignity and the associated non-discrimination, legal theorists have been developing the notion of a right to gender identity. Personality rights include SOGI, as they are intrinsically personal and complex issues, which the attempts to categorize them has failed to take into account. In this sense, Lando et. al argue that the right to self-determination on SOGI is part of personality rights and, therefore, constitutes the basis for the right to non-identification under biological categories.<sup>34</sup>

This matter of sex/gender registration illustrates how present SOGI issues are in our lives and how much they are enshrined by legal aspects. In Western legal tradition, the system is permeated by the cultural and historical background of Christianity. Such conjuncture played a central role in the shaping of sex and gender issues throughout the centuries and into today's practice. As Harold Berman notes, after the fall of the Roman Empire, its law flourished in the Easter part of the previous rule into the 10<sup>th</sup> century. In Western Europe, Roman law was taken as the basis for the drafting of the new legal systems; its tradition was carried out by rulers and also by Christianity and its power.<sup>35</sup> While focusing on common law jurisdiction, Kerry O'Halloran takes note of this in a perspective which is useful for the understanding of this evolution and can be applied to Western law in general and even Eastern systems if we consider such influence of the Roman legal tradition. The author highlights how the ethics and values which permeate Christian as a religion were imprinted in legal jurisdictions and justice systems. This means a common group of morals and standards were taken as the guiding handbook pointing the rightful way, coincident with that of Christianity's road to salvation. The idea of right and wrong, holiness and sin were ingrained in the inner works of society. During a time when the Christian churches held great power and were deeply involved with the State's institutions, what O'Halloran calls its "most basic enforcing mechanism", sin, was used both in the religious and civil contexts. Furthermore, States' institutions upheld this

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<sup>33</sup> CANNOOT, Pieter; DECOSTER, Mattias - *The Abolition of Sex/Gender Registration in the Age of Gender Self-Determination : An Interdisciplinary, Queer, Feminist and Human Rights Analysis*, p. 28-46.

<sup>34</sup> LANDO, Gorge André [et. al.] - *A Fluidez do Gênero e o Direito à Não Identificação do Sexo Biológico*, p. 49-53.

<sup>35</sup> BERMAN, Harold J. - *The Religious Foundations of Western Law*, p 491-492.



notion by constituting the means of execution of punishment of wrongful and deviating religious conduct. Christianity as a system of beliefs and the law were connected.

These religious moralities were engraved in secular laws, uniting Church and State in the regulating and controlling of the citizen's lives according to a common heritage, in all their dimensions. Sexuality was no exception. The rules and instructions according to which sexuality was to be lived were decided by the Church and kept in place by the State. The norm being heterosexual relations between cisgender individuals within the marriage and performed according to religious procedures, with the sole acceptable purpose of procreation, everything else falling outside these lines was deemed not only a deviation and a sin but prohibited. This included acts such as prostitution and any form of SOGI other than heterosexuality and cisgender identity, prohibiting any identity pertaining to the LGBTQIA+ community.<sup>36</sup> Family law was also marked by subjugation of women. The notion of *pater familias* from Roman law, according to which the chief of the family was the man and thus the one who detained the authority over all the members of the family, carried on in legal tradition. As an example, the Portuguese Civil Code of 1987 stated in Article 1885 that the women owed obedience to the husband. This establishment carried on until the transition from a monarchy to a republic, in 1910.<sup>37</sup> There were clear gender roles and patriarchal norms, restrictions and impositions established by law. These notions shaped legal norms and societal thinking for centuries, and still today can be used to explain internalized homophobia and social resistance to the LGBTQIA+ community. They are visible in the struggles of same-sex marriage, steaming from a culture of strict family law.

The secularization of the State and its institutions constitutes a milestone for the fading of Christianity's influence in legal systems, which can be seen also as a first step towards the establishment of SOGI rights. The transformation of social values and norms in the early 20<sup>th</sup> century and the restructuring in the period after the world wars continued this trend.<sup>38</sup> Following this, the Civil Rights Movement and feminism previously studied opened up the way for legal change and rights for SOGI matters. The advancements of the queer movement proved crucial in legal aspects due to the need for identification. As

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<sup>36</sup> O'HALLORAN, Kerry - **Sexual Orientation, Gender Identity and International Human Rights Law: Common Law Perspectives**, p. 8-10.

<sup>37</sup> GUIMARÃES, Elina - A mulher portuguesa na legislação civil, p. 560-565.

<sup>38</sup> O'HALLORAN - **Sexual Orientation, Gender ...**, p. 11.

O'Halloran clarifies, for an entity to be approach in a legal setting, it needs to be considered a legal personality. Without a strong sense of identity and characterization, the community and its members could not be ascribed rights and be involved in legal procedures. Therefore, the importance of the struggle for a recognition and a self-proclaimed identity. The role of self-determination is crucial in modern democratic and liberal society's for, as the author puts it, it takes away the power of others in defining someone by comparison to the norm as "otherness", and is a manifestation of the freedom to make personal choices and proclaim them.<sup>39</sup>

Nevertheless, the LGBTQIA+ remains a marginal group subject to exclusion and discrimination. The community has, throughout its history, from the stage when there wasn't even a united movement fighting for the rights of these individuals, or when the proclamation of such identities was so inconceivable for deviating from the norms and no terms even existed to refer to them, been alienated and oppressed. Although there is no commonly recognized definition of minority, the one provided by Francesco Capotorti, former Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, on a study presented in 1977 is widely accepted. It conceptualizes a minority as:

“(...) a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from the rest of the population and show, if only implicitly, a sense of solidarity directed towards preserving their culture, traditions, religion or language.”

Although there is no mention of the SOGI issues, and the community is not united by ethnic, religious, or linguistic characteristics, there is a commonality in the non-conformity with cisgender and heteronormative structures. We can also see that the sense of solidarity permeates the community. Above all, it is noticeable that the elements and individuals of the community are united by an alienation based on the same factors, their SOGI characteristics. The reality of a minority is, therefore, not constrained by conceptual and terminology aspects, or even the nominalization. For a group to constitute a minority does not imply or require it to be underrepresented or smaller in numbers. The important

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<sup>39</sup> O'HALLORAN - *Sexual Orientation, Gender ...*, p. 14.

idea in the context of the LGBTQIA+ community is that the group of people in question has been on the margins of society, not only outside the sphere of powerholders but being criminalized and forced into muteness, and the obstacle that constitutes to their enjoyment of universal human rights. The protection of minorities is a central concern and focus of International Law, as we will observe in the next section of our work.<sup>40</sup>

This discrimination persists, and members of the LGBTQIA+ community face barriers of legal nature in the diverse areas of their lives, from health care to relationships, parenthood, and safety. Despite the many efforts of the queer movement to eradicate inequalities, not only is progress slow and difficult, but there are also even setbacks happening all over the world. O'Halloran makes an interesting connection with the shift in geopolitics, and how the recent multiplication of populism rebuffs the previous trend of multiculturalism facilitated by globalization. This trend translates to a return to the ideologies of the nation-State and to a tightening of the sociocultural norms and a delimitation of sharper margins between the accepted citizens and "others". SOGI prejudices deeply affect the lives of individuals. Homophobia, transphobia, and other forms of hostility towards the LGBTQIA+ community constitute a form of discrimination which merits attention under human rights law. Not only does it leave these individuals more vulnerable to self-harm, hate crimes are very much a reality in this context, as we will explore further on. These noxious impacts on safety and health are but the tip of the iceberg. LGBTphobia, a term referring to practices of fear, dislike, hatred and/or discrimination towards individuals identifying outside the cisgender and heteronormative systems,<sup>41</sup> like other types of prejudice and intolerance, targets not only the rights but also the dignity of these individuals, incompatibly to the essential principles of human rights provisions. This form of alienation presupposes a relation of superiority of one group in comparison to another. One of its methods of manifestation is hate speech, a discourse which marginalizes and diminishes an individual or a group of people due to some characteristic. This contributes to furthering inequality and social exclusion of the LGBTQIA+ community and its members. This phenomenon has been pointed out by the community as a form of abuse, which is even more easily proliferated nowadays through

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<sup>40</sup> ALAMINO, Felipe Nicolau Pimentel; DEL VECCHIO, Victor Antonio - Os Princípios de Yogyakarta e a proteção de direitos fundamentais das minorias de orientação sexual e de identidade de gênero, p. 646-648.

<sup>41</sup> PIPINO, Mariana Viviane Ferreira; PIPINO, Marina Beatriz Ferreira - LGBTfobia: as raízes históricas da intolerância e seus efeitos sobre o acesso à saúde pública pela população LGBT, p. 22.

social media and other online platforms, constituting a serious harm to the mental health of these individuals, leading to anxiety, depression, isolation and in some cases even suicide. Hate speech separates from freedom of speech and expression once it proliferates violence, prejudice, and discrimination, leaving no space for communication and co-existence, and therefore constituting an obstruction to the enjoyment of these individuals' human rights.<sup>42</sup>

Modifications and structural changes, however, do not come about suddenly. Feminism, the Civil Rights movement, and the queer movement have all been pushing for the dismantling of the discriminatory and inequitable norms within the structures which constitute society's foundations, be it marriage, labour or others. To deconstruct and restructure the power relations and dynamics is a task which has been centuries in the making and is not likely to be accomplished in the foreseeable future. Profound social change and reform goes hand in hand with legal apparatuses. Society and law reinvent and shape one another continuously, accompanying the advancements of civilization. Or, at least, it ought to be so. Literature on legal systems and law is vast on this subject. Bernstein et. al take a look at this longstanding debate through the perspective of the LGBTQIA+ community. The queer movement has been advocating for reformation in society, law, culture, and politics, as they all interplay in social change. Legal conceptions of justice, equality, among others, stand as both ambitions and guidelines in the procurement of the LGBTQIA+'s space in society. Bernstein et. al highlight the two particularities which pose special difficulties for the legal reform of SOGI aspects and the accommodation of the queer movement's appeals - the difficulties that structural inequalities pose to social activism and movements, and the struggles encountered on a rights-based strategy.

These authors recall how legal regimes are designed to shield and keep the privileged in power. This comes to be, firstly, due to the fact that those in power positions have the advantage of easy access and better knowledge of the structural systems, and an influence in its construction and shaping. Secondly, these are the very own structures which the contesting activist movements need to agree to welcome their claims for rights. Inclusion is therefore hampered, once the relationship of power does not halter, but rather keep the

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<sup>42</sup> VALADARES, Gustavo; ALMEIDA, João Paulo Rodrigues - Direito Constitucional: A LGBTfobia como resultado do discurso de ódio, p. 53-56.

rights activism in a petitionary position, while maintain the basis of the inequality, the structural inequalities. Furthermore, legal norms and structures exist not in a void, but in the context of the surrounding institutions and political atmosphere, which some scholars consider removes their ability to actually de-construct the oppressive system.

The literary sector of queer legal theory considers that legal systems uphold and normalize certain identities, marginalizing those different from the norm, i.e., the cisgender and heteronormative models of SOGI. Moreover, the categorization itself is detrimental. Advocating for one group within the LGBTQIA+ community perpetuates the idea of cataloguing, damaging the idea of non-binarism, spectrums and fluidity which is essential to the community. This would be disregarding the needs of a whole range of individuals in order to benefit only one subgroup. Still, social activist movements continue to mobilize for the goal of rights and legal reform, once it is the more rooted mechanism in comparison to only political and social adjustment. Moreover, right-based activism denounces and contests the existing social norms, which is significant given the approach that Western society and politics to rights – their increasing weight and attention given to it through legal evolution and human rights development exposes the inequalities of the marginalized group, representing an important political play. Bernstein et. al highlight the impact of litigation as well as judicial procedures and decisions in disseminating the community's struggle, by making it known to the public, namely through the media.

The notion previously mentioned that laws do not exist in a vacuum is also relevant from another prism. Legal systems and regimes exist against the backdrop of a cultural and societal background. These institutions, influence and shape law's approach to SOGI matters, as we have above seen with the case of religion and medical outlooks. Law is not stagnant, but fluid and adaptable to the evolutions, transformations, and emerging needs of society. As Bernstein et. al explain, it is a two-fold dynamic relation. These societal institutions and structures are designed and governed by laws. On the other hand, and simultaneously, as they evolve and change, such societal institutions pressure law and legal systems to reconfigure and adapt to their most recent configurations. In this relationship, social movements play an important role as drivers, denouncing the defects of the status-quo and agitating public perception, and calling for the correction of such issues, while at times being also the ones initiating and engaging in prosecution. In line with this, the queer movement and the LGBTQIA+ community have performed this role,

bringing attention to, and condemning the oppression and inequalities of the existing social and legal structures permeated by heteronormativity. The hegemonism of the sex and gender binaries were present in society's discrimination, but also in law's criminalization and prohibition of same-sex relations. Likewise, in working within the legal system, the queer movement was able to push for legal change and equality of rights, in reflection of the gaps and inconsistency of law with the changes emerging in society, and simultaneously conveying a message of acceptability to the rest of society. As Bernstein, Marshall and Barclay cunningly put it, "In the hands of social movement activists, law is a symbolic resource for advancing social change."<sup>43</sup>

The role of political discourses is another important point on the interplay for legal change through social movements. The control exerted by political powerholders over the structurally established systems restrains the opportunities of social activism movements to push for legal reforms. Activism has different prospects depending on the windows of opportunity that emerge in the political scenario. The aforementioned authors resort to the example of same-sex marriage to exemplify how intense and deeply connotated with cultural and political value the process of legal reform can be. Here, the authors depict another facet of political influence on legal change besides through its interplay in legal systems and institutions, which is that of the impact on public views and opinion. By acting to change people's morals and vision, political discourse performs its potential for propelling reform.<sup>44</sup>

This chapter allowed us an understanding of SOGI issues, as the focus of our study. These are highly complex matters, which must be understood in their setting and full spectrum, avoiding categorization. We have also seen that these notions are the result of historical and cultural constructs, whose context is ever evolving. Law follows these social changes while creating the space for them to mobilize. As seen, law's role in creating and supporting social change is complex and not without dispute or shortcomings. However, despite sheltering the already privileged and preserving inequalities in certain contexts, legal systems also hold the mechanisms and opportunities to bring about social change and the advancement of rights and equality. In the following

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<sup>43</sup> BERNSTEIN, Mary; MARSHALL, Ana-Maria; BARCLAY, Scott - **Queer mobilizations: LGBT activists confront the law**, p. 11.

<sup>44</sup> BERNSTEIN; MARSHALL; BARCLAY - **Queer mobilizations: LGBT ...**, p. 1-12.

Sexual Orientation and Gender Identity (SOGI) in International Law:  
The UN and the ICC approaches

chapter, we will look at the existing instruments of international human rights, to assess how they make space for such opportunities on the subject of SOGI matters.

#### **IV. Sexual Orientation and Gender Identity in International Law**

Having done an analysis of the SOGI subject, which consists of our object of study, this next section now focuses our investigation further onto the legal aspect. Taking into consideration the theoretical analysis of the general aspects of SOGI issues in relation to the law from the previous chapter, we will observe them in the context of international law. We will start by observing if there are provisions covering this matter, and which are those. To do so, we will resort to an analysis of legislation. We will start by going over the core and basilar international human rights instruments. We then take an overview of the three existing regional instruments in America, Africa, and Europe, and whether and how they cover SOGI issues. Following this, we observe the existence of other provisions dealing with the subject. While examining the existence of international legal instruments and provisions on the subject, we also have a look at how international law has been responding to the shifts in society, as well as human rights violations related to SOGI, all through the eras of feminist and queer movements, by including jurisprudence analysis in our consideration of the wide international human rights law perspective.

Before even approaching the documents produced and endorsed by the UN as the leading international organism on human rights, the core documents known in their collective as the International Bill of Rights constitute the basis and the crowning of international human rights law. This consists of the Universal Declaration of Human Rights (UDHR), together with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

To start tracing the path of SOGI issues in human rights, we must begin with the UN. Adopted on the 10<sup>th</sup> of December 1948, by the UN General Assembly, despite its non-legally binding nature, the UDHR constitutes the leading document and the foundation for all subsequent work. Its prominent provision in Article 1, “All human beings are born free and equal in dignity and rights”, sets the tone for the principles of equality and dignity as the essence of human rights, and to which all human beings are entitled. Furthermore, its Article 2 proscribes any form of distinction in the enjoyment of such rights, be it of ethnic, religious, political or sexual nature. Article 3’s provision for freedom and security, as well as Article 5’s declaration against degrading and inhuman treatment can be invoked



in relation to the violence to which LGBTQIA+ people are subjected to, as we will observe later on. The bundle of Articles 6 until 11 protect the right of all individuals to equal treatment and non-discrimination before the law and legal and judicial proceedings. Subsequently, Article 12 merits mention for its approach to the right to privacy and family life from intervention by the State. Accordingly, Article 16 provides for the protection of “the right to marry and to found a family”, under national provisions. Regarding Articles 19 and 20, these accounts for the freedom of opinion and expression, and of assembly and association, respectively. Article 23 approaches the right to employment and remuneration equality. Finally, Article 26 states the right to education and personality development with the full respect of the individual’s human rights. These four Articles (19, 20, 23 and 26) gain special relevance from the perspective of the LGBTQIA+ community as a minority group. Article 25 also merits recognition for the relevance of health protection and healthcare access to the LGBTQIA+ community. This article establishes the right of all individuals to “a standard of living adequate for the health and well-being”, namely through medical care.<sup>45</sup> States’ obligations under international law to ensure the accessibility and universality of public healthcare mechanisms go beyond the mere existence of such resources, with suitability and quality playing an important part. Trained and informed healthcare professionals, adequate administrative procedures and stigma and prejudice-free treatment are important to the depathologization of the LGBTQIA+ community and the fulfilment of equality in healthcare.

The ICCPR came into effect in 1976. This legal instrument is of particular relevance for SOGI issues once it was under this document that the early jurisprudence on this theme was encompassed.<sup>46</sup> Regarding the provisions contained in the ICCPR, Articles 2, 17, 23 and 26 merit reference. Article 2, similarly to the UDHR’s Article 2, accounts for the principle of non-discrimination under all categories, including sex. Article 17 accounts for the right to privacy. Article 23 protects “the right of men and women” to marry. Finally, Article 26 prohibits discrimination by legal means under grounds of, namely, an individual’s sex.<sup>47</sup>

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<sup>45</sup> UNITED NATIONS GENERAL ASSEMBLY - Universal Declaration of Human Rights (1948).

<sup>46</sup> O'HALLORAN - **Sexual Orientation, Gender ...**, p. 51.

<sup>47</sup> UNITED NATIONS GENERAL ASSEMBLY - International Covenant on Civil and Political Rights (1966).

The third instrument constituting the International Bill of Rights, the ICESCR, also endorsed in 1976, offers similar protection in the social, economic and cultural context. Starting with Article 1, it provides for the right of peoples to self-determination. The Article then clarifies that this translates in the freedom of peoples to pursue their cultural development, which we can link to the struggle of the queer movement for social change. Article 2 accounts for the non-discrimination, by proclaiming the enjoyment of the rights established in the Covenant “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>48</sup> The United Nations Human Rights Committee (UNHRC), the body which monitors the ICCPR and the ICESCR, has mentioned that it interprets the categories of “sex” and “other status” to include SOGI and, therefore, considering that this Article provides for the protection of discrimination under these pretexts. Article 3 enshrines equal social, economic, and cultural rights for men and women. Articles 6 and 7 draw on the UDHR’s provisions contained in Article 23, regarding employment. They account for the enjoyment of equality and non-discrimination in the labour field. Although this has been usually interpreted exclusively in relation to sexual orientation discrimination, the UNHRC interprets this provision as referring to discrimination on the basis of any category, including not only sexual orientation, but sex as well.<sup>49</sup>

Regarding regional instruments, the American Convention on Human Rights, also known as Pact of San Jose, Costa Rica, came into force in 1978. This instrument provides in Article 1 for the obligation of States-Parties to respect the rights of all individuals, with no discrimination, namely by sex. Article 5 relates to the prohibition of inhuman and degrading treatment, noting that all individuals must be respected in their “physical, mental and moral integrity”. In relation to this, Article 24 provides for the equality of all individuals before the law. Another relevant provision is Article 11, which protects the right of individuals to privacy, namely in family life, protecting everyone’s honour and dignity, and even referring to the right to suffer no abuse of one’s reputation.<sup>50</sup> In terms of jurisprudence, in 2016, the Inter-American Court of Human Rights made a landmark ruling in favour sexual orientation in the context of the American Convention on Human Rights. In the case *Flor Freire v. Ecuador*, in which Homero Flor Freire, a Second

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<sup>48</sup> UNITED NATIONS GENERAL ASSEMBLY - International Covenant on Economic, Social and Cultural Rights (1966).

<sup>49</sup> O'HALLORAN - **Sexual Orientation, Gender ...**, p. 52.

<sup>50</sup> ORGANIZATION OF AMERICAN STATES (OAS) - American Convention on Human Rights (1969).

Lieutenant of the national army, was discharged on the account of homosexual conduct, based on the existing military code. Given the fact that Mr. Flor Freire denied such conduct and identified as not being homosexual, the Court's recognition of self-determination and identification is pivotal. Furthermore, the Court recognized the existence of discrimination from the State of Ecuador, in violation of, namely, Article 1 (1), Article 11 (1) on the right to honour and dignity, and Article 24 of the American Convention on Human Rights.<sup>51</sup>

In the African continent, the African Charter on Human and People's Rights entered into force in 1986. Its Article 2 states that no individual should have any restriction to the enjoyment of their human rights with any founding, namely sex or any other situation. Article 3 provides for the protection of the individual's equality before the law. Throughout the text of the document, caveats such as "every individual" provide for an inclusive and wide scope of application.<sup>52</sup> In 2014, the corresponding oversight body, the African Commission on Human and People's Rights, adopted a landmark resolution on SOGI issues. "Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity" or Resolution 275,<sup>53</sup> classifies discriminations and violations of human rights on the basis of SOGI matters as a violation of the rights and provisions set in the Charter, calling upon State action in this context. In line with this, the Court of Appeal of Botswana drew on this statement when, in 2016, in the case *Attorney General of Botswana v. Thuto Rammoge and 19 others*, it rules the LGBTQIA+ community as part of the national society, albeit a minority not accepted by some religious groups and beliefs, and therefore holder of rights and dignity.<sup>54</sup>

The European Convention on Human Rights (ECHR), drafted by the Council of Europe, came into force in 1953. Here, we find several provisions similar to the ones afore mentioned, namely judicial rights of fair trial and equality before the law in Article 6. There are also several others we would like to highlight. Article 8 concerns the right to

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<sup>51</sup> INTER-AMERICAN COURT OF HUMAN RIGHTS - **Flor Freire v. Ecuador**.

<sup>52</sup> ORGANIZATION OF AFRICAN UNITY (OAU) - African Charter on Human and Peoples' Rights (1981).

<sup>53</sup> AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS - **275 Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity** (2014).

<sup>54</sup> COURT OF APPEAL OF BOTSWANA - **Attorney General of Botswana v. Thuto Rammoge & 19 Others**.

privacy and family life. Jurisprudence and case law from the European Court of Human Rights (ECtHR) has interpreted this article widely as to include SOGI, applying it to cases regarding the LGBTQIA+ community.<sup>55</sup> Similarly, Articles 10 and 11, relating to freedom of expression and of assembly and association, respectively, draw on the provisions in Article 19 of the UDHR, protecting the safe expression of views, even those different from the norm, assuring diversity. Regarding the right to marry, Article 12 states, similarly to Article 23 of the ICCPR, the right of “men and women” to marry and constitute a family, while following the national laws. Article 14 prohibits any discrimination on the fulfilment of these rights, on ground of, namely, sex “or other status”, this last provision prone to application to SOGI matters.<sup>56</sup>

Regarding instruments from the European Union, the Charter of Fundamental Rights of the European Union, which came into force in 2009, encompasses all the rights proclaimed in the ECHR, while making some additions. It contains an article dedicated specifically to gender equality, albeit between men and women. Article 23 states that “Equality between men and women must be ensured in all areas”. However, it is Article 21 which introduce an important provision. This article, dedicated to non-discrimination, states that it applies to inequalities based on any reasoning, including sex, and it mentions clearly “sexual orientation”.<sup>57</sup> Also in functioning since 2009, the Treaty on the Functioning of the European Union (TFEU) makes reference too in Article 10 to the fight of the European Union against discrimination based on sex or sexual orientation. Moreover, Article 19 enables the European Parliament and the Council to combat such discrimination through legislating on it, namely in the area of sex and sexual orientation.<sup>58</sup>

The European Court of Human Rights issued a landmark decision in 2020, regarding legal gender recognition. In the case *Rana v. Hungary*, a transgender man from Iran, who was in Hungary under asylum, was not allowed to change his name and gender marker in Hungary. The State claimed it was due to a lack of a birth certificate with the new data. The ruling of the Court determined that there was an imbalance of public interest and the applicant’s human rights. It considered that the Hungarian State did not protect the

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<sup>55</sup> O'HALLORAN - **Sexual Orientation, Gender ...**, p. 49.

<sup>56</sup> COUNCIL OF EUROPE - European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

<sup>57</sup> EUROPEAN UNION - Charter of Fundamental Rights of the European Union (2012).

<sup>58</sup> EUROPEAN UNION - Consolidated version of the Treaty on the Functioning of the European Union (2012).

applicant's right to private life, under Article 8 of the ECHR, failing its international obligations under the Convention.<sup>59</sup> The ECtHR has been ruling on cases of gender non-binarism and self-determination of gender under Article 8, issuing that States' obstacles to non-binary gender recognition constitute a violation of the right to privacy, disproportionate to the restrictions imposed by binary gender registration.<sup>60</sup> In 2020, Robert Spano, President of the ECtHR, addressed the issue of how the Court's case-law has approached LGBTQIA+ equality. The President of the ECtHR recognized the Court's work as a pioneer in the area, noting how this approach has changed, from initially the European institutions not applying the notions of equality and non-discrimination to the LGBTQIA+ community and even dismissing their claims on the basis of the principle of proportionality and the necessity to safeguard public health and society's morals. In this context, the case *Salgueiro da Silva Mouta v. Portugal* has historical meaning, as it led the Court to state, in 1999, sexual orientation as being covered by the ECHR, under its Article 14, on the prohibition of discrimination on grounds such as sex or "other status". The advancements on this subject which kept arising during the following decades are of central importance given the ECtHR's influence and impact on other international as well as national courts, as a "rich source of jurisprudential inspiration".<sup>61</sup>

The cluster of basilar international human rights, named by the UN as core international human rights treaties, encompass a wide range of issues, from civil and political rights to socio-economic rights and the eradication of all forms of discrimination. From within this set of international legal instruments, one provision of relevance to SOGI matters is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which is in place since 1981. This convention targets discrimination against women, aiming at achieving gender equality. The associated body, the Committee on the Elimination of Discrimination Against Women has called out States in cases of discrimination for sexual orientation. Additionally, Article 5 does mention the elimination of gender roles and stereotypes. However, and similarly to the previous instruments, it considers gender equality from the perspective of the binary. Given that

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<sup>59</sup> EUROPEAN COURT OF HUMAN RIGHTS - **Case of Rana v. Hungary**.

<sup>60</sup> HOLZER, Lena - Legal gender recognition in times of change at the European Court of Human Rights, p. 14-16.

<sup>61</sup> Robert Spano, President of the European Court of Human Rights, on his keynote speech entitled "The evolution of the notion of equality for LGBTI persons in the Court's case-law", delivered on the Conference marking the 70th Anniversary of the European Convention on Human Rights, held in Strasbourg on 8 October 2020. The text of the speech can be consulted under the following URL: [https://echr.coe.int/Documents/Speech\\_20201008\\_Spano\\_LGBTI\\_ENG.pdf](https://echr.coe.int/Documents/Speech_20201008_Spano_LGBTI_ENG.pdf).

there is no international human rights legal instrument prohibiting the discrimination of LGBTQIA+ people and mandating that States-parties respect and implement SOGI human rights, scholars and legal practitioners have been dedicated to rethinking solutions for this. In this context, CEDAW gains particular importance. This instrument has been interpreted broadly to try to accommodate the issues of the LGBTQIA+ community. The Convention aims at achieving gender equality, as well as addressing and eliminating the roots of the issue. Its Article 2 (f) has been used as an opening. The Article indicates that States-Parties condemn discrimination against women and must “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women”. It is also worth mentioning that the document defines discrimination against women as “any distinction, exclusion or restriction made on the basis of sex”.<sup>62</sup> Thereby, these two provisions have been interpreted as to include any form of inequality of targeting related to a woman’s SOGI and/or gender roles, including lack of access to healthcare, employment, violence based on SOGI, among others. The Committee has included the LGBTQIA+ community’s issues in its mentions of intersectionality, namely on General Recommendation 28, where it has acknowledged the various basis of discrimination women may suffer and how intrinsically linked, they are to SOGI issues, recommending States-Parties to recognize this intersectionality as well. Furthermore, it has made such a connection as well under violence against women. Despite being advancements, these recommendations from the Committee are broad and don’t give States-Parties concrete actions to undertake.<sup>63</sup>

There are other areas worth mentioning, for the impact and effects of the recent tendency of wide interpretation of these norms on SOGI matters and LGBTQIA+ rights. Such fields relate to the rights of Indigenous people, the protection of refugees and the rights of children. The UN Declaration on the Rights of Indigenous People (UNDRIP) stands for the respect and recognition of Indigenous Peoples and their beliefs.<sup>64</sup> We recall the previous mention of the Two-Spirit identity by American Indigenous People. This instrument, therefore, covers cultural and societal norms and traditions which can be

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<sup>62</sup> UNITED NATIONS GENERAL ASSEMBLY - Convention on the Elimination of All Forms of Discrimination Against Women (1979).

<sup>63</sup> HOLTMAAT, Rikki; POST, Paul - Enhancing LGBTI Rights by Changing the Interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women?, p. 323-331.

<sup>64</sup> UNITED NATIONS GENERAL ASSEMBLY - United Nations Declaration on the Rights of Indigenous Peoples (2007).

interpreted to include views on SOGI, and include the cases of people considered transsexual or intersex by Western standards. The UN Convention Relating to the Status of Refugees can similarly be interpreted to include those individuals who are part of a social group that is marginalized in their country of origin, and are escaping persecution and endangerment due to their SOGI nature.<sup>65</sup> When it comes to the last mentioned topic, the Convention on the Rights of the Child is increasingly used as a source of legal basis to be applied in the instances relating to minors who are themselves or their parents part of the LGBTQIA+ community. Adding to the right to non-discrimination under Article 2, the Convention on the Rights of the Child institutes, in its Article 3, the right of the child to have their best interest as a guide of action and a first priority by public and private institutions, services and the State itself. Article 12 merits highlight in the context of SOGI issues for its assessment of the rights of children to be heard and to express personal views on all issues that affect their lives. Here, although the Convention does not concede children that right, we once more recall the tie with the aspect of self-determination and identification as central in SOGI matters, and the importance of this article in making a safe space for children to approach these matters. Lastly, Article 19 pertains to the safeguard against any forms of violence or abuse, which is a sensitive matter in the lives of LGBTQIA+ community members.<sup>66</sup> Furthermore, medical interventions against the wishes of the child or which are unnecessary, which may include sex-related procedures, can also fit in this scope.

As we have seen in this analysis, throughout these instruments, which constitute the core of international human rights provisions, explicit mentions of SOGI matters are scarce. Although these are wide and inclusive provisions and formulations, which has allowed for broad interpretation so as to include the protection of SOGI issues within their scope, the concern with this thematic has not been strongly present in the international human rights circle. Human rights law has been applied to SOGI issues. Still, there is no normative framework or international human rights instrument on prohibiting discrimination and assigning rights specifically to the LGBTQIA+ community. That being said, and given the existence of this gap, and in a context of great brutality and abuses against the LGBTQIA+ community, one document of great relevance comes up. The Yogyakarta Principles on the Application of International Human

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<sup>65</sup> UNITED NATIONS GENERAL ASSEMBLY - Convention Relating to the Status of Refugees (1951).

<sup>66</sup> UNITED NATIONS GENERAL ASSEMBLY - Convention on the Rights of the Child (1989).

Rights Law in relation to Sexual Orientation and Gender Identity, from here on referred to as Yogyakarta Principles, which we have mentioned in the previous chapter, consist of a crucial text dedicated to SOGI matters. A group of 29 experts and NGOs identified and recognized this necessity. Therefore, in 2005 they came together to analyse the discrimination and human rights violations suffered by individuals of SOGI outside the societal norms of cisgender identity and heteronormativity, and the application of international human rights instruments to this reality. This document contains 29 principles and does not address rights to the LGBTQIA+ community, but rather analyses their inclusion in the human rights provisions and recognizes States' obligations under them. It was signed in 2006 in Yogyakarta, Indonesia, and presented to the UN HR Committee in 2007. It is relevant for providing contemporary and wide definitions and clarifications on the terms of sexual orientation and gender identity.<sup>67</sup>

The document starts by recalling that “All human rights are universal, interdependent, indivisible and interrelated.” and that SOGI are central aspects ingrained in an individual's humanity and dignity. We would like to highlight some of the principles. Principle 3 pertains to recognition before the law, which is crucial to LGBTQIA+ people, for it states SOGI as an essential aspect of self-determination and recognizes the right of individuals to their identity and to not be forced to submit to the established social norms. Principle 5 states the right to security and protection from violence, not only from others but by groups and State officials. The cluster of Principles 12 to 18 approach socio-economic rights, such as the right to decent and just work, as well as social protection, without discrimination, adequate housing, quality education and health. Here, we would like to highlight principle 18, as it approaches protection from medical abuses. It states that SOGI are not medical conditions and thus, no individual shall be forced to procedures or treatments due to their SOGI. This constitutes an important provision given the LGBTQIA+ community's past with pathologization, which we have mentioned previously. Principles 19 to 21 deal with freedoms – of opinion and expression, assembly and association, and thought, conscience and religion. Principle 19, relating to freedom of opinion and expression, also has particular significance as LGBTQIA+ members have been and still are often marginalized, oppressed and discriminated based on their gender expression. Principle 21 covers freedom of thought, conscience and religion, making an

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<sup>67</sup> INTERNATIONAL COMMISSION OF JURISTS (ICJ) - Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity (2007).



important mention to State action – it proscribes that States make use of an individual’s SOGI to deny protection against or practice inequality and discrimination through legal or practical means. Principle 23 covers the right to seek asylum, which may be of great need for LGBTQIA+ members fleeing from violence and oppression, as seen. Principle 24 refers to the right to have a family, whatever form it may take due to SOGI matters, protecting diversity in marriage and in the descent. Furthermore, it urges States to take measures to ensure that the members of the community enjoy the same conditions as different sex married couples, and even to support them in the foundation of a family, by making adoption and assisted procreation accessible and free from SOGI discrimination. Finally, the last two Principles, 28 and 29, include mentions of the role and the responsibilities of others. Principle 28, relating to effective remedies and redress, incites awareness-training and similar measures to work on preventing violations, and adequate legal procedures to ensure remedy and reparations. Principle 29 closes the document by addressing accountability. It urges States to ensure that crimes based on SOGI discrimination motivations are properly approached, judged and punished, with no space for impunity for those involved directly or indirectly in the violations, including government officials.<sup>68</sup>

At the end, the document includes additional recommendations to concerned bodies such as the UN Human Rights Council, the WHO, Non-Governmental Organizations (NGOs), professional and commercial organizations, the media, and others, to reconsider their actions and avoid measures which might be harmful to SOGI issues, and to take measures to protect their rights. The document recognizes the individuals identifying outside the social SOGI norms as a marginalized and vulnerable group in the various spheres of life and society, and looks to contribute to the eradication of the human rights violations they fall victims to so regularly.

In 2017, a new text was adopted, consisting of 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.<sup>69</sup> Also known as YP+10, this document complements the original Yogyakarta Principles with nine new principles, to tackle breaches in several

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<sup>68</sup> ALAMINO; DEL VECCHIO - Os Princípios de ..., p. 648-663.

<sup>69</sup> ALAMINO; DEL VECCHIO - Os Princípios de ..., p. 661-662.

areas. Within this new set of principles, we would like to highlight Principles 32 and 33. Principle 32 adds the important perspective of the right to bodily and mental integrity, considering the violence, physical, emotional and psychological that individuals identifying with socially different SOGI categories suffer. Subsequently, Principle 33 approaches the right to freedom from criminalization or sanction based on SOGI aspects, directly or indirectly, urging States to end legal and criminal provisions which are discriminatory and oppressive in this sense.<sup>70</sup>

These documents have received criticisms, namely that they fall short on referring cases and specifying circumstances for some of the principles. This vagueness has been pointed out, namely, in relation to Principle 21's mention of freedom of expression which does not collide with the enjoyment of SOGI rights, by not clarifying the stance on a community's faith and their approach to members based on SOGI issues. Moreover, in the situations where circumstances are named, they have been criticized for being too narrow. For example, Principle 24 refers to non-discrimination of family life only in countries where same-sex marriage is already allowed. The document is also non-binding legally and juridically. Nevertheless, the principles constitute an important form of political pressure, drawing attention to the issue and calling for action. Its contribution to the interpretation and application of international human rights instruments through the principles it contains also constitutes added value.

This chapter allowed for an overview of the international legal provisions on human rights and their approach to SOGI issues. It shows us that, although these instruments are wide-ranging and allow for an interpretation which is inclusive of this subject and the rights of LGBTQIA+ people, namely under the broad provisions on human dignity and equality. Express mentions of SOGI matters are also not common due to the period of drafting of these documents and the status of queer movement and literature at the time. However, express mentions of the subject are important, especially as the cases of discrimination and violence based on SOGI matters continue elevated and a threat to human rights. Customary international law has been crucial in bridging these deficiencies. International courts and governing bodies have been following the trend and the path which started with criminalization, turned to the recognition of SOGI rights and now

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<sup>70</sup> INTERNATIONAL COMMISSION OF JURISTS (ICJ) - Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles (2017).

advances into the emerging complex identity matters of non-binarism. The Yogyakarta Principles are of central importance here in the broadening of interpretation and application of international human rights mechanisms to SOGI issues. In the following chapter, we take a look at how the international criminal field deals with the SOGI issues, and how it works with the frame of international human rights law we have just analysed.

## V. The approach to SOGI in International Criminal Law

In this chapter, we direct our attention to the approach which SOGI matters receive under international criminal law. We start by collecting data and information to paint the scene of the reality of people identifying outside SOGI norms. We then turn to international criminal law with a view to assess whether these matters are approached by this branch, and if so to what extent.

As we have seen in the previous chapter, mentions to SOGI matters and the LGBTQIA+ community are scarce in international human rights law. However, we can interpret the provisions contained in human rights instruments to encompass all SOGI issues, meaning they protect LGBTQIA+ people, as holders of these human rights as well. International bodies are following this interpretation trend in their rulings and commentaries. Nonetheless, people identifying outside the norms of SOGI are still big targets of crime. The foundation Human Rights Campaign gives account of at least 57 non-conforming or transgender individuals who were violently murdered in 2021 in the USA.<sup>71</sup> The Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE) communicates incidents reported on 36 States worldwide, consisting of attacks against property, threats and violent attacks against individuals, from least to more occurrences.<sup>72</sup> The Association for Human Rights in Central Asia (AHRCA), the Eurasian Coalition on Health, Rights, Gender, and Sexual Diversity (ECOM) and the International Partnership for Human Rights (IPHR) released a report which accounts for at least 36 LGBTQIA+ people being sentenced for homosexuality in Uzbekistan in 2021.<sup>73</sup> A report from Amnesty International on the impact of Covid-19 responses on marginalized groups accounts for unequal repercussions of such regulations on LGBTQIA+ people. Out of the 54 civil society organizations inquired, 69% responded that Covid-19 responsive measures exacerbated the inequalities that legislation and regulations already created for LGBTQIA+ people. The report further notes that enforcement and punishment for non-compliance with State measures for restraining the pandemic were also disproportionate for the LGBTQIA+ community.

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<sup>71</sup> HRC FOUNDATION - **Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2021.**

<sup>72</sup> OSCE ODIHR - **Anti-LGBTI hate crime.**

<sup>73</sup> RADIO FREE EUROPE/RADIO LIBERTY'S UZBEK SERVICE - **LGBT Community In Uzbekistan Faces Abuse, Discrimination, Imprisonment, Report Says.**

These already oppressed and marginalized individuals were targets of stricter and more violent policing, and more vulnerable to disproportionate arrests and fines. Moreover, these individuals restrained from seeking healthcare assistance for fear of further repercussions.<sup>74</sup>

As these numbers illustrate, the members of the LGBTQIA+ community, due to being individuals who identify outside the established norms of SOGI, are particularly exposed and susceptible to being victims of a series of crimes. This is an established reality. Such offenses may take the form of gendered violence, sexual violence or hate crimes, to mention some examples. The issue we set to assess is how these categories of crimes are approached by international criminal law, whether SOGI motivations are encompassed under these sets of criminal acts, and whether the provisions of international human rights law are applied to SOGI matters through this criminal context.

Crimes related to gender and sex have historically received diminished attention by the international criminal sphere. Furthermore, the formulation of human rights instruments was based on the heteronormative and cisgender suppositions which relate to the time in which they were drafted. Once more, the path of SOGI rights' recognition follows that of the feminist struggle in this situation. Gender violence was established as a violation of human rights from the perspective of violence against women. Drawing on that, international institutions have been interpreting legal provisions from a wider perspective, to include violence and persecution on the LGBTQIA+ community as an identity-based group.

The International Criminal Court (ICC), as the ruling and ultimate and permanent body on investigation and trial of the worst crimes internationally, is of central importance in this scenario. It acts as a last resort tribunal, to which cases arise after going through national courts. The Rome Statute consists of the treaty which was adopted by the UN General Assembly in 1998, and established the ICC, coming into force in 2002. In its preamble, the Statute makes reference to the need for the creation of the ICC as a permanent court for the trial of the worst crimes, alluding to the many occurrences of the 20<sup>th</sup> century which victimized millions, which includes the atrocities of World War II and the targeting and extermination of specific groups, namely homosexuals. The ICC acts

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<sup>74</sup> AMNESTY INTERNATIONAL UK - Covid-19: Pandemic restrictions magnified discrimination against marginalised groups - new report.

on the basis of a set of crimes which are considered the gravest crimes in the face of human rights and justice, to end impunity and to prevent further occurrences of these crimes, in connection with the UN, its principles and system. Those crimes, established on Article 5 of the Rome statute, consist of four categories – genocide, crimes against humanity, war crimes and the crime of aggression. There are currently 123 States Parties to the Rome Statute and, therefore, over which the ICC has jurisdiction.<sup>75</sup>

The persecution of individuals based on their SOGI characteristics comes, as we have seen in the aforementioned data, at the hand of private offenders or groups of offenders, but it can also be perpetrated by governmental structures and institutions themselves. Worldwide, SOGI characteristics outside the norms are outlawed in several countries. There are 68 countries where same-sex activity is criminalized<sup>76</sup>, with death penalty as punishment for transgression in at least six of them. Out of these, 30 are States Parties to the ICC.<sup>77</sup> At least nine countries have laws criminalizing forms of gender expression outside the norm.<sup>78</sup> The ICC has a crucial role and responsibility in upholding the highest human rights standards internationally, as a last resource court in both circumstances - for private parties' cases, but also as a mechanism of recourse when national entities are unwilling or unable to provide such protection.<sup>79</sup> Charles Moore takes incidents such as the attacks on LGBTQIA+ people at an HIV clinic which occurred in Kenya in 2010 to exemplify and justify that SOGI issue fall under the scope and jurisdiction of the ICC, as these LGBTQIA+ members are at risk of violence from other individuals and the government is unwilling or unable to protect them, having even refused to intervene for their protection.<sup>80</sup> Moreover, the argument has also been made for national criminalization of same-sex conduct as a crime against humanity. Not only by failing to protect individuals from attacks based on their SOGI characteristics is a State not

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<sup>75</sup> INTERNATIONAL CRIMINAL COURT - **The States Parties to the Rome Statute.**

<sup>76</sup> On a landmark ruling, the Eastern Caribbean Supreme Court has just recently, on 29 August 2022, ruled that Saint Kitts and Nevis laws from colonial era criminalizing same-sex relations as unconstitutional, overturning them. Further information is available at: <https://www.aljazeera.com/news/2022/8/30/null-and-void-judge-strikes-down-saint-kitts-anti-gay-law>.

<sup>77</sup> Those countries consist of: Afghanistan, Barbados, Senegal, Ghana, Sierra Leone, Dominica, Nigeria, Mauritius, Uganda, Namibia, Gambia, United Republic of Tanzania, Samoa, Malawi, Zambia, Saint Vincent and the Grenadines, Occupied Palestinian Territory, Guinea, Liberia, Guyana, Kenya, Comoros, Chad, Cook Islands, Bangladesh, Saint Lucia, Grenada, Tunisia, Maldives and Kiribati. See Human Rights Watch Website for further information, available at: [http://internap.hrw.org/features/lgbt\\_laws/](http://internap.hrw.org/features/lgbt_laws/).

<sup>78</sup> HUMAN RIGHTS WATCH - **OUTLAWED: "The love that dare not speak its name"**.

<sup>79</sup> BARRERA MOORE, Charles - 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, p. 1289-1290.

<sup>80</sup> BARRERA MOORE - Embracing Ambiguity and ..., p. 1292-1293.

complying with its human rights' international obligations, but by criminalizing same sex acts and, we further argue gender identity matters as well, States are conducting persecution of a group based on its identity, therefore breaching Article 7 of the Rome Statute. Article 27 further sustains this claim, providing for the application of the provisions in the Rome Statute to all individuals violating the provisions, regardless of their official statute or position.<sup>81</sup>

When it comes to conceptualization, the Rome Statute provides a definition of gender under its Article 7 (3), in the context of crimes against humanity, as follows:

“(...) the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.”<sup>82</sup>

This concept appears starkly delineated, but here a look at the historical redaction of the Rome Statute reveals pertinent. The drafting of the document involved negotiations between several parties, which had conflicting perspectives on SOGI matters. The discussions involved, on one side, several NGOs and activist groups on gender equality and women's rights, but also traditionalist organizations, the Vatican, and Catholic and Arab States. These conservative institutions argued for the removal of the word “gender” altogether from the statute. On the other hand, the defenders of gender equality suggested the use of the UN's definition of gender, which provides an understanding of this concept as a social construct, influenced by several factors such as culture, and variable according to space and time. The opposers, though, did not approve of this wide notion, pushing for the use of “sex” from a biological and binary perspective, excluding possibilities of including same-sex relations.<sup>83</sup> Therefore, although it presents as limited and very closed, this definition is the result and an accomplishment of the push of feminist and gender equality activists. It represents a victory in the context of what the alternatives would have been.

Still, the definition is, as the previous work cumulatively shows, dismissive of the complexities and dynamics of gender identity matters, and not an adequate provision for

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<sup>81</sup> DURIC, Nevenka; VIDLIČKA, Sunčana Roksandić; BOGUSH, Gleb - Legal Protection of Sexual Minorities in International Criminal Law, p. 43-46.

<sup>82</sup> UNITED NATIONS GENERAL ASSEMBLY - Rome Statute of the International Criminal Court, Article 7.

<sup>83</sup> BARRERA MOORE - Embracing Ambiguity and ..., p. 1300-1301.

application to the realities and necessities of our time. Not only does it over-simplify SOGI notions, but it also does not consider the character of the four dimensions we have previously analysed of sex, gender, sexual orientation and gender identity, smudging the lines between them and mixing concepts. It also does not comprise the idea of all these dimensions' fluidity in their spectrum nature, for it states the binary perspective. This situation is of central significance for it shapes and determines the scope of work of the ICC and its jurisdiction when dealing with SOGI matters. If the definition presented is taken exclusively to the letter, it means that the ICC cannot investigate and rule about matters other than the notion currently understood as sex, limiting it to the biological aspects and, therefore, excluding ICC action from the issues of roles, violence and human rights violations imposed by gender identity matters. This would be the case of the crimes against humanity committed by ISIS, on the basis of gender, against the Yazidi community, and which were submitted to the consideration of the ICC.<sup>84</sup> Furthermore, this interpretation of gender as the sex binary excludes cases of discriminatory and criminal conducts carried out systematically through harmful executions of societal perceptions of the acceptable gender roles, identities and expressions. One other dimension must be highlighted in this context, and that is the reality of intersex and non-binary people. As we have seen, those who have biological characteristics not entirely compatible to only one sex, and those who do not identify on the polars of the gender spectrum, constitute a big portion of the LGBTQIA+ community. One other central dimension of the LGBTQIA+ community, that of sexual orientation, is also absent. This approach to gender dismisses queerness, removing violence and discrimination against this group of people from the scope of Article 7. In order to enable an inclusion of all these mentioned dimensions, either the interpretation could be broadened, to include the aforementioned four dimensions, or the term could be interpreted as to fall under the scope of Article 7 (1) h), when it mentions persecution on "(...) other grounds universally recognized as impermissible under international law."

Regarding the possibility of including SOGI under the scope of the four crimes cited by the Rome Statute, when it comes to genocide, although this possibility has been considered for sexual orientation during the negotiating and drafting of the document, it has been dismissed for it was understood to create an opening and generate disputes due

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<sup>84</sup> MÁRQUEZ VELÁSQUEZ, María Manuela - *Intersex: A Neglected Category in the Understanding of Gender-Based Crimes at the ICC?*.



to the disagreements around SOGI matters.<sup>85</sup> Therefore, genocide has been understood to encompass only cases of criminal targeting of a group of individuals due to their characteristics of nationality, ethnicity, race or religion, as expressed in Article 6 of the Rome Statute.

Although the definition of gender presented on the Rome Statute has been widely criticized for long, there seems to be agreement that Article 7 and the framework of crimes against humanity provide the best path to be explored in the pursuit of the inclusion of SOGI matters under the scope of the ICC. Under Article 7, for a case to be admissible for prosecution, the crime must have resulted in a deprivation of one or more of the fundamental rights of the victims. Then, there needs to be presented proof that the crime was carried out against an individual or group on the grounds of the characteristics mentioned in paragraph 1 h), namely “(...) gender as defined in paragraph 3, or other ground that are universally recognized as impermissible under international law.”<sup>86</sup> Moreover, the act must have occurred as one of the crimes listed in Article 7 (1), such as murder, torture, rape or other forms of grave sexual violence, and as part of a systematic attack. The broad provision referring to other motives unacceptable under international law does provide an opening for interpretation and inclusion of SOGI matters. However, Moore highlights the complication and load that the expression “universally recognized” imposes, arguing it requires that the protection of SOGI matters is recognized as a customary norm of *jus cogens* in international law to enable their consideration under this provision of the Rome Statute, removing the possibility of including the LGBTQIA+ community in this scope under current circumstances worldwide.<sup>87</sup>

Academics and legal theorists have been resorting to Article 7 to argue that its interpretation enables the inclusion of the LGBTQIA+ community as subject of protection by the ICC, drawing on the ambiguity of the definition presented in paragraph 3 and the vulnerable situation of these individuals. However, the vagueness and confusing nature of the definition may be evoked to fit the interpretation of both opposing sides on SOGI matters. While those pushing for a broader SOGI inclusivity may use this

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<sup>85</sup> BARRERA MOORE - Embracing Ambiguity and ..., p. 1299.

<sup>86</sup> UNITED NATIONS GENERAL ASSEMBLY - Rome Statute of the International Criminal Court, Article 7 (1).

<sup>87</sup> BARRERA MOORE - Embracing Ambiguity and ..., p. 1305-1306.

argument, the same can apply to the conservative perspective of heteronormative and cisgender norms.<sup>88</sup>

Charles Moore goes even further, stating that not only does this definition and conceptualization of gender in the Rome Statute fall short on the needs for human rights protection on SOGI matters, arguing that the very institutional structure of the ICC also constitutes an obstacle to the protection of the LGBTQIA+ community. Given the historical background of the establishment of the ICC, with the *ad hoc* tribunals for former Yugoslavia and Rwanda as its predecessors, the ICC functions in relation to the gravest crimes for the international community, and under the principles of complementarity, meaning it has the jurisdiction to investigate cases only after they have gone through national justice systems and the State is unable or unwilling to prosecute. The cases referred to the ICC are selected by the Office of the Prosecutor and only then brought to the attention of the court.<sup>89</sup> The functioning of the ICC has been the target of growing criticism, as the court has taken a massive budget of almost 1.5 billion euros and 154,855,000 euros for 2022 alone, but shown few results. In the twenty years of its functioning, the ICC has issued only ten convictions. It has also ruled on cases exclusively from African countries, being accused of partiality and inequality in the selection of the cases.<sup>90</sup> The cases taken revolve around war crimes and crimes against humanity, with four individuals being charged with rape as a crime against humanity, under the interpretation of Article 7. However, the complexity of the cases in question and the fact that many countries remain unwilling to sign the Rome Statute limits the ICC's possibilities, namely on SOGI matters.

It has also been suggested that, as a newly formed institution, and with the lack of experience on SOGI matters due to the constraints we have observed above, the ICC takes the work of other senior international courts on SOGI matters as guiding notions. In this context, the ECtHR has been developing relevant jurisprudence on SOGI matters and the protection of the LGBTQIA+ community. As we have previously analysed, the ECtHR has been interpreting SOGI cases to fall under the framework of Articles 8 and 14 of the ECHR, on the right to private life and the protection against discrimination, respectively.

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<sup>88</sup> BARRERA MOORE - Embracing Ambiguity and ..., p. 1287-1304.

<sup>89</sup> BARRERA MOORE - Embracing Ambiguity and ..., p. 1292-1298.

<sup>90</sup> KILLINGSWORTH, Matt - **20 years on, the International Criminal Court is doing more good than its critics claim.**

This perspective has been applied by the ECtHR on several cases now, namely the case *Alekseyev and Others v. Russia*, where 51 applicants complained on the ban by the State authorities to the holding of LGBTQIA+ events. The Court ruled that there was no justifiable need or greater societal risk on the realisation of the event, and it went against the principles of a democratic society, violating, among others, Article 14 of the ECHR.<sup>91</sup> The workings of the two Courts present significant differences, however. While individuals may bring complaints against the ECtHR directly, while the ICC gets its cases from the Office of the Prosecutor, highlighting the role of this bureau in the consideration of SOGI matters by the ICC.<sup>92</sup> In any case, trends in legal interpretation and frameworks by the ECtHR are an important source of inspiration for the ICC.

Although controversy around the interpretation of the definition of gender in Article 7 (3) is ongoing, the ICC has since produced resources which bring new light to its approach to SOGI matters. In June 2014, the Office of the Prosecutor of the ICC published a document intitled “Policy Paper on Sexual and Gender-Based Crimes”. This document challenges the ambiguity of the notion of gender present in the Rome Statute and expands it, referring that gender-based crimes comprises attacks on individuals on the basis of not only their sex, but also their “constructed gender roles”. Recalling the provision of the Rome Statute, the paper states that the Office interprets and intends to apply it “in accordance with internationally recognized human rights”<sup>93</sup>, which we can infer to signify the Office takes the recent perspectives of international human rights law on SOGI as guidance. The paper also recognizes that gender-based crimes includes but is not limited to sexual attacks. One other central development brought about by this paper is the interpretation of SOGI matters as to be applicable to the framework of genocide. It considers that the Rome Statute allows the ICC to rule on cases where gender-based and sexual crimes constitute motivations for targeting a group and exerting, therefore, genocide. Regarding war crimes, the Policy Paper clarifies that gender-based and sexual crimes often occur in the context of armed conflicts, in the form of sexual slavery, rape or enforced sterilisation to name a few. In this case, not only are these acts violations of the Geneva Conventions, but they also merit the attention of the ICC under Article 8 of the Rome Statute. Additionally, paragraph 20 of the Policy Paper mentions that the Office

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<sup>91</sup> EUROPEAN COURT OF HUMAN RIGHTS - **Case of Alekseyev and Others v. Russia**.

<sup>92</sup> BARRERA MOORE - *Embracing Ambiguity and ...*, p. 1307-1309.

<sup>93</sup> OFFICE OF THE PROSECUTOR (ICC) – *Policy Paper on Sexual and Gender-Based Crimes*, p. 12.

intends to analyse all crimes under its jurisdiction from a gender-sensitive lens, considering the dynamics and backgrounds which interplay with the various violations of human rights considered.<sup>94</sup>

When it comes to sexual orientation, as previously seen, its inclusion was debated during the drafting of the Rome Statute, but conservative organizations blocked its inclusion. Although the struggle for the consideration of gender matters in its whole dimension in international criminal law has been a long path, there have been considerable efforts and attention dedicated to it. When it comes to sexual orientation, though, it continues to be under protected and even more blatantly disregarded in the international criminal sphere. The ICC has not worked with cases of crimes committed on the basis of sexual orientation. In this new document, by recognizing the evolving character of international human rights law and the need to adapt it to the circumstances of time in paragraph 15, the Office of the Prosecutor recognizes the value of looking to other institutions and organizations as guiding examples of the latest developments in international law. It does so by recalling the Office of the UN High Commissioner for Human Rights program The Free & Equal Initiative and its commitment to end discrimination based on sexual orientation.<sup>95</sup>

This Policy Paper has, therefore, come to answer some of the conceptual uncertainties and ambiguities surrounding SOGI matters in the Rome Statute, particularly Article 7 (3), providing an explanation of the understanding of the ICC and the Office of the Prosecutor on how to apply the provisions in cases including SOGI matters. It clarifies that the Office of the Prosecutor holds a gender-sensitive perspective on international criminal law, taking the notion of gender to have a wide meaning under the Rome Statute, and sexual orientation has included in some of its provisions. As Valerie Oosterveld refers, however, the publication of this paper does not constitute a solution to all the complications and needs of international criminal law or the ICC's action regarding SOGI matters. It must be accompanied by wide-ranging policies within the ICC as an institution, namely through the preparation and instruction of its staff on the contents of the policy and its application, and the monitoring of the actual use and application of the document.<sup>96</sup>

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<sup>94</sup> OFFICE OF THE PROSECUTOR (ICC) – Policy Paper on Sexual and Gender-Based Crimes, p. 13-20.

<sup>95</sup> OFFICE OF THE PROSECUTOR (ICC) – Policy Paper on Sexual and Gender-Based Crimes, p. 16.

<sup>96</sup> OOSTERVELD, Valerie - The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law, p. 456-457.

As a group at particular risk, we may consider, as we have seen in previous chapters, the LGBTQIA+ community as a gender and sexual minority. The existence and the extent of the crimes committed against the LGBTQIA+ community are of great seriousness. They result in the violation of several human rights, with the ultimate result being at times death, by the individual's hand or by third parties. However, international criminal law's considerations of SOGI matters in its theoretical and practical dimensions fall short of providing an adequate framework. The investigation and prosecution of crimes based on SOGI characteristics internationally, and the consequential effects of accountability and deterrence have yet to be truly fulfilled. Several factors play a part in this reality, from the existing conceptual Framework under which the ICC works to the logistical and structural challenges of the Court itself.

The approach of the international community to SOGI matters has evolved since the redaction of the Rome Statute more than 20 years ago. Fortuitously, the ICC as an institution and the Office of the Prosecutor give signs of renovation of its approach to SOGI matters. While there is great work further needed, there are also signs of improvement. Besides the more recent perspectives analysed on this chapter, on 20 December 2021, the Office of the Prosecutor of the ICC has launched a notice for public consultation on the development of a new policy document, regarding gender persecution. This new policy paper aims at developing, in the context of the Rome Statute, the ICC's work on transparency and accountability for persecution on the grounds of gender as a crime against humanity. It comes to complement the 2014 Policy Paper on Sexual and Gender-Based Crimes.<sup>97</sup> Not only does it confirm the ICC's recognition of sexual and gender-based crimes as very serious and in need of further attention and expertise, but it also holds great potential conceptually and in the broadening of the Rome Statute's framework on SOGI matters.

Therefore, in a time when political and other partial forces not only push for but manage to keep in place criminalization of SOGI matters, leading to a great setback on the path for gender equality and the queer movement, and resulting in the creation of an environment more prone to repression and violations of basic human rights on the basis of gender and sex, the role of the international institutions reveals more important than

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<sup>97</sup> INTERNATIONAL CRIMINAL COURT - **The Office of the Prosecutor launches public consultation on a new policy initiative to advance accountability for Gender Persecution under the Rome Statute.**

ever, as the bastions of the values of human dignity, freedom and equality, and the safeguards of human rights.

## **VI. Sexual Orientation and Gender Identity in the context of the United Nations**

This last chapter brings our attention to the handling of SOGI matters in the context of the UN. As we have previously seen, the core human rights instruments promulgated by the UN do not have mentions of SOGI matters in the terms they have evolved into nowadays. The cluster of international human rights law instruments, but also the subsequent work developed over the decades fail to explicitly include this subject, in both binding and non-binding international instruments. Thus, while the broadness of international human rights instruments allows for an interpretation which is inclusive to these matters through indirect mentions of equality and non-discrimination, the group of people identifying outside SOGI norms are not granted any rights with their particular situation and needs in mind, based on their SOGI characteristics and the vulnerabilities they face, as afore mentioned. As the most renowned International Organization when it comes to human rights, the UN holds a crucial role as a possible pacesetter in this subject. The question then arises of whether this potential is being materialized in the work and policy developed by the UN and its agencies, to what extent, and what reasons lie behind the observed situation.

Gender equality has been a concern on the UN agenda since the very beginning and foundation of the organization, with mentions to equality between men and women appearing in the preamble and in Article 8 of the Charter of the United Nations from 1945.<sup>98</sup> This, however, has been the view sustained throughout most of the time and work of the UN – gender from a binary perspective, and gender equality from the viewpoint of women empowerment. The question of how gender is interpreted and approached is of great significance for the understanding of the UN's policies on gender equality. Since the establishment of the UN, it took a perspective of gender as a binary system with male and female on either side, and a focus on the inequality and oppression of women and girls, thus establishing female empowerment as the focal point where its action for gender equality is centred. This approach reflects the cisgender and heteronormative stance, while also blurring notions of sex and gender, which we have established earlier in our investigation to be dismissive of all the complexities and dimensions of this subject. The Fourth World Conference on Women, which took place in Beijing in 1995, was a turning

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<sup>98</sup> UNITED NATIONS – Charter of the United Nations (1945).

point for the UN's approach to SOGI matters. For the first time in the context of the UN, the distinction between sex and gender was established, with the conceptualization of sex as relating to biological aspects and gender to social constructs. In the aftermath of the two weeks of the Conference, the Beijing Declaration and Platform for Action of 1995 was adopted, most revolutionary and visionary agenda for women's empowerment. Still, the conference and the following declaration remained heavily punctuated with the binary perspective of gender, and focused on women empowerment. The distinction of sex from gender was a way forward in dissociating gender roles which oppress women from the notion of predetermined natural reasonings often used to justify keeping these repressive systems in place. Nonetheless, this vision was altered merely in a primary and even superficial way, in line with the early conceptions criticizing sex and gender assumptions, far from the more deconstructed views on the societal structures of the queer movement. The idea of societal notions of gender being influenced by biological sex premises, as well as the interpretation of gender as a cisgender binary remained in place. It could also have prompted innovation on the grounds of sexual orientation, but the inclusion of this subject as a category for further discrimination of women was blocked during negotiations, and ultimately eliminated.<sup>99</sup>

The social movements on SOGI matters continued activism with the UN. As Francine D'Amico clarifies, the context of the 1990s with the end of the Cold War, accompanied by the advancements towards depathologization in the medical field, allowed for political opening and interaction of international LGBTQIA+ organizations to advocate for change. Amnesty International, an organization of pivotal importance in human rights advocacy, recognized criminalization of SOGI matters as a violation of human rights provisions. The situation improved from the middle of the 2000s decade on, with SOGI matters and the LGBTQIA+ community being addressed directly. In 2008, the UN General Assembly issued an important statement with the support of 66 Member States. Condemning the violence and violation of human rights of the LGBTQIA+ community, the Joint Statement on Human Rights, Sexual Orientation and Gender Identity recognizes the application of the principle of non-discrimination to SOGI matters. The proposal was presented by Argentina and supported mainly by European and American States. It is worth noting that the USA did not support it. The Vatican, Russia, China and Member

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<sup>99</sup> ONGSUPANKUL, Warisa - Finding Sexual Minorities in United Nations Sustainable Development Goals: Towards the Deconstruction of Gender Binary in International Development Policies, p. 6.



States of the Arab league declared against it. This was an important moment in the advancement of the debate on SOGI matters at the core of the UN. Francine D'Amico recalls how legal theorists consider it a pivotal moment on the discussions between the rights of States and those of individuals, and an extension of the challenge to the Westphalian system ignited by the UDHR.<sup>100</sup> This relates also to the role of other organizations in the engagement with the UN and States, as we will explore below. The UN High Commissioner for Refugees published, in November of that same year, a document titled “Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity”, recognizing for the first time the vulnerabilities of sexual minorities and their relation to the refugee status.

In 2010, another important moment took place, with the inclusion of SOGI on a resolution condemning extra-judicial and summary executions was presented to the UN General Assembly. Although the UNHRC deleted the mentions before submitting the draft, the USA delegation proposed their reintroduction through an amendment, which receives enough support to be adopted. The situation reflected the persistence of the polarization of opinions from the 2008 debate. The following year, in 2011, the UN Human Rights Council adopted the first resolution on human rights and SOGI, resolution 17/19, submitted by South Africa. Francine D'Amico accounts for a shift in positions, with several neutral States from the 2008 document to supporters of this resolution, namely the Republic of Korea and Ukraine. The reduction of neutral States for both the positions in favour and against increases the divergence of views on this subject, further complicating and deterring legal advancements on the consideration of SOGI matters by international human rights instruments. This resolution mandated the creation of a report. Therefore, still in 2011, the first ever report by the UN on SOGI matters and human rights was published. It consists of a report by the UN High Commissioner for Human Rights, under the title of “Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity”, where discrimination and violence towards the LGBTQIA+ people worldwide are documented. Crimes such as rape and torture, systemic and institutional violations and inequalities in access to justice and health, denial of asylum and exclusion from the rights to participation in community

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<sup>100</sup> D'AMICO, Francine - LGBT and (Dis)United Nations, p. 57-61.

are some of the referred situations.<sup>101</sup> An expert panel was set by the UN Human Rights Council to study the report and to advance workings on ending violence and discrimination against individuals based on their SOGI. The then Secretary-General of the UN, Ban-Ki Moon, state this subject to be of great importance, as a tragedy LBTQIA+ people have to live and which shames all the world. He also encouraged the established panel to issue recommendations on this. The work of the panel was not without resistance, however, with delegations leaving the room and others clearly declaring their opposition to the consideration of SOGI matters by the UN Human Rights Council, as these issues are not mentioned by international human rights instruments and, therefore, do not fall under its scope. Accordingly, the panel could only take a more moderated approach, and the report finalized by the panel states there is no need for the creation of further provisions conceding rights relating to SOGI matters, but rather the existing instruments should be applied in a way that enables protection of LGBTQIA+ people, in equality to all other people.<sup>102</sup> Once again, this event reflects the difficulties around advancements on SOGI matters by and through the UN, leaving SOGI matters to be addressed vaguely.

The Office of the United Nations High Commissioner for Human Rights (OHCHR) took an important step with the publication of “Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law”, a booklet set to elucidate on the obligations of states regarding the protection of LGBTQIA+ people, in 2012. It pinpoints the five central legal obligations of States on this matter, namely – protect individuals from homophobic and transphobic violence, prevent torture and any treatments of LGBTQIA+ people which are degrading or inhumane, revoke criminalization of same-sex actions, forbid discrimination based on SOGI, and protect the freedoms of expression, association and assembly of LGBTQIA+ people.<sup>103</sup> The OHCHR further developed work on this subject when, the following year, it launched a unique new campaign against homophobia and transphobia, the UN Free & Equal. The name builds on the statement that all individuals “are born free and equal” in condition, present in Article 1 of the UDHR. Through the spread of resources in the form of fact sheets, videos and others, and the organization of events, this initiative promotes

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<sup>101</sup> OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS - Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity (2011).

<sup>102</sup> D’AMICO - LGBT and (Dis)United ..., p. 64.

<sup>103</sup> OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS – Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law, p. 13.

information on SOGI matters and the engagement of several relevant actors, from politicians to civil society organizations and religious leaders.<sup>104</sup> That same year, the UN High Commissioner for Refugees drew on the existing document from 2008 with the publication of the “Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity.”

The first International Conference on Human Rights, Sexual Orientation and Gender Identity took place in Oslo on April 2013, still in the aftermath of the 2011 resolution 17/19, where the outcomes of a series of regional seminars held under the UN context in Kathmandu, Paris and Brasilia, were presented. The conference provided an important forum for discussion on SOGI matters, as representatives from governments all over the world and several civil society and human rights organizations and institutions were present. The summary report of the conference advises on the creation of a mechanism which enables the continued investigation and documentation of the most current updates and trends on SOGI matters and their relation to human rights. It also encourages more debate and dialogue on this subject, particularly on the application of existing human rights legal instruments and the collaboration between UN agencies regarding SOGI matters, suggesting the provision of training and technical guidance to Member States. As Francine D’Amico describes, these actions would result in the institutionalization of SOGI matters in the UN system.<sup>105</sup>

One of the major conquests on SOGI matters at the UN level was the adoption of Resolution 27/32 by the UNHRC in 2014. The resolution on human rights, sexual orientation and gender identity was passed with 25 votes in favour and 14 votes against, with opposition mostly from Islamic States.<sup>106</sup> The document states the great concern of the committee regarding the violence and oppression targeting LGBTQIA+ people throughout the world. It also requested that the UN High Commissioner for Human rights updated the 2011 report on “Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity”.

The following year, in 2015, the UN Member States adopted the 2030 Agenda for Sustainable Development, containing 17 Sustainable Development Goals (SDGs). These

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<sup>104</sup> UNITED NATIONS FREE AND EQUAL – About UN Free & Equal.

<sup>105</sup> D’AMICO - LGBT and (Dis)United ..., p. 67.

<sup>106</sup> O’HALLORAN - **Sexual Orientation, Gender ...**, p. 57.

consist of guides on the plan for peace and prosperity, on relevant areas for the achievement of equality. One of them, SDG number 5, pertains to gender equality. Throughout the target goals intended to be reached by 2030 under this SDG, the mentions of gender equality through parity between men and women and women's empowerment stand out. Even though the SDGs consist of guiding aims with several targets each, they are not a binding international law resource. Still, they set the framework for the desired reality to be achieved by world nations, resembling the perceived manifestation of the realization of human rights. The SDGs are taken by States as ambitions to guide their varied conduct. They are also often proudly used by not only States but companies and other organizations as measures of their accomplishments towards sustainability, equality, and human rights. Moreover, the SDGs are also perceived as the result of conversations which reflect common views and draw on the commitments already manifested in other international law instruments, while also addressing some of their shortcomings.<sup>107</sup> As mentioned, SDG 5 is the most relevant for our investigation, for it relates to gender equality. There is not, however, a clear definition of "gender" presented in the context of this SDG. Rather, the resources where it is referred continuously allude to the goals of equality between men and women and the importance of women's empowerment, reflecting a binary and cisgender perspective.

In 2016, the UNHRC adopted resolution 32/2, on the "Protection against violence and discrimination based on sexual orientation and gender identity". This resolution creates the mandate for three years of an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, also known as simply Independent Expert on Sexual Orientation and Gender Identity (IE SOGI). The mandate was extended for a period of further three years in 2019 with the adoption of the HRC resolution 41/18, and then renewed again in July 2022 for also three years. The current holder of the IE SOGI mandate is Victor Madrigal-Boroz. This Independent Expert is tasked with the assessment and monitoring of the state of implementation of the already existing international human rights legal provisions and instruments to SOGI matters, and circulating that information, through reports and documents on the situation.<sup>108</sup> Likewise,

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<sup>107</sup> ONGSUPANKUL - Finding Sexual Minorities ..., p. 5.

<sup>108</sup> OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS - Independent Expert on sexual orientation and gender identity.

this office works on important efforts of awareness raising and mobilization of the interest of UN agencies and Member States to this subject.

One other aspect worth mentioning in the perspective of how human rights are addressed at the UN is the participation of other organizations. Civil society organizations and NGOs have an important part to play in advocating and bringing issues relating to human rights to the attention of governments, companies, and International Organizations. In the UN, the Economic and Social Council (ECOSOC) is responsible for deciding which NGOs can be bestowed the consultative status, being thus allowed to participate in the events and meetings of the varied UN agencies. Of the organizations and institutions which received this status, only a scarce number dedicated to and advocated explicitly for SOGI matters and the LGBTQIA+ community, with several organizations on the subject being rejected for the position, discarding the opportunity for SOGI matters to be brought to the attention of UN agencies and government representative in the varied contexts and areas of work of the UN.<sup>109</sup> During the internship and the participation on the activities of several of the UN's agencies in Vienna, the theme of civil society participation was recurrent. It was debated namely during the negotiations of resolution 9/1 of UNCAC, known as the Sharm el-Sheikh declaration on strengthening international cooperation in the prevention of and fight against corruption during times of emergencies and crisis response and recovery. It received support from some delegations and resistance from others, but the importance of the participation of these organizations was ultimately included in the resolution. The involvement of these bodies is of great importance for, as we have previously seen, they are acquainted with the latest trends and developments regarding technical and specific themes which government representatives and members of some agencies might not be so familiar with due to the high volume of information they already deal with on a daily basis. Moreover, they provide pertinent feedback on the reality they experience when working on the field in close proximity to individuals and the contexts they live in, being able to provide input on the usefulness of measures and policies being discussed and how to apply them to better materialize human rights in the everyday lives of individuals.

This analysis of the existing instruments and efforts on SOGI at the UN level allows us to comprehend that, while there is acknowledgment from the organization's side as an

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<sup>109</sup> D'AMICO - LGBT and (Dis)United ..., p. 67-68.

institution, and of its higher-level leaders, of the pertinence and urgency of approaching and furthering work on this subject, advancements on SOGI matters reveal difficult due to the lack of consensus on the part of the Member States. As Francine D'Amico puts it, the world nations remain “(dis)united” when it comes to this subject. The author further argues that LGBTQIA+ matters “remain constrained by UN politics.”<sup>110</sup> The occurrence with the panel of experts, which we have seen above, demonstrates this well. The solution found to enable some type of work to be advanced on SOGI matters came through a compromise which dismisses much of the problem. By stating there is no need for additional provisions conceding rights and offering protection specifically to SOGI matters, it is implied that the LGBTQIA+ community is not in a particular situation which needs special addressing. However, we know this to not be true. As previous chapters have established, these individuals are at great risk of violence and discrimination due to their SOGI characteristics outside the established social norms. The physical and psychological violence they are exposed to is also further complicated by the systemic inequalities and oppression in place. The ineffectiveness of UN policy is further complicated by the non-binding nature of these instruments where SOGI matters are managed to be included. Moreover, it falls short on the potential role it could exert as endorser and supporter of relevant instruments on human rights, as is the case of the Yogyakarta Principles. Their publication provided an opportunity for legal and political advancements and change, but the state of world politics and its expression at the UN limited these prospects.

In relation to international criminal law, the previous chapter allowed us an understanding of the impact the UN can have on the ICC. The Policy Paper on Sexual and Gender-Based Crimes by the Office of the Prosecutor of the ICC recognizes the work of relevant international institutions and organizations in the interpretation of international human rights law for the adjustment of the ICC's work on SOGI matters, to ensure a better application of justice to the contemporary tendencies and needs on human rights. It even makes reference to the UNOHCHR and the Free & Equal Initiative as a guide on how to take and apply human rights to SOGI matters.

Therefore, despite the several advances on the subject, the approach of the UN system to SOGI matters is still narrow and conservative, in the conjecture of the current reality

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<sup>110</sup> D'AMICO - LGBT and (Dis)United ..., p. 66.

and needs of the LGBTQIA+ community. There is work being developed under the structures specified for this subject, namely the Free & Equal initiative and the IE SOGI, and attention conferred to the issue under the mandate of the OHCHR. In the sequence of this here is a need to bring the issue to the attention of the wider UN system, promoting dialogue and further debating on this subject, as well as the inclusion of SOGI matters as a concern for other organizations and agencies other than the afore mentioned ones.

## VII. Final Remarks

The completion of the internship with the Portuguese Mission in Vienna provided an exceptional learning and personal growth opportunity. The observance and application of concepts and learnings acquired during the first year of the master's degree in International and European Law at NOVA School of Law were heightened by the circumstances of the internship. Not only does the unique configuration of the Portuguese Mission in Vienna allow for an experience of several of the dynamics and contexts of international law and diplomacy through one single representation, the social and political conjuncture with the effects of the Covid-19 pandemic and the situation which arose with the war in Ukraine created a distinctive moment to be experiencing international politics interplay. The portion of the internship conducted under the work of the Portuguese representation to the UN opened the doors to the most renowned organization in the human rights area, a long aspiration throughout my academic training. The close proximity to the decision making and the organizations workings led to the questioning of the framing of SOGI matters by international human rights and criminal law.

The matters of Sexual Orientation and Gender Identity are profoundly complex and, despite the centuries of historical, cultural, and social norms which dictate otherwise, are not immutable and permanent. Human experience is profoundly complex, personal, and unique. Thus, law and social movements have been interplaying and striving for change and adaptation to the modifications society has been undergoing for decades and even centuries. As we have seen through this research, the role of academia and activism in the search for the fulfilment of equality and non-discrimination on this subject is central. The path towards gender equality has been made mostly through the women's rights movement and based on the gender binary. Considering the multifaceted and spectrum-oriented nature of SOGI matters, there is a need to deconstruct these cisgendered, heteronormative and patriarchal notions, enshrined throughout history and society, including in law, to allow for the consideration of the violations and oppression suffered by those identifying outside the established SOGI norms.

Diversity is a central part of human nature, which international human rights instruments set to protect. They are, however, dismissive of SOGI matters in its broader aspect due to their constricted understandings of gender and sexuality. The international



human rights approach to SOGI is binary-centric. This leads it to be dismissive and of the varied social and cultural experiences of individuals around the globe, pushing an approach centred on societal and legal Western conceptions of SOGI matters. Both the UN and the ICC have ingrained this cisgendered and heteronormative perspective, imposing great limitations and shortcomings in their work. The need to overcome binary oversimplifications of SOGI is made clear in this context, to enable addressing not only the more direct and recognizable attacks on human rights based on SOGI matters, but also the lack of protection and the discrimination perpetuated by persisting institutional and structural inequalities. For international law to be more humanized, all these dimensions must be considered, through the employment of an intersectional approach. In the lack of provisions relating directly and explicitly to SOGI matters, new ways of interpreting the existing instruments to allow for its application to this subject is crucial. Here, the role of customary international law and jurisprudence gains further relevance.

Regarding international criminal law and the ICC, as we have seen, the existing framework fails to adequately accommodate SOGI matters. Furthermore, several conceptual structural shortcomings are hindering the advancing of the ICC's work on several grounds, with SOGI matters being one of them. These need addressing through innovative strategies, of which the Policy Paper on Sexual and Gender-Based Crimes is a good example. In it, the Office of the Prosecutor of the ICC states its intention to innovate on this subject, so as to provide effective protection to LGBTQIA+ people, which reflects an important development in the willingness to address the issue, a crucial first step to begin change. The new policy paper under consultation and drafting consists of a valuable and promising prospect in this sense.

In the context of the UN, the political nature of the institution complicates advancements on SOGI matters, and gender equality and sexuality are still approached from the binary heteronormative and cisgender perspectives, with the focus on women's rights and empowerment as the single way forward. While women's rights are of central importance for gender equality, given the oppressive patriarchal structures still in place across sectors and the violence they are subjected to, keeping the fight for gender equality focused solely on this point is prejudicial to both women and queer people more broadly. Not only does it uphold restrictive and narrow notions of the gender binary, assuming all women fall under simplistic and one-dimensional categories, it dismisses the entirety of gender and sex in all their complexity. Furthermore, the recognition of the importance

and the development of work under one of these dimensions does not discharge or diminish the need for the other. Rather, women's and queer activism could benefit from a combined perspective which considers its interplays and dynamics, allowing the development of a more comprehensive approach.

Therefore, the ICC and the UN, as two of the highest-rank institutions on human rights, hold great potential to advance and positively impact the approach to SOGI matters by international law, individually but essentially in coordination. It is important to note that the ICC needs to maintain its work and the institution as a whole separate from the UN and independent from political influences, to guarantee equity and fairness. Nonetheless, the guidance of the UN is important for the ICC, as the institution has stated itself. Looking at other international institutions for guidance has proved beneficial and, we argue, a way forward for the ICC to adapt its approach to SOGI matters through modification and reinterpretation. The UN also has the potential for producing and spreading content and resources on SOGI matters, which is significant given its worldwide influence and how it is looked at, as we have seen, for assistance on the current and latest trends in human rights. Furthermore, it would be beneficial for the UN to promote this subject widely throughout the institution, not leaving it to be addressed in front of the public by those who have already established to be concerned and ready to work on the subject, such as the UNHRC. This would encourage the inclusion of a SOGI-comprehensive perspective in the work of all UN agencies, while raising awareness over time with Member States. Likewise, these organizations would form a two dimensional and complementary functioning where they push for SOGI rights from both sides, with the UN maintaining an innovative and comprehensive analysis, accompanied by policy and legal development in the subject, and the ICC working as an effective mechanism of accountability and deterrence.

The difficulties to the approach of SOGI matters are still, however, numerous. At a time of particular vulnerability for the LGBTQIA+ community, progress must not be taken for granted. Here, once again, the UN and the ICC reveal crucial, in ensuring that human rights are not instrumentalized and bent for convenience under strategical interests. This analysis allowed us the understanding that political forces are the main blockers of further advancements on SOGI matters. States' resistance to the inclusion of SOGI and gender equality matters in the works they develop, even in the binary sense and from the perspective of women's empowerment, is often a deterrent of furthering

discussions to encompass SOGI matters and the LGBTQIA+ community. This reflects the need of further work on the deconstructing notions of SOGI matters and LGBTQIA+ rights as controversial issues. Therefore, change in law and policies needs to be accompanied by changes in political stances. When the issue is, however, major threats to basic human rights, such as life and security as is often the case in this context, the imperatives of human dignity and protection guiding international law and action must not be overthrown.

Furthermore, as we have perceived through this investigation, this is a subject of great complexity and of a deep personal nature, very dynamic and progressing. This poses great difficulties for law to keep up with something so rapidly changeable. It reveals a struggle even to literature and academic research - by the time publications come out and resources, they are likely to be obsolete and already missing part of evolution that took place in the meantime. In the test of time, this investigation too risks becoming obsolete. The central matter is to not lose the focus on the humane side of human rights.

On the 10<sup>th</sup> anniversary of the UDHR, Eleanor Roosevelt delivered a famous speech which states the nature of human rights as the very essence forming “the world of the individual person”, present in the small acts of daily life, for its there that freedom, equality and non-discrimination are rooted, reflecting the effectiveness of human rights.<sup>111</sup> In line with what we have observed, SOGI matters are at the core of human experience, and require respect and protection to enable the freedom of all individuals to live their truth and procure their happiness and fulfilment in safety and with pride, principles which permeate international law and an aspiration which can be traced in the very foundations of human rights.

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<sup>111</sup> AMNESTY INTERNATIONAL UK - **What is the Universal Declaration of Human Rights?**

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