

**The Emerging Right to Individual Self-Determination:
A New Framework for Human Rights Litigation and Theory**

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Abstract

Right to privacy litigation in international human rights law (IHRL) is often pursued by non-hegemonic human legal subjects (NHHLs), particularly before the European Court of Human Rights (ECtHR). In this thesis, I explore the limitations of this right vis-à-vis NHHLs and ask how the emerging right to individual self-determination can be shaped as an appropriate alternative avenue for their claims.

I examine privacy as a particular expression of IHRL's acts of inclusion and exclusion of subjects, objects, actions and spaces. In particular, I focus on two foundational acts: (i) the making of legal subjects and (ii) the division of the (legal) space into private and public spheres of discretion and regulation. These acts invisibilise the identity of IHRL's primary *human* legal subject: the hegemonic-heteronormative-cisgender-bodily-abled-adult-wealthy-Christian-Western-white-man.

Moving between a specific critique to privacy and a broader one to IHRL, I analyse the jurisprudence on the right to privacy of NHHLs to show (i) privacy is a precarious avenue for their claims and (ii) privacy is an insufficient framework to accommodate the harm of which they complain. Instead, a more foundational issue is at stake – the harm to their recognition as full human legal subjects which stems directly from IHRL's acts of inclusion and exclusion.

While the concept of *individual* self-determination is gaining visibility in IHRL, it is used in a fragmented way and has not yet been studied as a unified concept. I fill this gap by organising, theorising and operationalising the emerging right to individual self-determination. By centring on the notion of substantive recognition of subjects, I define this emerging right as a necessary tool to bridging the gap between the human subject and the human legal subject in IHRL. By insisting on the importance of recognition, the emerging right is a further safeguard to ensure participation of subjects in IHRL.

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The submission date of this thesis falls on the Jewish holiday of Passover, which is all about liberty, the responsibility which comes with freedom and in a sense, a move towards new beginnings. These years, months, weeks, days and hours of refining my arguments, editing my words have all made me reflect on how much I have grown as an academic and as a human being during these past years of research. It is time to share this thesis with other people and I am happy to do so on Passover.

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List of Abbreviations

ACHPR	African Charter on Human and Peoples Rights
ACHR	American Convention on Human Rights
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECRI	European Commission against Racism and Intolerance
HRC	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
IHRL	International Human Rights Law
NHLS	Non-hegemonic human legal subject
NHLSs	Non-hegemonic human legal subjects
UN	United Nations

Table of Cases

United Kingdom

Airedale NHS Trust v Bland [1993] 1 All ER 821 at 866.

R v Brown.

R (on the application of Pretty) v Director of Public Prosecutions [2002] 1 ALL ER 1 UKHL 61.

International Law

African Commission on Human and Peoples' Rights

Open Society Justice Initiative v Côte d'Ivoire Comm no 318/06 (ACommHPR, 28 February 2015).

The Nubian Community in Kenya v The Republic of Kenya Comm no 317/2006 (ACommHPR 28 February 2015).

Committee on the Rights of Persons with Disabilities

H.M. v Sweden Comm no 3/2011 (CRPD, 6 December 2010).

European Court of Human Rights

A, B and C v Ireland App no 25579/05 (ECtHR, 16 December 2010).

A.K. v Latvia App no 33011/08 (ECtHR, 24 June 2014).

Al-Adsani v The United Kingdom App no 35763/97 (ECtHR, 21 November 2001).

Amann v Switzerland App no 27798/95 (ECtHR, 16 February 2000).

Amuur v France App no 19776/92 (ECtHR, 25 June 1996).

Angelova v Bulgaria App no 38361/97 (ECtHR, 13 June 2002).

A.P., Garçon and Nicot v France App nos 79885/12; 52471/13; and 52596/13 (ECtHR, 6 April 2017).

Artico v Italy App no 6694/74 (ECtHR, 13 May 1980).

Belcacemi and Oussar v Belgium App no 37798/13 (ECtHR, 11 July 2017).

Biç and Others v Turkey App no 55955/00 (ECtHR, 2 February 2006)/

Botta v Italy App no 153/196/772/973 (ECtHR, 24 February 1998).

Bouyid v Belgium App no 23380/09 (ECtHR, 28 September 2015).

Carbonara and Ventura v Italy App no 24538/94 (ECtHR, 30 May 2000).

Case of Liberty and Others v The United Kingdom App no 58243/00 (ECtHR, 1 October 2008).

Chapin and Charpentier v France App no 40183/08 (ECtHR, 9 June 2016).

Chapman v United Kingdom App no 27238/95 (ECtHR 18 January 2001).

Christine Goodwin v UK App no 28957/95 (ECtHR, 11 July 2002).

Costa and Pavan v Italy App no 54270/10 (ECtHR, 11 February 2013).

Dakir v Belgium App no 4619/12 (ECtHR, 11 July 2017).

Daróczy v Hungary App no 44378/05 (ECtHR, 1 July 2008).

Dubská and Krejzová v The Czech Republic App nos 28859/11; and 28473/12 (ECtHR, 15 November 2016).

Dudgeon v United Kingdom App no 7525/76 (ECtHR, 22 October 1981).

Fedotova and Others v Russia App nos 40792/10; 30538/14; and 43439/14 (ECtHR, 17 January 2023).

Fretté v France App no 36515/97 (ECtHR, 26 February 2002).

G. v Italy App no 12787/87 (ECtHR, 27 February 1992).

H v Finland App no 37359/09 (ECtHR, 13 November 2012).

Hämäläinen v Finland App no 37359/09 (ECtHR, 16 July 2014).

Handyside v United Kingdom App no 5493/72 (ECtHR, 7 December 1976).

I.G. and Others v Slovakia App no 15966/04 (ECtHR, 13 November 2012).

Ireland v United Kingdom App no 5310/71 (ECtHR, 13 December 1977).

Jalloh v Germany App no 54810/00 (ECtHR, 11 July 2006).

Jehovah's Witnesses of Moscow v Russia App no 302/02 (ECtHR, 10 June 2010).

Johnston and Others v Ireland App no 9697/82 (ECtHR, 18 December 1986).

Karner v Austria, App no 40016/98, ECtHR (24 July 2003).

Keegan v Ireland App no 16969/90 (ECtHR, 26 May 1994).

L. v Lithuania App no 27527/03 (ECtHR, 11 September 2007).

L. and V. v Austria App nos 39392/94; and 39829/98 (ECtHR, 9 January 2003).

Laskey and Others v United Kingdom App nos 21627/93; 21628/93; and 21974/93 (ECtHR, 19 February 1997).

Lithgow and Others v United Kingdom App nos 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; and 9405/81 (ECtHR, 8 July 1986).

Leyla Şahin v Turkey App no 44774/98 (ECtHR, 10 November 2005).

López Ostra v Spain App no 16798/90 (ECtHR, 9 December 1994).

Modinos v Cyprus App no 15070/98 (ECtHR, 22 April 1993).

N.B. v Slovakia App no 29518/10 (ECtHR, 12 June 2012).

Nicolae Virgiliu Tănase v Romania App no 41720/13 (ECtHR, 25 June 2019).

Niemietz v Germany, App no 13710/88, ECtHR (16 December 1992).

Norris v Ireland App no 10581/83 (ECtHR, 26 October 1988).

Oliari and Others v Italy App no 18766/11; and 36030/11 (ECtHR, 21 July 2015).

Orlandi and Others v Italy App nos 26431/12; 26742/12; 44057/12 and 60088/12 (ECtHR, 14 December 2017).

P. and S. v Poland App 57375/08 (ECtHR, 30 October 2012).

Pajić v Croatia App no 68453/13 (ECtHR, 23 February 2016).

Parrillo v Italy, App no 46470/11 (27 August 2015).

Peck v United Kingdom App no 44647/98 ECtHR (28 January 2003).

Perry v United Kingdom App no 63737/00 (ECtHR, 17 July 2003).

Pretty v United Kingdom App no 2346/02 (ECtHR, 29 April 2002).

Rees v United Kingdom App no 9532/81 (ECtHR, 17 October 1986).

Sanles Sanles v Spain App no 48335/99 (ECtHR, 26 October 2000).

S.A.S. v France App no 43835/11 (ECtHR, 1 July 2014).

Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland App no 931/13 (ECtHR, 27 June 2017).

Scherer v Switzerland App no 17116/90 (ECtHR, 25 March 1994).

S.H. and Others v Austria App no 57813/00 (ECtHR, 3 November 2011).

Silver and Others v United Kingdom App no 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75 and 7136/75 (ECtHR, 25 March 1983).

S.L. v Austria App no 45330/99 (ECtHR, 9 January 2003).

S.V. v Italy App no 55216/08 (ECtHR, 11 October 2018).

Ternovszky v Hungary App no 67545/09 (ECtHR, 14 December 2010).

The Sunday Times v The United Kingdom App no 6538/74 (ECtHR, 26 April 1979).

Tyrer v United Kingdom App no 5856/72 (ECtHR, 25 April 1978).

Tysic v Poland App no 5410/03 (ECtHR, 20 March 2007).

Van Kck v Germany App no 35968/97 (ECtHR, 12 June 2003).

V.C v Slovakia App no 18968/07 (ECtHR, 8 November 2011).

Velkova v Bulgaria App no 1849/08 (ECtHR, 13 July 2017).

Vocaturu v Italy App no 11891/85 (ECtHR, 24 May 1991).

Von Hannover v Germany App no 5920/00 (ECtHR, 24 June 2004).

X and Y v The Netherlands App no 8978/80 (ECtHR, 26 March 1985).

Y.Y. v Turkey App no 14793/08 (ECtHR, 10 March 2015).

United Nations Human Rights Committee

Amanda Jane Mellet v Ireland Comm no 2324/2013 (HRC, 31 March 2016).

A.R. Coeriel and M.A.R. Aurik v The Netherlands Comm no 453/1991 (HRC, 31 October 1994).

H.E.A.K. v Denmark Comm no 2343/2014 (HRC, 23 July 2015).

K.L. v Peru Comm no 1153/2003 (HRC, 13 November 2005).

Leonid Raihman v Latvia, Comm no 1621/2007, HRC (28 October 2010).

L.M.R v Argentina Comm no 1608/2007 (HRC, 29 March 2011).

Lubicon Lake Band v Canada Comm no 167/1984 (HRC, 26 March 1990).

Manuel Wackenheim v France Comm no 854/1999 (HRC, 15 July 2002).

Ms. Juliet Joslin et al. v New Zealand Comm no 902/1999 (HRC, 17 July 2002).

Naima Boutarsa v Algeria, Comm no 3010/2017 (HRC, 8 July 2022).

Nicolas Toonen v Australia Comm no 488/1992 (HRC, 31 March 1994).

Ram Kumar Bhandari v Nepal Comm no 2031/2011 (HRC, 29 October 2014).

S. v Denmark Comm 2642/2015 (HRC, 29 June 2018).

Siobhn Whelan v Ireland Comm no 2425/2014 (HRC, 17 March 2017).

Inter-American Court of Human Rights

Artavia Murillo et al. (“In vitro fertilization”) v Costa Rica, Preliminary Objections, Merits, Reparations and Costs (IACtHR, 28 November 2012).

Atala Riffo and Daughters v Chile, Merits, Reparations and Costs (IACtHR, 24 February 2012).

Bámaca-Velásquez v Guatemala, Merits (IACtHR, 25 November 2000).

Chaparro Álvarez and Lapo Iñiguez v Ecuador, Preliminary Objections, Merits, Reparations, and Costs (IACtHR, 21 November 2007)

Duque v Colombia, Preliminary Objections, Merits, Reparations and Costs (IACtHR, 26 February 2016).

Expelled Dominicans and Haitians v Dominican Republic, Preliminary Objections, Merits, Reparations and Costs (IACtHR, 28 August 2014).

Gelman v Uruguay, Merits and Reparations (IACtHR, 24 February 2011).

Ituango Massacres v Colombia, Preliminary Objections, Merits, Reparations and Costs (IACtHR, 1 July 2006).

I.V. v Bolivia, Preliminary objections, Merits, Reparations and Costs (IACtHR, 30 November 2016).

Río Negro Massacres v Guatemala, Preliminary Objection, Merits, Reparations and Costs (IACtHR, 4 September 2012).

Rosendo Cantú et al. v Mexico, Preliminary Objections, Merits, Reparations and Costs (IACtHR, 31 August 2010).

Sawhoyamaya Indigenous Community v Paraguay, Merits, Reparations and Costs (IACtHR, 29 March 2009).

The Girls Yean and Bosico v The Dominican Republic, Preliminary Objections, Merits, Reparations and Costs (IACtHR, 8 September 2005).

Advisory Opinions of the Inter-American Court of Human Rights

Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples, Advisory Opinion OC-24/17 (Inter-American Court of Human Rights, 24 November 2017).

International Court of Justice

Case Concerning East Timor (Portugal v Australia), ICJ, Judgement (30 June 1995).

Legal Consequences for States of the Continued Presence of South African in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, ICJ, Advisory Opinion (21 June 1971).

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ, Advisory Opinion (9 July 2004); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ, Advisory Opinion (22 July 2010).

Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, ICJ, Advisory Opinion (25 February 2019).

Reparations for Injuries Suffered in the Service of the United Nations, ICJ, Advisory Opinion (11 April 1949).

Western Sahara, ICJ, Advisory Opinion (16 October 1957).

Permanent Court of Justice

S.S. 'Lotus' case (France v Turkey), PCIJ, Judgment (7 September 1927).

Table of Legislation

Domestic Legislation

Finland

563/2002 Act on Legal Recognition of the Gender of Transsexuals, Section 1(3).

156/2015 Lai Avioliittolain Muutamisesta (Law on the Amendment to the Marriage Act).

International and Regional Treaties

African Charter on Human and Peoples' Rights, Organization of African Unity, OAU Doc. CAB/LEG/67/3 27 June 1981, rev.5, 21 I.L.M. 58 (27 June 1982, in force 21 October 1982).

American Convention on Human Rights ("Pact of San Jose") Organization of American States, TS No 36 (22 November 1969, in force 18 July 1978).

Charter of the United Nations and Statute of the International Court of Justice, 1 UNTS XVI (26 June 1945, in force 24 October 1945).

Convention for the Protection of Human Rights and Fundamental Freedoms (*European Convention on Human Rights*) Council of Europe ETS 5 (4 November 1950, in force 3 September 1953).

Convention on the Elimination of All Forms of Discrimination Against Women, UNGA, UNTS 1249 (18 December 1979, in force 3 September 1981).

Convention on Rights and Duties of States ("Montevideo Convention") OAS TS No 37 (26 December 1933, in force 26 December 1934).

Convention on the Rights of Persons with Disabilities, UNGA, A/RES/61/106 (13 December 2006, in force 3 May 2008).

International Covenant on Civil and Political Rights, UNGA, UNTS 999 (16 December 1966, in force 23 March 1976).

International Covenant on Economic, Social and Cultural Rights, UNGA, UNTS 993 (16 December 1966, in force 3 January 1976).

International Convention for the Protection of All Persons from Enforced Disappearance UNGA UNTS 2716 (adopted 20 December 2006, entered into force 23 December 2010).

International Convention on the Elimination of All Forms of Racial Discrimination, UNGA, UNTS 660 (21 December 1965, in force 4 January 1969).

Optional Protocol to the International Covenant on Civil and Political Rights, UNGA, Res. 22991 (XXI) (adopted 15 December 1966, in force 23 March 1976).

Protocol to the African Charter on Human and People's Rights of Women in Africa, Organization of African Unity, OAU (11 July 2003 in force 25 November 2005).

Rome Statute of the International Court, UNTS 2187 (17 July 1998, in force 1 July 2002).

Additional Instruments and Sources

United Nations Documents

CCPR General Comment No 12: Article 1 (The Right to Self-Determination of Peoples), United Nations, Human Rights Committee (13 March 1984).

CCPR General Comment No.16: Article 17 (right to privacy) United Nations, Human Rights Committee (8 April 1988).

CCPR General Comment No 28: Article 3 (The Equality of Rights Between Men and Women), United Nations, Human Rights Committee (29 March 2000).

CCPR General Comment No 36: Article 6 (Right to Life) United Nations, Human Rights Committee (3 September 2019).

CEDAW General Recommendation No 21: Equality in Marriage and Family Relations, United Nations, Committee on the Elimination of Discrimination Against Women (1994).

CEDAW General Recommendation No 23: Political and Public Life, United Nations, Committee on the Elimination of Discrimination Against Women (1997).

Concluding Observations of the Human Rights Committee: Angola, HRC, United Nations, CCPR/C/AGO/CO/1 (29 April 2013).

Concluding Observations of the Human Rights Committee: Ireland, HRC, United Nations CCPR/C/IRL/CO/3 (30 July 2008).

Concluding Observations of the Human Rights Committee: Panama, HRC, United Nations, CCPR/C/PAN/CO/3 Committee (17 April 2008).

Concluding Observations of the Human Rights Committee: Uruguay, HRC, United Nations, CCPR/C/URY/CO/6 (3 October 2022).

CRPD General Comment No 1: Article 12 (Equal Recognition Before the Law), United Nations, Committee on the Rights of Persons with Disabilities (19 May 2014)

CRPD General Comment No 5: Article 19 (on Living Independently and Being Included in the Community) Committee on the Rights of Persons with Disabilities (27 September 2017).

Declaration of Principles of International law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, UNGA, A/RES/2625 (24 October 1970).

Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA, A/RES/1514 (14 December 1960).

Declaration on the Right to Development, UNGA, Res.41/128 (4 December 1986).

Draft Concluding Observations of the Committee on Elimination of Discrimination against Women: Slovakia CEDAW/C/SVK/CO/4 (CEDAW, 17 July 2008).

International Conference on Population and Development Programme of Action Cairo, United Nations Population Fund (UNFPA) A/CONF.171/13 (5-13 September 1994).

National Institutions for the Promotion and Protection of Human Rights, UN Commission on Human Rights, E/CN.4/RES/1993/55 (9 March 1993).

Report of Special Rapporteur of Right to Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Anand Grover to Health, UN, Human Rights Council A/64/272 (10 August 2009)

Report of Special Rapporteur on Torture and Other Inhuman or Degrading Treatment or Punishment, Juan E. Méndez, UN, Human Rights Council, A/HRC/31/57 (5 January 2016).

Report of the Special Rapporteur of Torture and Other Inhuman or Degrading Treatment or Punishment, Nils Melzer, UN, Human Rights Council A/HRC/43/49 (20 March 2020).

Rules of Procedure of the Human Rights Committee, United Nations Human Rights Committee, CCPR/C/3/Rev.12 (4 January 2021)

United Nations Declaration on the Rights of Indigenous Peoples, UNGA, A/RES/61/295 (2 October 2007).

Universal Declaration of Human Rights, UNGA Res. 217 A (III) (10 December 1948).

Vienna Declaration and Programme of Action UNGA, A/CONF.157/23 (12 July 1994).

Organization of American States Documents

American Declaration on the Rights and Duties of Man, (2 May 1948).

Opinion on the Right to Identity, OAS, The Inter-American Judicial Committee, OAE/Ser.Q CJI/doc.276/07 rev 1 (10 August 2007).

Rules of Procedure of the Inter-American Court of Human Rights, Inter-American Court of Human Rights, OAS (Approved by the Court during its LXXXV regular period of sessions 2009).

Organization of African Unity

Rules of Procedure of the African Commission on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, OAU, (19 February to 04 March 2020).

Council of Europe Documents

Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe, COE, Commissioner for Human Rights (2nd edition, September 2011).

Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe (Background Document) Commissioner for Human Rights COE (October 2011).

Fourth Report on France (Fourth Monitoring Cycle) CRI(2010)16 (European Commission against Racism and Intolerance, ECRI 29 April 2010).

Human Rights and Gender Identity (Issue Paper) COE Commissioner for Human Rights CommDH/IssuePaper(2009)2 (July 2009).

Human Rights in Europe: No Ground for Complacency Viewpoints by Thomas Hammarberg (Council of Europe, Commissioner on Human Rights, April 2011).

Recommendation of the Commissioner for Human Rights Concerning Certain Aspects of Law and Practice Relating to Sterilisation in the Slovak Republic CommDH(2003)12 (Council of Europe Commissioner for Human Rights, 17 October 2003).

Report by Nils Muižnieks following his visit to Finland from 11 to 13 June 2012 CommDH(2012)27 (Commissioner for Human Rights of the Council of Europe, 25 September 2012).

Report by Mr Alvaro Gil-Robels, Commissioner for Human Rights, On the Effective Respect for Human Rights in France Following his Visit From 5 to 21 September 2005 CommDH(2006)2 (Office of the Commissioner for Human Rights, Council of Europe, 15 February 2006).

Rules of the Court, European Court of Human Rights, COE (20 March 2023).

Third Report on France CRI(2005)3 (European Commission Against Racism and Intolerance, ECRI, 25 June 2004).

Other Documents

Arab Charter on Human Rights, League of Arab States (15 September 1994)

Yogyakarta Principles – Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, International Commission of Jurists (March 2007).

The Yogyakarta Principles Plus 10- Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, International Commission of Jurists (10 November 2017).

Introduction

For those who are deemed dependent on doors being opened, those who embody diversity, whose entry is understood as debt, a door can be shut at any point. A door can be shut after you enter. A door can be shut because you enter.¹

Sarah Ahmed

With the image of a door, Ahmed skilfully encapsulates the daily experiences of exclusion and the fragility of inclusion of a category of subjects which in this thesis I refer to as the non-hegemonic human legal subject (NHHLS). This is a heterogenous category of human legal subjects who either identify, or are identified by others, as different to IHRL's narrow yet universalized human - the hegemonic-heteronormative-cisgender-bodily-abled-adult-wealthy-Christian-Western-white-man. The subjects who use the doors of which Ahmed writes are at the centre of my thesis, and the doors of which I write are those constructed by international human rights law (IHRL) and its inclusions and exclusions;² these doors representing the architectural flaws of the IHRL edifice itself.³ Thus, my thesis sits within a tradition of disruptive and critical scholarly work that examines how and when IHRL's doors shut and open, noting the moments when doors do open for NHHLSs and how far they open, and what the conditions are for entering.⁴

¹ Sara Ahmed, 'Slammed Doors' (Feministkilljoys, 17 March 2020) <<https://feministkilljoys.com/2020/03/17/slammed-doors/>> last accessed 9 April 2023.

² A similar frame can be found in Grear when she states that "[t]he gender of legal rationality, in the light of law's role as a dominant and legitimating carrier of inclusions and exclusions is, accordingly, a matter in need of continuing critical interrogation". Anna Grear, "'Sexing the Matrix': Embodiment, Disembodiment and the Law-Towards the Re-Gendering of Legal Rationality' in Jackie Jones, Anna Grear, Rachel Anne Fenton and Kim Stevenson (eds), *Gender, Sexualities and Law* (Routledge 2017) 39.

³ See Karen Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22 *The European Journal of International Law* 141, 163.

⁴ See among many others: Ratna Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Elgar 2018); Emily Jones, *Feminist Theory and International Law: Posthuman Perspectives* (Routledge 2023); Dianne Otto, 'Celebrating Complexity' (2012) 106 *Proceedings of the Annual Meeting American Society of International Law* 168; Dianne Otto, 'Beyond Legal Justice: Some Personal Reflections on Peoples' Tribunals, Listening and Responsibility' (2017) 5 *London Review of International Law* 225; Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27 *Third World Quarterly* 739; Rosemary Hunter, 'Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism' in Margaret Davies and Vanessa E. Munro, *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2013); Anne Orford, *International*

More specifically, I examine the opening and shutting of the door constructed by the right to privacy. I argue that while this door has opened the way for some claims that have been brought by NHHLSs, it is also an avenue too narrow and precarious for many of these subjects and the harms of which they complain. Instead of relying on the right to privacy, I propose to craft another opening in IHRL: the emerging right to individual self-determination, which I will argue can better recognise and address the harms that NHHLSs have thus far brought primarily within the scope of the right to privacy. I shape individual self-determination as a framework for substantive recognition of subjects; as a right to be recognised as a full human legal subject, as the human subject that one *is*. Substantive recognition, I therefore argue, should be understood as a necessary condition to participating in IHRL and democratic society.

1. Problem, Scope and Research Question

This thesis engages with the problem of inclusion and exclusion of human subjects in IHRL. More specifically, the thesis explores how IHRL, in its current understanding and operation, accommodates NHHLSs. Thus, I ask a main overarching question: is IHRL currently able to fully accommodate NHHLSs? I examine the overarching question first through a general overview of subjecthood in international law and IHRL. That is, I ask who the human of international law and IHRL is and demonstrating how IHRL operates through inclusion and exclusion of subjects, objects, actions, and spaces. This first step essentially exposes the foundational problem that the thesis engages with – the inherent acts of inclusion and exclusion. I then move to examine two main examples of existing and emerging avenues of potential inclusion of NHHLS in IHRL: (1) the growing use of the right to privacy and in particular private life and (2) the emerging concept and right to individual self-determination. The scope

Law and Its Others (Cambridge University Press 2006); Karen Knop, 'Why Rethinking the Sovereign State is Important for Women's International Human Rights Law' in Rebecca J Cook, *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994).

of this thesis is therefore to assess whether IHRL through the examples of the right to privacy as an existing avenue, and the concept of individual self-determination as an emerging avenue, can fully accommodate NHHLSs.

I first explore the right to privacy precisely because NHHLSs have often turned to this framework in IHRL⁵ to find recourse for harms they face in areas such as access to reproductive rights and justice,⁶ legal gender recognition,⁷ and legal recognition of their relationships.⁸ NHHLSs have brought such claims predominantly before the European Court of Human Rights (ECtHR) as well as before the Human Rights Committee (HRC) and the Inter-American Court of Human Rights (IACtHR). The jurisprudence on the right to privacy demonstrates that this right has an exceptional ability to *expand* and thus to recognise, at least partially, some of these claims especially through the concept of private life. This can be seen in the right's

⁵ In this thesis I use the right to privacy and private life interchangeably because while 'private life' is included in the codification only of the ECHR and ACHR, the HRC examines cases that arguably fit best in this category.

⁶ For example, in the Human Rights Committee: *K.L. v Peru* Comm no 1153/2003 (HRC, 13 November 2005); *L.M.R v Argentina* Comm no 1608/2007 (HRC, 29 March 2011); *Amanda Jane Mellet v Ireland* Comm no 2324/2013 (HRC, 31 March 2016); *Siobhán Whelan v Ireland* Comm no 2425/2014 (HRC, 17 March 2017). ECtHR: *Tysiąc v Poland* App no 5410/03 (ECtHR, 20 March 2007); *A, B and C v Ireland* App no 25579/05 (ECtHR, 16 December 2010); *V.C v Slovakia* App no 18968/07 (ECtHR, 8 November 2011); *N.B. v Slovakia* App no 29518/10 (ECtHR, 12 June 2012) and *I.G. and Others v Slovakia* App no 15966/04 (ECtHR, 13 November 2012); *Y.Y. v Turkey* App no 14793/08 (ECtHR, 10 March 2015); *A.P., Garçon and Nicot v France* App nos 79885/12; 52471/13; and 52596/13 (ECtHR, 6 April 2017). IACtHR: *Artavia Murillo et al. ("In vitro fertilization") v Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, (IACtHR, 28 November 2012); *I.V. v Bolivia*, Preliminary objections, Meris, Reparations and Costs (IACtHR, 30 November 2016).

⁷ For example, in ECtHR: *Rees v United Kingdom* App no 9532/81 (ECtHR, 17 October 1986); *Christine Goodwin v UK* App no 28957/95 (ECtHR, 11 July 2002); *L v Lithuania* App no 27527/03 (ECtHR, 11 September 2007); *Hämäläinen v Finland* App no 37359/09 (ECtHR, 16 July 2014); *Y.Y. v Turkey* App no 14793/08 (ECtHR, 10 March 2015); *A.P., Garçon and Nicot v France* App nos 79885/12; 52471/13; and 52596/13 (ECtHR, 6 April 2017).

⁸ For example, in HRC: *Nicolas Toonen v Australia* Comm no 488/1992 (HRC, 31 March 1994). In IACtHR: *Atala Riffo and Daughters v Chile*, Merits, Reparations and Costs, (IACtHR, 24 February 2012). In ECtHR: *Hämäläinen v Finland* App no 37359/09 (ECtHR, 16 July 2014); *Oliari and Others v Italy* App no 18766/11; and 36030/11 (ECtHR, 21 July 2015); *Orlandi and Others v Italy* App nos 26431/12; 26742/12; 44057/12 and 60088/12 (ECtHR, 14 December 2017) *Fedotova and Others v Russia* App nos 40792/10; 30538/14; and 43439/14 (ECtHR, 17 January 2023).

incorporation of elements such as a right to identity and personality,⁹ personal autonomy,¹⁰ and decision-making in relation to various aspects of life.¹¹ In addition, the jurisprudence demonstrates that although the boundaries of privacy were set to uphold the clear division of space between the private and the public spheres, at times these spatial boundaries blur so to protect relationships and areas of interaction that take place in the public as well.

These legal developments have undoubtedly brought relief and recognition to some individuals who can now assert this right. Some scholars see the expansion of privacy positively, *albeit* with some reservations.¹² For example, Marshall argues that the jurisprudence of the ECtHR “has developed to increase the personal freedom in a way which goes to the very heart of what it means to be a person, protecting areas of one’s life and increasingly doing so even when the effects are felt in public rather than private life for the applicants concerned”.¹³ However, scholars who challenge liberal legalism claim that while the right to privacy has brought some relief to NHHLS, focusing on privacy litigation for their harms is at times insufficient and inadequate. Instead, they argue that other rights may be more appropriate for litigating these harms.¹⁴ For example, Bassetti proposes a shift away from right to privacy litigation in the

⁹ The rights to personality and identity appear both in the jurisprudence of the IACtHR and ECtHR. For example, in the IACtHR: *Atala Riffo and Daughters v Chile*, Merits, Reparations and Costs, (IACtHR, 24 February 2012) para 136; *I.V. v Bolivia*, Preliminary objections, Meris, Reparations and Costs (IACtHR, 30 November 2016), para 152. In the ECtHR: *Peck v United Kingdom* App no 44647/98 (ECtHR, 28 January 2003), para 57; *Van Kück v Germany* App no 35968/97 (ECtHR, 12 June 2003), para 73.

¹⁰ IACtHR: *I.V. v Bolivia*, Preliminary objections, Meris, Reparations and Costs (IACtHR, 30 November 2016), para 152; ECtHR: *Pretty v United Kingdom* App no 2346/02 (ECtHR, 29 April 2002), para 61; *Van Kück v Germany* App no 35968/97 (ECtHR, 12 June 2003), para 69.

¹¹ See HRC: *K.L. v Peru* Comm no 1153/2003 (HRC, 13 November 2005), para 6.4; *Siobhán Whelan v Ireland*, Comm no 2425/2014, HRC (17 March 2017), para 7.9. See among others ECtHR: *S.H. and Others v Austria* App no 57813/00 (ECtHR, 3 November 2011), para 82; *Ternovszky v Hungary* App no 67545/09 (ECtHR, 14 December 2010) para 24. See IACtHR: *Artavia Murillo et al. (“In vitro fertilization”) v Costa Rica*, Preliminary Objections, Merits, Reparations and Costs (IACtHR, 28 November 2012) para 272; *I.V. v Bolivia*, Preliminary objections, Meris, Reparations and Costs (IACtHR, 30 November 2016), para 152.

¹² Elizabeth Wicks, *The State and the Body: Legal Regulation of Bodily Autonomy* (Hart Publishing 2016) 154.

¹³ Jill Marshall, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights* (Brill 2009) 203.

¹⁴ Patricia Palacios Zuloaga, ‘Pushing Past the Tipping Point: Can the Inter-American System Accommodate Abortion Rights?’ (2020) 21 Human Rights Law Review 899.

narrative of legal gender recognition of trans people – claiming that pathologisation requirements for legal gender recognition amount to a violation of the prohibition on cruel, inhuman and degrading treatment rather than a violation of privacy.¹⁵

Noting the increasing turn toward right to privacy litigation, I examine IHRL's current ability to fully accommodate NHHLSs through the example of the right to privacy. I limit the scope of the inquiry on the right to privacy to examining how it addresses claims brought by NHHLSs which regard their bodies, identities, and relationships as these categories of claims represent a major site for jurisprudential development for NHHLSs. I therefore ask the following questions: How does the right to privacy operate within IHRL's acts of inclusion and exclusion? How do NHHLSs use the right to privacy? What are the outcomes of their petitions before the relevant IHRL adjudicative bodies? In which ways are NHHLSs included and accommodated within the right to privacy? How does their inclusion look like? Is the right to privacy able to fully accommodate their claims?

In this thesis I join the efforts challenging liberal legalism and the focus on right to privacy litigation for the claims which NHHLSs have thus far brought predominately within this framework. Firstly, I argue that the right to privacy suffers from structural and interpretive limitations which make it a precarious site for inclusion of the NHHLSs ("a door can be shut at any point").¹⁶ This is because privacy is a particular expression of two IHRL foundational acts of inclusion and exclusion: (i) the making of legal subjects and (ii) the division of the legal space. Framing IHRL as operating through inclusion and exclusion of subjects, objects, actions, and spaces is the main analytical frame I use in this thesis. Within this analytical frame, the

¹⁵ Matteo E. Bassetti, 'Human Rights Bodies' Adjudication of Trans People's Rights: Shifting the Narrative from the Right to Private life to Cruel and Inhuman or Degrading Treatment' (2020) 12 *European Journal of Legal Studies* 291.

¹⁶ Ahmed (n 1).

making of legal subjects is key to examining these claims from a different perspective. In this sense, I apply to IHRL Naffine's observation that law more generally 'has always assumed and constituted a subject who is deemed to act in certain ways, to wield certain rights and to assume certain responsibilities'.¹⁷ Therefore, and secondly, approaching these claims through the perspective of acts of inclusion and exclusion has two consequences. First, the right to privacy is understood as a precarious avenue for NHHLSs. Second, not only is the right to privacy a precarious legal avenue for their inclusion but it is also insufficient in its ability to accommodate issues that go beyond its scope. Put simply, the right to privacy can at best accommodate only a part of these claims, their privacy aspect. The rest of these claims therefore necessitate a different response which I devise in this thesis.

Many of the right to privacy cases brought by NHHLSs also include allegations of violations of the right to non-discrimination and/or equality, and at times refer to an additional substantive right such as freedom of religion or the prohibition on torture. Often, regardless of whether a violation of privacy is found, the non-discrimination and/or equality aspects of the petitions are either deemed unnecessary to examine or are decided against.¹⁸ These cases, I argue, demonstrate the 'glitch' in the system, through which the harmful effects of IHRL's acts of inclusion and exclusion are brought to the fore; the non-hegemonic position is visible when NHHLSs find themselves occupying a space between recognition as full human legal subjects and less than fully human subjects legal subjects.

The second avenue that I explore in this thesis is the concept of individual self-determination which has been increasingly incorporated into IHRL discourse and norm-development

¹⁷ Ngaire Naffine and Rosemary J Owens, 'Sexing Law' in Ngaire Naffine and Rosemary J Owens (eds), *Sexing the Subject of Law* (Sweet and Maxwell 1997) 7.

¹⁸ I explain this in Chapter 2, part 2.

primarily in relation to NHHLSs. Different uses of individual self-determination have emerged in the last two decades, in particular since the ECtHR ruling in *Pretty v United Kingdom*¹⁹ which include self-determination in general, sexual self-determination, gender self-determination, reproductive self-determination and informational self-determination and have gradually become part of IHRL discourse and advocacy. One of the main sites of its development is precisely the abovementioned jurisprudence on the right to privacy, primarily that of the ECtHR and the IACtHR. Importantly, it is being developed and used in relation to subjects who are generally included within the category of NHHLSs.

Although the notion of self-determination of individuals is becoming more and more visible in IHRL, it is being developed and used in fragmented manner and is yet to be studied and theorised as a holistic and unified concept in IHRL. I therefore examine the concept of individual self-determination as another evolving site for inclusion of NHHLSs. I first ask how individual self-determination is being developed in IHRL. In this sense my thesis aims to fill this gap in the literature. The scope of my study of this concept is to examine how adjudicative bodies use this concept as well as how it is being incorporated into soft law instruments. I then proceed to ask what the normative quality of this concept within IHRL is. Afterwards I move to examine whether individual self-determination, due to its emerging nature, can be an avenue that fully accommodates NHHLSs. If concluded as a possible avenue, the follow-up question would be, how should it be applied to become an adequate avenue for addressing NHHLSs' claims?

It is important to note the decision to examine existing avenues- such as the right to privacy - and emerging avenues such as individual self-determination- has a comparative aspect. That

¹⁹ *Pretty* (n 10), para 61.

is, it asks whether there it is possible to shape and engage with either existing or emerging avenues in IHRL to fully accommodate NHHLSs. In this sense, the thesis is conducted through a critical lens that requires engagement with the perpetual question of whether IHRL could be able to fully accommodate NHHLSs in its existing or future framing of whether IHRL would always exclude these subjects to different degrees.

2. Concepts and Tensions

2.1 Non-Hegemonic Human Legal Subjects

Throughout this thesis I use the concept of NHHLS. This general category is a source of tension and has the risk of over-generalising and of essentialising different lived experiences of a very heterogenous group of individuals.²⁰ I use the term hegemonic not as a reference to Gramsci's theory of hegemony,²¹ but rather as a mere indication of *positionality*, or better, *positionalities*.²² Many human subjects are placed in a non-hegemonic position because of IHRL's structure and interpretation which upholds a hierarchy of subjects through its acts of inclusion and exclusion. Or as Marshall argues: "Human Rights law permits, provides and defines who should be included and excluded from its protection. In doing so, it recognizes and ignores, or refuses to recognize, certain identities".²³ The category of NHHLSs therefore directly stems from the vast critical approaches to law scholarship such as intersectional feminist, TWAIL and Queer approach that frame law as a site of power that constructs the

²⁰ Harris explains that "[j]ust like law itself, in trying to speak for all persons, ends up silencing those without power, feminist legal theory is in danger of silencing those who have traditionally been kept from speaking, or have been ignored when they spoke, including black women". Angela P Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 Stanford Law Review 581, 585.

²¹ For an overview of the intellectual history of the term hegemony see: Perry Anderson, *The H-Word: The Peripeteia of Hegemony* (Verso 2017).

²² See Heathcote's explanation of the importance of positionality and intersectionality in feminist legal research: Gina Heathcote, 'On Feminist Legal Methodologies: Split, Plural and Speaking Subjects' (2018) 8 Feminist@law 1,16.

²³ Jill Marshall, *S.A.S. v France: Burqa bans and the Control or Empowerment of Identities*' (2015) 15 Human Rights Law Review 377, 378.

human and upholds hierarchies of subjects.²⁴ These approaches challenge the alleged universality and inclusivity of IHRL by unmasking the particularity of the abstracted and universalised human legal subject of human rights: a human legal subject which in this thesis I define as the hegemonic-heteronormative-cisgender-bodily-abled-adult-wealthy-Christian-Western-white-man.²⁵ Thus, by making and upholding the *hegemonic* human legal subject IHRL creates the contrasting category of the *non-hegemonic* which consists of every individual who self-identifies and/or is identified by others as different to the hegemonic-heteronormative-cisgender-bodily-abled-adult-wealthy-Christian-Western-white-man.

However, the non-hegemonic position is not a position of *sameness*. This is an extremely heterogenous category, and the NHHLS in this or any thesis are not representative of the entire category, nor should they be seen as such. The importance I have given to using the term *hegemonic* in this thesis ought to be understood as an accusation and a condemnation against IHRL, joining many academic interventions that undermine its neutrality and generality.²⁶ Applying intersectionality theory appreciates that different NHHLSs face different harms due to their intersecting non-hegemonic positions and in this sense, it is impossible and undesirable to attempt to generalise claims by NHHLSs, as many feminist efforts have wrongfully done.²⁷ Harris, in critiquing white radical feminism, explains that it is impossible not to categorise because categories are necessary for “social change”.²⁸ However, she adds: “[m]y suggestion is only that we make our categories explicitly tentative, relational, and unstable, and that to do

²⁴ See Chapter 1, part 1.

²⁵ Davies for example argues that by insisting the law sexes its subjects rather than genders them “it will no longer be possible to present any subject as an abstract person before the law, meaning that if it is to retain its ideal of equality, the law will have to begin to deal with its inbuilt prejudices in some way, or at least invent new ways of masking them”. Margaret Davies, ‘Taking the Inside Out’ in Ngaire Naffine and Rosemary J Owens (eds), *Sexing the Subject of Law* (Sweet and Maxwell 1997) 27.

²⁶ See Chapter 1, Part 1.

²⁷ Harris (n 20) 586.

²⁸ *Ibid.*

so is all the more important in a discipline like law, where abstraction and ‘frozen’ categories are the norm”.²⁹

This is precisely how I ask the reader of this thesis to understand the category of the non-hegemonic – it is a tool for critiquing, for changing IHRL, which must be understood as dynamic and relational. By reflecting on my own positionality within this category as a Jewish cis woman, granddaughter of Holocaust survivors, *and* citizen of Israel which engages in the ongoing violation of Palestinian right to self-determination and the human rights of Palestinians within 1948 boundaries and outside of them,³⁰ I understand that law is a powerful social construction for creating and upholding hierarchies of legal subjects. It can be used for excluding humans from the category of the human as my family was - as many Palestinians are. In this sense, while I frame the NHLSs of IHRL as hegemonic-heteronormative-cisgender-bodily-abled-adult-wealthy-Christian-Western-white-man, each context will have its own variations. Even the slightest variations on how the hegemonic subject is ‘translated’ locally creates a similar, although not identical, hegemonic subject. Meaning, all subjects – both the hegemonic and non-hegemonic are situated in specific contexts. In this sense, categories of subjects such as Kapur’s category of the sexual subaltern that is framed on the basis of subaltern studies³¹ is an example of a broad category of diverse subjects that are situated in a particular context - a category that is both broad *and* specific at the same time.

Kapur explains that

The term sexual subaltern is intended to bring together, the disparate range of sexual minorities within postcolonial India, without suggesting that it is either a homogenised or stable category. Indeed, the location and politics of the sexual subaltern in postcolonial

²⁹ *Ibid.*

³⁰ See: Human Rights Watch, ‘World Report 2022 – Israel and Palestine’ <<https://www.hrw.org/world-report/2022/country-chapters/israel-and-palestine>> accessed on 8 April 2023.

³¹ See: Gayatri Chakravorty Spivak, ‘Can the Subaltern Speak?’ in Rosalind C Morris (ed) *Can the Subaltern Speak? Reflections on the History of an Idea* (Columbia University Press 2010).

India is mediated by class, caste and religion, producing a complex and at times even contradictory politics.³²

My use of the non-hegemonic in this sense is less contextualised and therefore more abstracted and potentially more dangerous than Kapur's sexual subaltern. The category of NHHLSs is perhaps more similar to other categories such as 'non-dominant'³³ which also contains a descriptor of power. The choice of using the term NHHLS does not, however, mean that this thesis advances general and abstract claims about disembodied subjects. The use of NHHLS is instrumental and pragmatic as a site for a variety of demands which all insist on the IHRL's creation and upholding of a hierarchy of subjects that underlines its structure and interpretation. Moreover, the very heart of the argument I make in this thesis is that of framing the emerging right to individual self-determination precisely as a right that requires an examination of subjects in context in order to shift IHRL away from its habit of formal equality of subjects through abstraction. It is my hope that by bringing awareness to the choice of using this category I can assist the readers of this work in situating my contribution within these tensions.

2.2 Individual Self-Determination

A central concept I use throughout this thesis is that of *individual* self-determination. However, the decision to write about the self-determination of *individuals*, means to develop a framework that is separate to that of self-determination as a collective right. In fact, international law and IHRL already have a recognised and accepted legal framework of self-determination which is

³² Ratna Kapur, 'Law and the Sexual Subaltern: A Comparative Perspective' (2000) 48 Cleveland State Law Review 15, 16.

³³ Eva Brems, 'Introduction' in Eva Brems (ed), *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (Cambridge University Press 2012) 1.

an *erga omnes* norm³⁴ and a human right.³⁵ It is an integral aspect of all political and legal struggles for decolonisation and other forms of self-government and autonomy which are often labelled as either external or internal self-determination³⁶ that is especially important for colonised peoples, minorities, and indigenous peoples.³⁷

While it is one of the pillars of international law and the first human right listed in both of the main IHRL treaties – the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights - whether it has reached a *jus cogens* right is still unclear.³⁸ In terms of its justiciability, an evident disparity is revealed between the ability of the International Court of Justice and the HRC to develop a jurisprudence of self-determination. The International Court of Justice has issued several important decisions regarding the status of this norm and its resulting obligations and has a robust jurisprudence on this right.³⁹ This is not the case for the HRC. According to General Comment 12 which offers

³⁴ See among other authorities: *Case Concerning East Timor (Portugal v Australia)*, ICJ, Judgment (30 June 1995), para 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion (9 July 2004), paras 88, 155.

³⁵ Peoples' self-determination is found in the following treaties and soft law instruments: *International Covenant on Civil and Political Rights*, UNGA, UNTS 999 (16 December 1966, in force 23 March 1976) Article 1; *UN International Covenant on Economic, Social and Cultural Rights*, UNGA, UNTS 993 (16 December 1966, in force 3 January 1976), Article 1. In soft law instruments: *Declaration on the Granting of Independence to Colonial Countries and Peoples*, UNGA, A/RES/1514 (14 December 1960) point 1; *Declaration of Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations*, UNGA, A/RES/2625 (24 October 1970); *Vienna Declaration and Programme of Action*, UNGA, A/CONF.157/23 (12 July 1993); UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA, A/RES/61/295 (2 October 2007) Article 3; *Arab Charter on Human Rights*, League of Arab States (15 September 1994), Article 2(1), *African Charter on Human and Peoples' Rights*, Organization of African Unity, OAU Doc. CAB/LEG/67/3 27 June 1981, rev.5, 21 I.L.M. 58 (27 June 1982) Article 20; *American Declaration on the Rights of Indigenous Peoples*, Organization of American States, OAS, OAE/Ser.P AG/RES. 28888 (XLVI-O/16) (15 June 2006) Article III and XXI(1).

³⁶ For a critical assessment of the nexus between internal and external self-determination: Kalana Senaratne, 'Internal Self-Determination in International Law: A Critical Third World Perspective' (2013) 3 *Asian Journal of International Law* 305.

³⁷ See: *American Declaration on the Rights of Indigenous Peoples* (n 35) and *United Nations Declaration on the Rights of Indigenous Peoples* (n 35).

³⁸ See, for example: Matthew Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' (2011) 11 *Human Rights Law Review* 609; Ki-Gab Park, 'The Right to Self-Determination and Peremptory Norms in Dire Tladi (ed), *Peremptory Norms of General International Law (Jus Cogens)* (Brill, 2021).

³⁹ See for example: *Western Sahara*, ICJ, Advisory Opinion (16 October 1975); *Legal Consequences for States of the Continued Presence of South African in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, ICJ, Advisory Opinion (21 June 1971); *Case Concerning East Timor (Portugal v Australia)*, ICJ,

an authoritative yet non-binding interpretation of the right to peoples' self-determination by the HRC, this right is 'an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights'.⁴⁰ However, as the HRC began to receive communications on alleged violations of this right, it soon became clear that its justiciability within the Optional Protocol to the ICCPR is compromised by the interpretation of Articles 1 and 2.⁴¹ This is because the HRC determined that the right to self-determination is a collective right 'conferred upon a people, as such'⁴² and, therefore, it is inadmissible precisely because of its collective nature; its collective nature implies that it cannot raise individual violations.⁴³

This is an extremely brief overview of the right to self-determination in international law and IHRL. However, it is important to include in order to situate my decision in this thesis to develop the concept of *individual* self-determination as an emerging individual right in IHRL. The decision to write about *individual* self-determination should not be understood as undermining the collective, recognised and accepted right to self-determination in international law and IHRL. For this reason, I use the framing 'individual self-determination' and not 'self-determination' so to ensure that the fundamental distinction between the two is maintained. However, the HRC's decision to interpret Article 1 as an inherently collective right and therefore inadmissible, means that it upholds a binary of collective rights v individual rights,

Judgement (30 June 1995); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion (9 July 2004); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ, Advisory Opinion (22 July 2010); *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, ICJ, Advisory Opinion (25 February 2019).

⁴⁰ *CCPR General Comment No 12: Article 1 (The Right to Self-Determination of Peoples)*, United Nations, Human Rights Committee (13 March 1984), para 1.

⁴¹ *Optional Protocol to the International Covenant on Civil and Political Rights*, UNGA, UNTS 999 (16 December 1966, in force 23 March 1976) Article 1 and Article 2. See also Richard Burchill, 'Chapter 9: Self-Determination', in Alex Conte and Richard Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (2nd edition, Tylor and Francis 2009) 247.

⁴² *Lubicon Lake Band v Canada* Comm no 167/1984 (HRC, 26 March 1990), paras 32.1 and 13.3.

⁴³ *Ibid*, 32.1; *S. v Denmark* Comm 2642/2015 (HRC, 29 June 2018), para 7.4; Similarly: *H.E.A.K. v Denmark* Comm no 2343/2014 (HRC, 23 July 2015), para 7.3.

and that individual rights have the privilege of being admissible under the Optional Protocol to the ICCPR. Thus, not only is the decision to devise yet another *individual* right in IHRL a source of tension, but devising it in a way that can mistakenly be understood as conflating with or contradicting the right to self-determination is clearly risky. In this thesis I am unable to resolve all of the tensions stemming from the possible confusion between individual self-determination and the established right to self-determination. However, I use the tensions as a constant reminder to carefully consider the engagement with IHRL and its exclusionary practices.

At the same time, my decision to develop individual self-determination, especially in light of these tensions, is a timely and strategic one. As I explained earlier in this introduction, the concept of self-determination of individuals has been ever more present in IHRL as a separate concept from that of the established and recognised norm of international law and IHRL. The fragmented uses of this concept present a possibility to shape its content in a responsive and responsible manner. That is what my thesis aims to do.

Although I write about individual self-determination, this concept as such does not currently appear in IHRL precisely because it is being used in a fragmented manner. Therefore, the fragmented uses of self-determination *of individuals* include framing such as self-determination, sexual self-determination, gender self-determination, reproductive self-determination and informational self-determination.⁴⁴ Many of the uses of self-determination of individuals have grown within the framework of the right to privacy as part of the development of its normative content and obligations. For example, in relation to sexual orientation, gender identity, gender expression and sex characteristic rights, the term individual

⁴⁴ The issue of informational self-determination is not a constitutive part of this thesis as it is understood as predominately fitting the right to privacy as protecting personal data. See: *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* App no 931/13 (ECtHR, 27 June 2017), para 137.

self-determination is particularly present in scholarly work regarding gender recognition regimes and the individual self-determination of trans, non-binary and gender non-conforming people. Much like the claim I make in Chapter 3 regarding the emergence of a new right to individual self-determination, Brems, Cannoot and Moonen identify the “emergence of a right to self-determination of gender identity under international human rights law”.⁴⁵ Furthermore, Cannoot argues that the ECtHR has recognised a right to gender self-determination within the meaning of the right to privacy and private life and has thus placed states under a positive obligation to adopt procedures for legal gender recognition.⁴⁶ More specifically, Cannoot sees the ECtHR’s continued approval of pathologisation practices within the doctrine of the margin of appreciation as undermining the right to self-determination of transgender persons.⁴⁷

In this thesis I adopt the concept of ‘individual self-determination’ in order to study, organise and theorise these fragmented uses of self-determination of individuals. I do so in view of articulating the relevance and role of individual self-determination in relation to NHHLSs. Furthermore, in Chapter 3, I argue that this concept and its uses in IHRL indicate that it is also a new and emerging *right*.

3. Methodology, Method, Scope and Limitations

3.1 Intersectional Feminist Legal Methodology- a Methodology of Tensions

In this thesis I use intersectional feminist critical legal methodologies. Crenshaw first coined intersectionality to explain the exclusion of Black women from feminist theory *and* from the

⁴⁵ Eva Brems, Pieter Cannoot and Toon Moonen, ‘Introduction’ in Eva Brems, Pieter Cannoot and Toon Moonen (eds), *Protecting Trans Rights in the Age of Gender Self-Determination* (Intersentia 2020) 6.

⁴⁶ Pieter Cannoot, ‘The Pathologisation of Trans* Persons in the ECtHR’s Case Law on Legal Gender Recognition’ (2019) 37 *Netherlands Quarterly of Human Rights* 14, 27.

⁴⁷ *Ibid*, 23-27.

antiracist political movement precisely because each was centred around a single-axis ground for discrimination. Crenshaw explains that “this single-axis framework erases Black women in the conceptualization, identification and remediation of race and sex discrimination by limiting inquiry to the experiences of otherwise-privileged members of the group”.⁴⁸

This approach therefore understands the burden of intersecting discrimination as a particular form of discrimination that cannot be reduced to the mere sum of grounds for discrimination. Crenshaw explains that “[i]ntersectional subordination need not be intentionally produced; in fact, it is frequently the consequences of the imposition of one burden that intersects with preexisting vulnerabilities to create yet another dimension of disempowerment”.⁴⁹ Intersectionality actively undermines essentialist framings of categories such as that of ‘woman’.⁵⁰ In this thesis I approach feminist legal intervention as requiring an intersectional lens with a view to dismantling hierarchies based on, among other, gender, sex, race, ability, class, and ethnicity.

Applying intersectional feminist critical approaches to law, and to IHRL specifically, means to view law as “a paradigmatic site of power”.⁵¹ According to Romany “in claiming autonomy from the political framework, law gives legitimacy to the social construction of that framework”.⁵² Therefore, I study IHRL as a site of power and seek to disrupt its façade of

⁴⁸ Kimberlé Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) 1 The University of Chicago Legal Forum 139, 141.

⁴⁹ Kimberlé Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color’ (1991) 43 Stanford Law Review 1241, 1249.

⁵⁰ See Harris (n 20) 586. See also: Lorena P. A. Sosa, ‘Inter-American Case Law on Femicide: Obscuring Intersections?’ (2017) 35 Netherlands Quarterly of Human Rights, 85, 87.

⁵¹ Celina Romany, ‘State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law’ in Rebecca J Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994) 88.

⁵² *Ibid.*

neutrality, objectivity and universality.⁵³ This is expressed in the main analytical frame I use throughout this thesis whereby IHRL is a particular social construct which operates through acts of inclusion and exclusion.⁵⁴ Intersectionality engages with the power to situate NHHLSs, it “helps reveal how power works in diffuse and differentiated ways through the creation and development of overlapping identity categories”.⁵⁵ Engaging with law as a social construction that affects and exercises power over people’s lives means also to develop dynamic and reflective strategies in order to approach the harms it may cause. Kapur therefore reminds us that “there will ALWAYS, always be another ‘other’ that will come along”,⁵⁶ and in this sense the act of critical reflection is dynamic rather than static.

Intersectional feminist critical approaches to law are methodologies of tensions which Kouvo and Pearson label as working between “resistance and compliance”.⁵⁷ The methodology therefore requires the continuous reflection and noting of tensions that stem from engaging with IHRL. These tensions accompany me throughout the thesis and are particularly driven by Kapur’s critique of IHRL. Kapur argues, that IHRL can only offer freedom in a fishbowl.⁵⁸ That is, freedom which is contained within the liberal episteme and thus advances – a form of “unfreedom”.⁵⁹ IHRL is therefore, according to Kapur, a governance project – a disciplinary mechanism that aims to manufacture regulated subjecthood, to assimilate, repress and oppress those “who refuse to comply or turn away from such a mandate”.⁶⁰ Baars, like Kapur, asks

⁵³ Dianne Otto, ‘Rethinking Universals: Opening Transformative Possibilities in International Human Rights Law’ (1997) 18 *Australian Year Book of International Law* 1, 15.

⁵⁴ See also Laclau and Mouffe on the nexus between social constructions and discourse. Ernesto Laclau and Chantal Mouffe ‘Post-Marxism without Apologies’ in Ernesto Laclau, *New Reflections on the Revolution of Our Time* (Verso 1990) 100-102.

⁵⁵ Sumi Cho, Kimberlé Williams Crenshaw and Leslie McCall, ‘Toward a Field of Intersectionality Studies: Theory, Applications and Praxis’ (2013) 38 785, 797.

⁵⁶ Kapur (n 32) 23.

⁵⁷ Sari Kouvo and Zoe Pearson, ‘Introduction’ in Sari Kouvo and Zoe Pearson, *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance* (Hart Publishing 2011) 5.

⁵⁸ Kapur (n 4) 10.

⁵⁹ *Ibid* 29.

⁶⁰ *Ibid* 46.

whether there is any sense in continuing to engage with law. In their critique of law's gendering power as an expression of the "cisheteronormative order"⁶¹ Baars asks a simple and compelling question that demonstrates the core of the tension the lays in any intersectional feminist critical engagement with the law: "[t]he heteronorm thus shapes what we can ask for and what we can get, but does it shape what we can imagine (...) can we say that it is possible to queer the legal structures that seek to contain our genders and sexualities or is now the time to say 'fuck law'?"⁶²

Baars concludes not by explicitly abandoning law, but by insisting on extra-legal strategies; primarily on building networks of radical solidarity and "a queer utopia well beyond the current normative horizon".⁶³ Similarly, Kapur explains in her critique of the fishbowl that while human rights advocacy cannot be abandoned "we must recognise its inability to procure freedom".⁶⁴ Kapur urges us to 'not only evolve truly mindful, equitable and inclusive strategies of rights deployment, but also actively direct our attention beyond the fishbowl of familiar liberal hegemonies and seek out alternative registers for their capacity to realize the promise of lasting freedom'.⁶⁵

In applying these methodologies to my thesis, I do not seek to silence nor to solve the tensions, but to accept and work with them. Unlike Baars and Kapur, my answers are within the fishbowl as I devise a framework that while disruptive, still arguably operates within what IHRL could, at least partially, accept. I therefore find Engle's reflection on feminist engagements with IHRL

⁶¹ Grietje Baars, 'Queer Cases Unmake Gendered Law, Or, Fucking Law's Gendering Function' (2019) 45 *The Australian Feminist Law Journal* 15, 62.

⁶² *Ibid*, 48.

⁶³ *Ibid*, 50.

⁶⁴ *Kapur* (n 4) 235.

⁶⁵ *Ibid*.

through the metaphor of ‘core’ and ‘periphery’ particularly relevant.⁶⁶ Engle reflects on feminism’s relationship with IHRL and explains that

The literature and movement surrounding women’s human rights has possibly challenged the human rights core more than any other literature of movement. At the same time, it has become one of the core’s staunchest defenders. Even as every author identifies and conveys difficulties with the discourse, they all make it work for them. The core is shaken but it remains. Women are still on the periphery.⁶⁷

Between resistance and compliance is a position that does not need to be understood as a binary. Applying intersectional feminist critical legal approach in this thesis does not require us to choose to abandon IHRL or to accept it fully. Rather it requires awareness to limitations and possibilities and building these into my work. In this sense, I apply Otto’s approach when she explains that

The task is to bring transparency to foundational claims (...) Such an understanding can only emerge from continually questioning the claims to Truth of foundational knowledge and exposing the political purposes they serve (...) it requires rejection of the modern project of decontextualising the individual in order to make innocent universal assessments.⁶⁸

In this thesis I argue as well for a shift away from abstraction and towards contextualisation. I do so in particular in Chapter 4 where I define the emerging right to individual self-determination as requiring a process of contextualisation of subjects in order to assess interference with their right. I apply this same requirement in Chapter 5 where I re-imagine three ECtHR cases through the framework of the emerging right to individual self-determination.

3.2 Method and Case Law Corpus

⁶⁶ Karen Engle, ‘International Human Rights and Feminist: When Discourses Meet’ (1992) 13 *Michigan Journal of International Law* 517, 517-610.

⁶⁷ *Ibid*, 610.

⁶⁸ Otto (n 53).

The primary method applied in this thesis is that of desk research and legal analysis of primary sources in IHRL including treaties, jurisprudence of the relevant adjudicative bodies and soft law instruments. The case-law corpus on the right to privacy was compiled between October 2018 and December 2019. Consequently, I gathered judgements issued by the ECtHR, IACtHR and HRC as these are the only IHRL adjudicative bodies which can decide on right to privacy matters. However, it is important to note that the ECtHR's abundance of right to privacy jurisprudence is incomparable to that of the HRC and IACtHR. By the end of 2019, the ECtHR had issued 2006 judgements, the HRC had decided on 81 communications and the IACtHR had ruled on 31 petitions all of which contained an allegation on a violation of the right to privacy at the merits stage.⁶⁹ I further limited the scope of my research by excluding cases which, while containing a right to privacy aspect, primarily regarded either gross violations of human rights, violations of right to fair trial, refugee status, non-refoulment or detention both in the context of migration and outside of it. I critically reflect on the decision to exclude these cases, primarily the decision to not engage with cases regarding the private life of migrants and the private life of refugees in the following section on scope and limitations. Instead, I focused on compiling a case-law corpus that primarily dealt with right to privacy issues in relation to NHHLSs' bodies, identities, and relationships. After applying these criteria, 7 cases from the HRC and 4 from the IACtHR satisfied my criteria and these I will therefore examine. As for the ECtHR which had the highest volume of right to privacy judgements, I decided to examine 53 cases on the right to privacy of NHHLSs. This sample is composed of key cases which have shifted the jurisprudence on the right to privacy of NHHLSs and cases that are often mentioned

⁶⁹ The databases used in order to filter the jurisprudence of each adjudicative bodies were the following: for the ECtHR I used HUDOC database <www.echr.coe.int> accessed 28 July 2023; for the HRC I used the United Nations Human Rights Office of the High Commissioner Jurisprudence database <<https://juris.ohchr.org/AdvancedSearch>> last accessed 28 July 2023; and for the IACtHR I used the database of the official website of the Supreme Court of Mexico on the jurisprudence of the IACtHR <<https://corteidh.scjn.gob.mx/buscador/>> last accessed 28 July 2023.

in secondary literature. The legal analysis was further complemented with extra-legal scholarship, primarily that of intersectional feminist theory and queer theory.

In addition, I used the method of re-imagination of judgments through the application of my framework of the emerging right to individual self-determination. This is not a new practice but rather one that has been developing in feminist, intersectional and queer legal scholarships. Taking a material product such as a judgment given by an IHRL adjudicative body and applying my theory is a material intervention. Davies argues that critique itself “is a theoretical intervention simply because it places the structurally sexed nature of law in the foreground, and by doing so alters our fundamental perception of what law is”.⁷⁰ By showing how a different reasoning and outcome are possible, and demonstrating the difference between the original judgment and my own, the act of re-imagining judgments is an active intervention with the material artefact which is the judgment – it changes the law.

3.3 Scope and Limitations

In line with the methodologies I presented earlier, the scope of my thesis also points to some tensions. Due to my focus on the right to privacy, this thesis primarily considers IHRL sources and adjudicative bodies that engage with this right. The focus on the right to privacy means that the African Human Rights System entered my analysis only in specific moments. For example, in Chapter 4 I explain the right to be recognised as a person before the law simply because the African Charter on Human and Peoples’ Rights as well as its protocols do not contain a codified right to privacy. Consequently, the jurisprudence of the African Commission on Human and Peoples’ Rights received less space in this work. Undoubtedly, one of the challenges of this thesis is that it is heavily centred around the jurisprudence of the ECtHR for

⁷⁰ Davies (n 25).

the simple reason that it produces an exceptional amount of judgments on this right that is incomparable with the HRC and IACtHR. This does not mean that it produces better judgments, but simply that there are more cases to examine in this human rights system. Many of my arguments find particular strength in the case-law of the ECtHR which can undermine my objective of framing a unified approach to the concept and identifying an emerging right to individual self-determination in IHRL. However, the number of cases does not mean that the thesis is about the ECtHR *per se*. In fact, some of the most important aspects of my definition of the emerging right to individual self-determination are taken from the jurisprudence of the IACtHR as well as from soft law instruments like the two Yogyakarta Principles. However, the three cases which I re-imagine through the application of the new emerging right to individual self-determination are all ECtHR cases. *I.G. and Others v Slovakia*,⁷¹ *Hämäläinen v Finland*⁷² and *S.A.S. v France*.⁷³

Although I engage with the right to privacy, I do not engage with all of its elements. The thesis is guided by types of claims that NHHLSs have made under this right, and more specifically with concepts of ‘private life’ and only marginally with ‘family’. I draw this line in order to focus on the claims that have shaped privacy beyond what it was initially imagined to encapsulate such as privacy, home, correspondence and honour or informational privacy. However, only marginally including claims under privacy’s protection of the family, means that I did not engage with issues such as asylum and citizenship. These are undeniably relevant issues for NHHLSs, and for some of the most marginalised of them. I left these claims outside of the scope simply because they require a separate and thorough analysis and theorisation.

⁷¹ *I.G. and Others v Slovakia* (n 6).

⁷² *Hämäläinen v Finland* (n 8).

⁷³ *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014).

Lastly, although I critique law's legal subjects in Chapter 1, by centring my work in IHRL I did not engage in a thorough manner with law's objectification of non-human animals nor with the environment, which are both issues that I would like to address in future work. By focusing on IHRL I do not mean to undermine the need for a radical shift in the legal personality of non-human animals and the environment which are a necessary part of an intersection feminist critical legal project.⁷⁴

4. Thesis Structure

The thesis begins by setting out the main analytical frame used throughout the research and analysis in **Chapter 1**, i.e., understanding IHRL as operating through acts of inclusion and exclusion of subjects, objects, actions, and spaces. I identify two main acts or 'layers' of inclusion and exclusion: (i) the making of legal subjects and (ii) the division of the (legal) space into private and public spheres of discretion and regulation. I argue that these two foundational layers create and uphold a hierarchy of legal subjects. They mask, under the façade of universality, the narrow identity of IHRL's primary *human* legal subject, that is, the hegemonic-heteronormative-cisgender-bodily-abled-adult-wealthy-Western-white-man, and create the non-hegemonic position of NHHLSs. The second layer of inclusion and exclusion divides the space and thus informs and upholds the hierarchy of legal subjects. The division of space in international law and IHRL therefore generates three intersecting binaries that are relevant to understanding the position of NHHLSs in IHRL. First, the binary that upholds the primarily legal subjects of international law – the sovereign state- that of domestic (discretion)/international (regulation). Second, the binary within the sovereign state of private sphere of discretion/public sphere of regulation. This second binary produces a subsequent one

⁷⁴ See for example Jones (n 4) and Chapter 1, (n 4).

– framing individual claims as private against collective claims as public. The objective of this chapter is therefore to demonstrate the harmful position of NHHLSs within IHRL as sitting within these binaries that uphold the hierarchy of legal subjects.

In **Chapter 2** I move from the analysis of the general – IHLR as a structure and discourse - to the specific – the right to privacy as a particular expression of IHRL’s acts of inclusion and exclusion. I therefore analyse the structural and interpretative limitations of the right to privacy of NHHLSs noting the inclusions and exclusions the right performs as applied to these subjects in practice. The Chapter presents three main claims regarding the right to privacy, NHHLSs and the role of adjudication in IHRL. Firstly, I claim that privacy is a precarious avenue for NHHLSs including: (i) its spatial notion of private/public (second layer of inclusion and exclusion), (ii) its built-in ability to expand *and* contract, and finally (iii) the predominately negative nature of the right. Through my analysis, I show that the claims of NHHLSs can be understood as falling under three categories: bodies, identities, and relationships. This brings me to my second argument that not only is privacy precarious but, at best, can only accommodate part of the claims that NHHLSs bring within its scope. That is because their claims have a privacy element, but also go beyond privacy. These are claims about recognition of legal subjecthood. Thirdly, I further refine the claim against IHRL as operating through inclusion and exclusion by analysing the role of interpretation by adjudicative bodies as a continuous invitation to dynamically engage with the legal boundaries of that which is included and excluded; thus determining that the categories are dynamic rather than static.

Concluding that expansion beyond the right to privacy framework is called for, I begin the second part of the thesis by introducing the concept of *individual* self-determination in **Chapter 3**. In this chapter I examine the concept of individual self-determination which often intersects with the right to privacy and is increasingly being used in IHRL in relation to NHHLS. Multiple different IHRL actors have used this concept in a fragmented manner, and it has yet to be

studied, organised and theorised as a unified concept. The scope of this chapter is therefore to begin to weave together the different uses of individual self-determination by tracing its trajectories and locating commonalities between these uses. These trajectories demonstrate tensions and potentialities in developing this concept, in particular its relationships with the right to privacy. Furthermore, I assess the role of the concept of individual self-determination and argue that it is an *emerging right* in IHRL, and one which requires our attention and care. This emerging right presents an opportunity to better address the rights of NHHLs precisely because it is *emerging*, providing the possibility to shape the right's content and future trajectories in a responsible manner. I conclude the Chapter by arguing that a strategic development of this emerging right is possible and desirable when the tensions themselves become an integral part of the design and operationalisation of this right.

This is precisely the scope of **Chapter 4** in which I define the new emerging right to individual self-determination as a right to substantive recognition. I arrive at this definition by examining two concepts that I have identified when tracing the trajectories of individual self-determination in Chapter 3, namely (i) recognition and (ii) existence. Substantive recognition complements the formal and procedural right to be recognised as a person before the law and actively works to bridge the gap between the human subject and the human legal subjects in order to make space for NHHLs in IHRL and to protect their full participation in society. When the emerging right to individual self-determination is framed as such, it distances itself from the right to privacy and makes IHRL's acts of inclusion and exclusion visible. Complaints regarding bodies, identities and relationships are therefore *prima facie* within the scope of this right because under the emerging right to individual self-determination these are categorised as areas of recognition of subjects.

Lastly, I set out the limitations to this emerging right and explain that any interference must prove that it does not undermine the ability of an individual to be recognised as a full human legal subject. That is to demonstrate that the individual's recognition and hence their ability to participate in society is not harmed. This is because, when recognition is hindered, the ability to access rights and participate in a democratic society, which are part of the premises of IHRL, are impaired. In order to do so, any assessment of interferences must demonstrate a careful process of contextualisation that is centred on co-constructing the positionality of subjects and considers the harm of which they complain in relation to their positionality.

Finally, in **Chapter 5** I return to three cases which have accompanied me throughout the problematization, theorisation and response to the research question in this thesis: *I.G. and Others v Slovakia*, *Hämäläinen v Finland* and *S.A.S. v France*. The scope of this last Chapter is to examine what happens to these cases when the framework of the new emerging right to self-determination is applied to them - whether and how the reasoning and the outcome in each can change. Inspired by feminist judgment project that engage in the re-imagination of different legal fields, in this chapter I re-imagine the jurisprudence of the ECtHR in order to (i) to show the potential of potential contribution and of this emerging right to the case-law and (ii) to illuminate existing gaps in the law and its application in cases regarding non-hegemonic human legal subjects.

This thesis presents a first step in the articulation of a unified concept of individual self-determination in IHRL. It is a timely contribution to the pressing need to shape the emerging right to individual self-determination for NHLSs. This right is in the process of emerging and much can be done to ensure that when it does emerge, that it emerges as a radical tool for illuminating structural hierarchies of human legal subjects which actively seeks to make spaces

for NHHLSs and to safeguard their participation in society. Different strategies can be incorporated by different actors in order to do so. Litigants, third parties, grassroots organisations, international organisations and NGOs, and are all relevant actors to the shaping of this emerging right. For example, by weaving together alliances between the different fragmented uses of individuals self-determination. Thus, advocates of reproductive self-determination and those of gender and sexual self-determination should see themselves as allies and centre their use of self-determination as inherently relating to the positionality and needs of NHHLSs. To devise shared strategies and claims that push IHRL and its actors to acknowledge the insufficient safeguards it currently has for these human legal subjects.

Part I: Problematizing and Defining

Chapter 1: Identifying the Tensions through Inclusion and Exclusion in International Human Rights Law – Legal Subjects and Private Spaces

Introduction

In this first Chapter I introduce the primary analytical frame that accompanies me throughout this thesis – understanding IHRL as operating through acts of inclusion and exclusion of subjects, objects, actions, and spaces. This is a necessary element both for analysing the right to privacy in Chapter 2 and examining its limitations vis-à-vis NHHLs, as well as defining the new emerging right to individual self-determination in Chapter 4 as a potential alternative avenue for their claims.

By framing IHRL as operating through acts of inclusion and exclusion I locate my work within the heterogeneous field of critical approaches to law, and more specifically, to international law and IHRL.¹ That is, to examine IHRL beyond the façade of universality, neutrality, and objectivity as a particular social construction. Thus, in this chapter I undermine the inclusivity and neutrality of the concept of legal subjects, and specifically of human legal subjects and critically assess the seemingly neutral and general division of the legal space to spheres of regulation and discretion. Put simply, I focus on two acts of inclusion and exclusion –the making of legal subjects and the division of the legal space. These two acts function as

¹ I use the term ‘critical approaches to law’ to describe different and at times intersecting approaches to the studying of law and the legal discipline as a social construction that upholds human hierarchies including intersectional feminist, Queer, TWAIL, critical race studies, critical gender studies, critical disability studies, and posthumanism. Many of which are referred to in this chapter.

foundational layers of the structure and interpretation of IHRL. The first layer – that of legal subjects - creates and upholds the *positionality* of certain human legal subjects as non-hegemonic. IHRL’s universalised human legal subject is an exclusionary category of subjects – the hegemonic-heteronormative-cisgender-bodily-abled-adult-wealthy-Christian-Western-white-man and as such locates all other subjects in a *non-hegemonic* position. The second layer is that of the division of the legal space which upholds and informs the hierarchy of legal subjects. I therefore analyse how international law’s primary legal subjects – sovereign states – divided the legal sphere into two binaries: (i) the domestic sphere of discretion/international sphere regulation and (ii) the private sphere of discretion/public sphere of regulation. I argue that these binaries, I argue, place NHHLSs in a ‘tension within a tension’.

In the first section I explore the concept of personhood and the making of legal subjects as the primary layer of inclusion and exclusion. Legal personality, under IL, is the recognition of a subject as having rights and duties at law which may at times include also a right to standing.² Personhood is thus key to understanding who is included and excluded in participation in the law by the mere fact of being recognised as having rights and duties.³ Drawing on legal theory, I present various approaches to legal personality, in domestic law and IL, which reflect different theoretical and political perspectives towards law, human beings, non-human

² *Reparations for Injuries Suffered in the Service of the United Nations*, ICJ, Advisory Opinion (11 April 1949) 9.

³ Ngaire Naffine, ‘Who are Law’s Persons? From Cheshire Cats to Responsible Subjects’ (2003) 66 *The Modern Law Review*, 346.

animals,⁴ the environment⁵ and corporations.⁶ I explain that both positive law and natural law approaches to making legal subjects tend to assign differential weight and importance to these categories, thus granting legal personality to some and not others, or granting different levels of legal personality and standing.⁷ In the case of IL, the primary legal person and subject is the sovereign state.⁸ Following critical legal scholarship and positioning my own work within intersectional feminist legal theory, I argue that the doctrine of sovereignty and the primacy of the state as part of international law's doctrine of legal subjects is embedded in a complex history of dominance, colonialism, racism, speciesism, ethnocentrism and patriarchal imposition. Subsequently, I discuss the role of the state in the making and upholding of IHRL and its role in creating new legal subjects such as the human legal subject of IHRL. This category of subjects, I argue, carries with it a similar façade of inclusion and universality as that of international law's primary subject – the sovereign state and the (formal) equality between sovereign states. However, I show that the human legal subject of IHRL is anything but universal. Rather, the human legal subject at the centre of IHRL is a narrow and

⁴ See: David Favre, 'Equitable Self-Ownership for Animals' (2000) 50 Duke Law Journal 473; Taimie L Bryant, 'Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans' (2008) 39 Rutgers Law Journal 247; David Bilchitz, 'Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals' (2009) 25 South African Journal of Human Rights 38; Steven Tudor, 'Some Implications for Legal Personhood of Extending Legal Rights to Non-Human Animals' (2010) 35 Australian Journal of Legal Philosophy 134; Marina Lostal, 'De-Objectifying Animals: Could they Qualify as Victims before the International Criminal Court?' (2021) 19 Journal of International Criminal Justice 583; Steven M Wise, 'The Legal Thinghood of Nonhuman Animals' (1996) 23 Boston College Environmental Affairs Law Review 471.

⁵ See: Emily Jones, 'Posthuman International Law and the Rights of Nature' (2021) 12 Journal of Human Rights and the Environment 76.

⁶ Grear argues that: 'law – including international law- *systematically privileges* the corporation as an idiosyncratic juridical form possessing disembodied characteristics that no corporally specific human (or animal) body ultimately can possess (...) the corporation's privilege in law- including the contemporary international legal order- stems from its special intimacy with the dominant underlying trope of what it means to be a legal person at all'. Anna Grear, 'Deconstructing Anthropos: A Critical Legal Reflection on 'Anthropocentric' Law and Anthropocene 'Humanity'' (2015) 26 Law and Critique 225, 241; see also Anna Grear, 'Challenging Corporate 'Humanity': Legal Disembodiment, Embodiment and Human Rights' (2007) 7 Human Rights Law Review 511.

⁷ Kate Parlett, *The Individual in the International Legal System- Continuity and Change in International Law* (Cambridge University Press 2013) 356 and Malcolm N. Shaw, *International Law* (6th edition, Cambridge University 2008) 196-197.

⁸ Karen Knop, 'Why Rethinking the Sovereign State is Important for Women's International Human Rights Law' in Rebecca J. Cook (ed), *The Human Rights of Women* (University of Pennsylvania Press 1994) 153.

exclusionary construction that prioritises the legal subjecthood and rights of hegemonic-heteronormative-cisgender-bodily-abled-adult-wealthy-Christian-Western-white-men. That is, I analyse legal personality as “a mechanism that ‘naturalises’ and/or renders ‘neutral’ the law’s mediation of hierarchy and dominance”.⁹

I then move to examine the second act of inclusion and exclusion – the division of space into public and private spheres of regulation and discretion. I argue that this second layer of inclusion and exclusion must be understood in relation to the first. Meaning, that the division of space is informed by the hierarchy of legal subjects and in turn upholds and further shapes this hierarchy. This adversely affects the ability of NHHLSs to inhabit the public and the private spaces of regulation and discretion. To substantiate this claim, I first examine the role of international law and IHRL’s primary legal subject – the sovereign state – in shaping the legal spaces of regulation and discretion: (i) the binary division of the domestic sphere of discretion versus the international sphere of regulation; and (ii) the private sphere of discretion and the public sphere of regulation within the sovereign state. Thus, locating NHHLSs in a further binary - individual(private)/collective(public). A tension within a tension.

⁹ Gear (n 6) 242.

1. First Layer of Inclusion and Exclusion: The Making of Hegemonic and Non-Hegemonic (Human) Legal Subjects

1.1 Defining Legal Subjects

The law needs a legal subject in order to be operational.¹⁰ Simply put, being recognised as a legal subject is a necessary condition to having rights and duties, including the ability to bring claims.¹¹ Naffine asks ‘how, why, and with what and whom, law peoples its world’ and suggests that the legal use of the word “person” cannot be separated from the definition of person.¹² This is a key entry point to unpacking inclusion and exclusion in IHRL. There are various ways to understand the main approaches to assigning legal personality in general terms. One possible route¹³ is to compare positive law and natural law conceptualisations of legal personality.¹⁴ The scope of such comparison is not to claim that the processes of making and organising categories of legal persons can be fully explained or explained in the best way possible. Instead, it is the mere insistence that the category and instrument of “legal person” is constructed, and such construction is rendered invisible by law’s claims to objectivity and neutrality.¹⁵

¹⁰ According to Shaw: “[w]ithout it institutions and groups cannot operate, for they need to be able to maintain and enforce claims”. Shaw (n 6) 195.

¹¹ Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates About Property and Personality* (Ashgate 2001) 51.

¹² Naffine (n 3).

¹³ While I begin my engagement with the debate by contrasting and comparing positive law and natural law approaches, this is not the only way to begin such inquiry. For example, Kurki traces Roman conceptions of personhood and how these shaped modern understanding of legal personhood. See Visa A.J. Kurki, *A Theory of Legal Personhood* (Oxford University Press 2019) 31-118.

¹⁴ See e.g.: Elena Blanco and Anna Grear, ‘Personhood, Jurisdiction and Injustice: Law, Colonialities and the Global Order’, (2019) 10 *Journal of Human Rights and the Environment* 86, 102, and Davies and Naffine (n 11) 52-57.

¹⁵ Koskenniemi argues that the language and discourse of international law “conveys to us a certain interpretation of the social reality to which it is addressed, under the veil of objectivity, or naturalness. Deconstruction seeks to bring out the conventional character of this interpretation and its dependence on certain constable assumption. It becomes critical as it shows that legal argument cannot produce the kinds of objective resolutions it claims to produce”. Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (reissued

A positive law approach to determining legal personality follows an abstracted logic of what subjecthood and personality mean. That is, a legal person does not necessarily have to be a ‘person’ in the sense of a ‘natural’ person, meaning they do not need to be a human person at all. For Kelsen, legal persons are a tool for locating rights and duties, meaning that the legal subject is the “bearer of the rights and duties”.¹⁶ In other words, “the legal person is the legal substance to which duties and rights belong as legal qualities”.¹⁷ Such an approach to determining legal personality allows the lawmaker to decide how to best fill the seemingly content-neutral category of personhood. Davies and Naffine argue that the positivist doctrine of legal personality presents personhood as “a fiction” and “a device” which is construed by “variable legal rights and duties”.¹⁸ An example of such an approach is found in Bryant’s description of legal personality as a functional and operational instrument. Bryant states that if

it suits the purposes of society to make a ship a legal person, not because the ship’s conduct will be any different, of course, but because its personality is an effective instrument to control in certain particulars the conduct of its owner or of other human beings. The broad purpose of legal personality, whether of a ship, an idol, a molecule, or a man, and upon whomever or whatever conferred, is to facilitate the regulation, by organized society, of human conduct and intercourse.¹⁹

Bryant’s argument is clear – legal persons are an instrumental category and legal personality can therefore be assigned to achieve any specific function or scope that is deemed desirable. This means that legal personhood can be effectively given to any subject, object, or artefact, as long as the granting of legal personality is ‘useful’. According to Naffine, such an approach to

edition, Cambridge University Press 2005) 12; Similarly, Charlesworth and Chinkin highlight another crack in the neutral façade of international law’s language and argue that the “vocabulary of international-law making relies on concepts that have a gendered dimension”. Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2nd edition, Manchester University Press 2016) 70.

¹⁶ Hans Kelsen, *General Theory of Law and State* (Russel & Russel 1961) 93.

¹⁷ *Ibid.*

¹⁸ Davies and Naffine (n 11) 53.

¹⁹ Bryant Smith, ‘Legal Personality’ (1928) 37 *The Yale Law School Journal* 283, 296.

determining legal personality has the “emptiest definition” of the subject of rights and duties.²⁰ This is precisely because the subject has “no necessary moral or empirical content”, nor does this approach sets up any requirements of biological, social or psychological elements.²¹ A positive law approach alludes to a realm of potentialities where legal personality is perceived as a means to an end, which is not constrained by any pre-set moral or other consideration beyond ‘neutral’ aspirations of utility and pragmatism.

Natural law approaches the making and regulating of legal personality from a human-centred perspective. Ducor argues that “the human being is the paradigmatic subject of rights”²² and therefore, the very ‘human-status’ of the human is a sufficient condition for legal personality.²³ This implies that if one is (deemed) human, that automatically satisfies the requirements for legal personality. Such arguments can be taken to the extreme. Finnis, for example, claims that legal personhood should be extended to include fetuses as they satisfy this basic ‘humanity’ requirement.²⁴ In this sense, natural law conceptions of legal personality attach personhood *prima facie* to every human being. This approach seems to suggest that there is a conflation between the legal person and the human person.

Both approaches to legal personality, be it the empty vessel one advanced by positivists, or the human-centred approach advocated by natural law scholars, operate through inclusion and exclusion of subjects, objects, actions and spaces to and from the category of legal personality.

²⁰ Naffine (n 3) 351.

²¹ *Ibid.*

²² Philippe Ducor, ‘The Legal Status of Human Materials’ (1996) 44 Drake Law Review 195, 200.

²³ *Ibid.*

²⁴ According to Finnis: “[i]t is increasingly accepted, by legislative and judicial authorities in most US states, that the unborn child is entitled to protection and remedies in tort even if born dead, and likewise to the protection of the criminal law. These developments, though restricted rather arbitrarily by the constitutional maternal rights declared by the Supreme Court in *Roe*, mark a retreat from simple refusal to take account of the realities of personal existence before birth”. John Finnis, *Collected Essays: Volume II, Intention and Identity* (Oxford University Press 2011) 28.

I therefore examine how these approaches shape IHRL's subjects and how both natural and positive law conceptualisations are applying mechanisms of inclusion and exclusion that are often not brought to the fore. In this sense, I follow Blanco and Grear who argue that personhood "has long been central to law's tilted distribution of power and privilege, marginalization and dispossession".²⁵ Both positivist and natural law approaches to legal personality render the power to make legal persons and the hierarchies of subjects invisible by either claiming that personality is an empty vessel or claiming that personality is the prerogative of all human beings. Both do so by claiming that they follow an inclusive and objective criterion to denoting personality. I demonstrate these two claims by unpacking IHRL's subjects, beginning with the primary legal subject of IL– the sovereign state.

1.2 Legal Subjects in International Law and International Human Rights Law

International law's primary legal subjects are sovereign states.²⁶ According to Sellers, states are artificial persons, unlike human persons or 'real' persons.²⁷ In this sense, Seller argues that legal personality is a "metaphor"²⁸ since personality is a human attribute. It is "the separate existence of individual human characters (...) in the possession of mental and moral consciousness".²⁹ Nonetheless, Sellers explains that states are recognised as having "an independent personality"³⁰ precisely because they represent real (human) people and protect their rights and duties.³¹ This approach to legal personality encapsulates both natural law and positive law approaches to different extents. On the one hand, Sellers explains that personality

²⁵ Blanco and Grear (n 14) 98.

²⁶ Antony Anghie, 'Rethinking Sovereignty in International Law' (2009) 5 Annual Review of Law and Social Sciences 291, 306.

²⁷ Mortimer N S Sellers, 'International Legal Personality' (2005) 11 IUS GENTIUM 67, 77.

²⁸ *Ibid* 68.

²⁹ *Ibid*, 67.

³⁰ *Ibid*.

³¹ *Ibid*, 69; 73 and 78.

is a human prerogative which resonates with natural law in following an explicitly human-centred approach to legal personality. On the other hand, Sellers understands legal personality as instrumental and therefore aligns with positivist approaches to legal personality by accepting that ‘artificial’ persons can exist alongside ‘natural’ human persons. Jones explains how international law’s primary subject – the state- is on the one hand an example of a nonhuman subject whilst on the other hand it is not a posthuman subject.³² She further argues that international law is not posthuman because it “is based upon both exclusionary humanist and anthropocentric values”.³³ In this sense, the legal personality of the sovereign state itself requires further complication as a primary example of inclusion and exclusion in international law. Sellers’ description of legal personality of states arguably silences the role of the state in setting a hierarchy of subjects by framing subjecthood as ‘given’ and ‘decided’ by international law itself, as if it were a separately operating entity from that of sovereign states. This is important to understand as the very ordering and operation of international law is posited on these exclusionary subjects. It follows, international law is based on state consent and therefore so is the granting of subjecthood to all other entities.³⁴ Anghie affirms that international law is complicit in colonialism and subjugation of peoples, and its doctrine of state sovereignty is a prime example of how international law is still shaped by its history in the making, upholding and undoing of colonialism.³⁵ Mutua argues that the concept of sovereignty played a key role in “justifying, managing and legitimizing colonialism”.³⁶ Similarly, Anghie further explains the harms of the doctrine of sovereignty and its deadly exclusionary power as it

³² Emily Jones, *Feminist Theory and International Law: Posthuman Perspectives* (Routledge 2023) 27-31.

³³ *Ibid* 31.

³⁴ Jones explains that “other entities, including international organisations and individual are also formally recognised as international legal subjects. This means that they, too, have legal personality, defined as the capacity to have rights and duties under international law. However, the legal status of entities other than the state derives from states consenting to them having personality. In this model, the state therefore remains as the central subject of international law, being an entity upon which authority in international law is derived”. *Ibid* 28-29.

³⁵ Antony Anghie, ‘The Evolution of International Law: Colonial and Postcolonial Realities’ (2006) 27 *Third World Quarterly* 739, 741.

³⁶ Makau Mutua ‘What is TWAIL?’ (2000) 94 *Proceedings of the American Society of International Law* 31, 33

expels the non-European world from its realm, and then proceeds to legitimize the imperialism that resulted in the incorporation of the non-European world into the system of international law. The process of transforming the non-European world is completed through decolonization, which enables the non-European state to emerge as a sovereign and equal member of the global community. In short, these mechanisms of exclusion are as essential a part of the sovereignty doctrine as the mechanisms of incorporation and transformation, colonialism and decolonization that are the subject of the conventional histories of international law.³⁷

Anghie is describing the nearly complete control over the term ‘sovereignty’ in international law by European sovereign states and how these entities created thresholds for participation and inclusion in international law that affected the degree to which non-European peoples could participate, and, in the process, contributed to their continued subjugation. In this sense, “civilising missions” facilitated international law in claiming universality through subjugation of those deemed less civilised and hence not sovereign.³⁸ It becomes clear then that the model of sovereignty enforces a division of the world into binary categories of civilized and hence sovereign peoples and states and uncivilized and non-sovereign peoples.³⁹ These processes of inclusion and exclusion have brought about deadly consequences as the logics of sovereignty rendered entities and populations that were deemed non-sovereign effectively invisible and vulnerable to attacks and dispossession, thus becoming objects of “conquest and exploitation”⁴⁰ and domination.⁴¹ Or, as Kapur frames it “The search for a standard to both explain and justify the exclusion of non-European subjects from international law in the 19th century was based on the prevailing, and uninterrogated assumption that European states were civilized”.⁴²

³⁷ Anghie ‘The Evolution of International Law: Colonial and Postcolonial Realities’ (n 35) 741.

³⁸ Ibid 742.

³⁹ Anghie ‘Rethinking Sovereignty in International Law’ (n 26) 293.

⁴⁰ Anghie, ‘The Evolution of International Law: Colonial and Postcolonial Realities’ (n 35) 745.

⁴¹ Anghie, ‘Rethinking Sovereignty in International Law’ (n 26) 293.

⁴² Ratna Kapur, ‘Human Rights in the 21st Century: Take a Walk on the Dark Side’ (2006) 28 Sydney Law Review 665, 674.

The standards for civilisation⁴³ are also reflected in the Montevideo Convention on Rights and Duties of States,⁴⁴ for example in the “defined territory” requirement as specified in Article 1(b).⁴⁵ According to Charlesworth and Chinkin, the territorial requirement for establishing state sovereignty resonate “the international legal imagery of colonial conquest (...) Penetration of dark, unbounded territory (*terra nullis*) justified its ownership”.⁴⁶ They further explain that different NHHLSs, such as indigenous peoples and other minorities, do not satisfy the requirement to firm borders or firm “control over a coherent unified territory”⁴⁷ and in this sense “do not qualify as full subjects of international law”.⁴⁸ Thus, the image of the sovereign state as “impermeable, bounded, independent and separate from the chaotic word that surrounds it”⁴⁹ works to exclude other entities from IL. Such exclusionary nature, Charlesworth and Chinkin argue, can be explained through a gendered perspective whereby the sovereign state is equated with the “heterosexual male body [which has] no ‘natural’ points of entry, and its boundedness makes forced entry the clearest possible breach of international law”⁵⁰ and those who are deemed “as having preamble, negotiable, penetrable, vulnerable boundaries” are feminised.⁵¹ Or, as Orford explains, the sovereign state is presented as “impermeable, bounded, independent and separate from the chaotic word that surrounds it”.⁵² This is also evident in Article 8 of the Montevideo Convention which sets out a prohibition on recognising “territorial acquisition or special advantages which have been obtained by force (...) or in any other

⁴³ See also Tzouvala on the role of capitalism in the shaping of legal personality in international law and legal order that further clarifies in a critical way that ideas of civilisation as exclusionary tools with deadly consequences for those deemed uncivilised or not-civilised enough. Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020).

⁴⁴ *Convention on Rights and Duties of States* (“Montevideo Convention”) OAS TS No 37 (26 December 1933, in force 26 December 1934).

⁴⁵ *Ibid* Article 1(b).

⁴⁶ Charlesworth and Chinkin (n 15)130.

⁴⁷ Charlesworth and Chinkin (n 15) 129-130.

⁴⁸ Charlesworth and Chinkin (n 15)129-130.

⁴⁹ Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press 2009) 148.

⁵⁰ Charlesworth and Chinkin (n 15)129.

⁵¹ Hilary Charlesworth and Christine Chinkin (n 15)130.

⁵² Orford (n 49).

effective coercive measure [because the] territory of a State is inviolable and may not be the object of military occupation nor of other measures of force imposed by another State directly or indirectly or for any motive whatever ever temporarily”.⁵³ Sovereign states, have, in principle, a right to the inviolability of their territories.

If sovereign states are international law’s primary and privileged full legal subject,⁵⁴ and the doctrine of state sovereignty emerges from a long and vile participation in colonialism and mechanisms of subjugation and oppression, this necessarily implies that while the concept of legal personality in international law seems to follow a positivist logic (i.e., any entity can be a legal subject and not only humans), the fallacy of the inclusive ‘empty vessel’ theory is visible. That is, positivism’s empty approach to attributing legal personality can be harnessed to mask political and moral biases that uphold subjugation and create hierarchies of subjects. The sovereign state is a privileged legal person in the sense that it controls access to and participation in the international legal system⁵⁵ and is premised on exclusionary criteria and violence that were rendered invisible through the neutralisation and normalisation of the concept of ‘sovereignty’.

However, while the doctrine of sovereignty controls access to participation in international law and international law-making, legal personality is not the sole prerogative of sovereign states. Contemporary international law introduces new legal subjects to the arena. Shaw points out

⁵³ *Convention on Rights and Duties of States* (n 44) Article 11.

⁵⁴ Anghie ‘Rethinking Sovereignty in International Law’ (n 26) 306.

⁵⁵ Parlett (n 7) 358.

that international organizations,⁵⁶ NGOs,⁵⁷ corporations⁵⁸ and individuals can participate in international law *albeit* with different degrees of participation⁵⁹ and different degrees of legal personality.⁶⁰ This is expressed by the various avenues for participation of non-state legal persons in international law and IHRL proceedings.⁶¹ However, while these additional legal persons may participate to different degrees, certain prerogatives, such as various avenues to making new international law or IHRL, or to participating in proceedings, are predominately reserved for sovereign states. This can be explained, in part, by framing international law as state-centred and therefore state-consent-based, meaning that all other entities which are recognised as having some degree of legal personality have been recognised as such *because* the primary subject of international law consented to their recognition and participation.⁶² In this sense, the hierarchy of subjects is maintained, and the sovereign state has full participation rights while other legal persons have different degrees of participation in international law and IHRL as granted to them by the sovereign state.

⁵⁶ See the International Court of Justice opinion in the *Reparations* case where it established that the UN possess the capacity to bring international claims against states. See: *Reparations for Injuries Suffered in the Service of the United Nations* (n 2).

⁵⁷ According to Charlesworth and Chinkin “NGOs have to some limited extent lessened the state monopoly in the treaty-drafting process”. Charlesworth and Chinkin (n 15) 99; and 99-102.

⁵⁸ See (n 6).

⁵⁹ According to Parlett: “[t]he notions of capacities, participation and functions are conceptually useful because they suggest that what is significant is not the formal status of an entity, but its actual ability to engage in the international legal system in a given context”, Parlett (n 7) 356.

⁶⁰ Shaw (n 7) 196-197.

⁶¹ For example, see the different avenue for accessing the relevant IHRL adjudicative bodies for this thesis: *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by protocols No. 11 and 14 (European Convention on Human Rights)* Council of Europe ETS 5 (4 November 1950, in force 3 September 1953) Article 34; The American Convention on Human Rights’ procedure differentiates between the ability to present a petition to the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: *American Convention on Human Rights (“Pact of San Jose”)* Organization of American States, TS No 36 (22 November 1969, in force 18 July 1978) Article 44; Article 61. *Optional Protocol to the International Covenant on Civil and Political Rights*, UNGA, UNTS 999 (16 December 1966, in force 23 March 1976) Article 1.

⁶² See further Jones (n 32) 28-29.

With the stipulation of IHRL treaties, individuals became subjects of international law “to the extent that they can derive rights, obligations and capacities directly from international law”.⁶³ However, as Parlett explains, they are only legal subjects and therefore participants in IHRL because of the “instigation and (...) consent of other subjects of international law which control access to the international legal system”.⁶⁴ In this sense, Parlett argues that individuals as legal subjects of international law are “subordinated in the international system, suspended between object and independent or autonomous subject”.⁶⁵ Participation is nonetheless governed by international law and IHRL’s primary legal subject – the sovereign state and the doctrine of sovereignty.

Shaw argues that the human legal subject simply enjoys the state’s implementation of international law in the domestic sphere.⁶⁶ However, while legal personality means having rights and duties as well as an ability to participate in law, participation must be further qualified. Sellers argues that legal personality and standing, i.e., the right to present a legal claim before a specific court or other adjudicative or pseudo-adjudicative body, are not to be conflated.⁶⁷ It may be the case that an individual has legal personality in the sense that they have rights and duties, but that they are simply unable to “vindicate” their rights.⁶⁸ An argument of this sort, while it appears to be logically coherent, poses serious questions regarding the meaning of rights if rights cannot be made effective. While IHRL recognises individuals as legal subjects, it does not mean that all individuals are immediately recognised as having legal standing under international law.

⁶³ Parlett (n 7) 359-360

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Shaw (n 7) 258

⁶⁷ Sellers (n 27) 73-74.

⁶⁸ *Ibid.*

As I showed above, the sovereign state as a legal person fits within positivist approaches to legal personality and its logics of ‘empty vessel/instrument’ masks exclusionary powers and effects. IHRL’s legal persons are first and foremost the sovereign state (as is in IL) but also the ‘universal’ human of human rights. The focus on the human person in IHRL finds its roots in natural law approaches to legal personality where legal personality is *prima facie* granted to those who are recognised as human.⁶⁹ This approach is integral to the framing of key IHRL instruments such as the UDHR. The Declaration establishes that “all members of the human family”⁷⁰ have “inherent dignity”⁷¹ and “equal and inalienable rights”.⁷² Thus, every human possesses human rights and has legal personality by virtue of being human. Nijman takes this approach further to argue that it is not the sovereign state which is the primary subject of international law but rather the individual person who has an innate right to international legal personality.⁷³ According to Nijman, international law is “the law of mankind” and as such states are under the obligation to protect the human person who is both “the source and the final destination” of this legal regime.⁷⁴

However, not all humans are considered human legal subjects. Grear argues in her analysis of the UDHR⁷⁵ that this human referred to in the text is nothing but a “complex construction” that “(re)produces a range of ‘others’ as marginalized subjects”.⁷⁶ The universalized human is an abstraction of a particular subject, a sexed and gendered subject who is re-packaged as a

⁶⁹ Grear suggests that “the international human rights law edifice is usually understood to rest upon the foundation of a notion of pre-existing ‘natural’ human being”. See Anna Grear, ‘Framing the Project of International Human Rights Law: Reflections on the Dysfunctional ‘Family’ of the Universal Declaration’ in Conor Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (Cambridge University Press 2012) 18.

⁷⁰ *Universal Declaration of Human Rights*, UNGA Res. 217 A (III) (10 December 1948) Preamble.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ Jane Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (Asser Press 2004) 473.

⁷⁴ *Ibid.*

⁷⁵ Grear ‘Framing the Project of International Human Rights Law’ (n 69) 19.

⁷⁶ *Ibid* 18.

“neutral (...) representative of all humanity”.⁷⁷ Gear goes further and argues that this narrow construction of the human subject is

never neutral, never empty, because its essential rationality comes laden with philosophical and ideological provenance – most especially a long standing co-imbriication of rationality and maleness. Inevitably, then, this abstract universal is gendered.⁷⁸

Otto also contends that the human of IHRL is a specific and exclusionary category of humans that is repurposed as an inclusive one. She claims that IHRL “‘sexes’ its subjects, (re)producing unequal relations of gender power”.⁷⁹ Like Otto, Davies insists that law’s subjects are sexed and not gendered so to move away from any illusion of nature/culture binary. Meaning that

sex is not a ‘natural’ phenomenon – it is not outside language, culture, perception. (...) the ‘natural’ is a political category – it is a central part of many ideological systems to naturalise, or to make normal, eternal, and unchangeable certain fundamental aspects of their world view. This entrenches as unquestionable certain fundamental aspects which might otherwise be open to argument.⁸⁰

In this sense, Davies explains that it “is a social law – not a natural law – which forces sex upon us”.⁸¹ For Otto, the human legal subject is either expected to be heterosexual⁸² or to conform to heterosexuality.⁸³ Similarly, Gear states that the specific universalized human subject cannot account for “the full complexity, the sheer fleshy variability and multiple forms, colours, shapes and sex/genders of the embodied human personality in all its vulnerability”.⁸⁴ In addition to having a gender, the hegemonic human legal subject also has a citizenship. According to Arendt

⁷⁷ *Ibid* 30.

⁷⁸ *Ibid*.

⁷⁹ Dianne Otto, ‘Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law’, in Anne Orford (ed), *International Law and Its Others* (Cambridge University Press 2006) 318.

⁸⁰ Margaret Davies, ‘Taking the Inside Out’, in Ngaire Naffine and Rosemary J Owens, *Sexing the Subject of Law* (Sweet and Maxwell 1997) 32.

⁸¹ *Ibid* 33.

⁸² According to Otto: “[i]t is also important to acknowledge that we all have a ‘sexual orientation’ – that heterosexuality is as much a sexual orientation as homosexuality, and that these two categories do not exhaust the possible forms that sexual orientation can take”. Dianne Otto, ‘Gender and Sexual Diversity: A Question of Humanity?’ (2016) 17 *Melbourne Journal of International Law* 477, 478.

⁸³ See also: Charlesworth and Chinkin (n 15) 232; Davies (n 80) 33.

⁸⁴ Gear ‘Framing the Project of International Human Rights Law’ (n 69) 32.

The calamity of the rightless is not that they are deprived of life, liberty, and the pursuit of happiness, or of equality before the law and freedom of opinion- formulas which were designed to solve problems within given communities- but that they no longer belong to any community whatsoever.⁸⁵

Rancière, building on Arendt's work, argues that it is not the general human who has human rights but the citizen of the sovereign state.⁸⁶ This is a serious limitation of IHRL which undermines its façade of 'universality' because of the built-in tension between its primary subject- the sovereign state and its human legal subjects. I come back to a similar tension in the next section on the division of spaces and explain how state sovereignty places and displaces NHHLSs between: (i) the domestic sphere of discretion and the international sphere of regulation and (ii) the internal division of space inside the sovereign state into a private sphere of discretion and a public sphere of regulation.

In this thesis, I position myself next to Gear's and Otto's critical examination of the human legal subject of IHRL. I therefore label the universal human of human rights as the narrow hegemonic-heteronormative-cisgender-bodily-abled-adult-wealthy-Christian-Western-white-man, or in short, the hegemonic human legal subject. In the same vein, the hegemonic legal subject generates the marginalised subjects of which Gear and Otto speak and which I label as NHHLSs. This category is heterogeneous and is composed of subjects who identify and/or are identified by others as different from the hegemonic human legal subject.

In this sense, I question the inclusive nature of the category of 'human' and therefore of 'human' legal subjects and argue that natural law attitudes towards legal personality as a human

⁸⁵ Hannah Arendt, *The Origins of Totalitarianism* (Penguin Books, first published 1951, first published in Penguin Classics 2017) 386-387.

⁸⁶ Jacques Rancière, 'Who is the Subject of the Rights of Men?' (2004) 103 *The South Atlantic Quarterly* 297, 298; Douzinas also discusses how citizenship has shaped modern law and human rights, however he does not argue that human rights are only enforceable to citizens, see: Costas Douzinas 'The End(s) of Human Rights' (2002) 26 *Melbourne University Law Review* 445, 449-450.

prerogative mask the exclusionary mechanisms that are effectively selecting the types of humans that are recognised as such.⁸⁷ Grear claims that even the UDHR doesn't really provide for protection and rights to all humans and is "a profound ethical failure".⁸⁸ A similar argument is found also in Charlesworth and Chinkin, who affirm that even from a linguistic point of view, "all the 'general' human rights instruments use only the masculine pronoun".⁸⁹ Thus, the exclusion of female pronouns from these texts "operates both directly and more subtly to exclude women".⁹⁰ The masculine form is used in these texts as if it were neutral and inclusive to all genders as the cis-maleness, straightness and whiteness of the human of human rights was disembodied to become an inclusive category for all humans.⁹¹ According to Halewood, the separation of subjects and objects, and the construction of a legal subject as a "theoretical subject" that is "outside of any substantive context" facilitates the idea of formal equality.⁹² Halewood attributes this material division between the subject and object to liberal theory and argues that it "defines persons in their most bare form, stripped of all particularity so that each possesses a similar moral weight".⁹³ Halewood's critique goes further to say that

The erasure of the body in liberal legalism thus ensures the erasure of the female and racially 'other' subject, while the white, male, autonomous 'universal' will, defined in opposition to the particularity of these 'other' subjugated wills and bodies, finds full expression and recognition in legal discourse.⁹⁴

Thus, from a formal perspective, all humans have human rights and are therefore recognised as human legal subjects. However, if IHRL is built to accommodate the needs, wants and desires of the hegemonic human and human legal subject, this implies two things. First, that

⁸⁷ While I focus my thesis on the hierarchies of human subjects, this does not imply that I agree with the subjugation of other nonhuman subjects and the category of 'humanity' as an organising concept in international law. See for example: Jones (n 32) 9-24.

⁸⁸ Grear, 'Framing the Project of International Human Rights Law' (n 69) 32.

⁸⁹ Charlesworth and Chinkin (n 15) 232.

⁹⁰ *Ibid.*

⁹¹ Grear, 'Deconstructing Anthropos' (n 6) 237.

⁹² Peter Halewood, 'Law's Bodies: Disembodiment and the Structure of Liberal Property Rights' (1996) 81 Iowa Law Review 1331, 1340.

⁹³ *Ibid.*

⁹⁴ *Ibid* 1378.

rights are tailored to specific measures – the hegemonic ones – and, second, NHHLSs are asked to fit within these measures in order to assert rights. Thus, all humans must be autonomous,⁹⁵ self-sufficient proprietors,⁹⁶ who do not require any special accommodation. Davies explains that there is “an ideal of self-ownership and of having clear personal boundaries and associated rights as fundamental to adult male personality”.⁹⁷ According to Nedelsky, this means that concepts such as dependency and mutual care are not perceived as an integral part of being human.⁹⁸ Furthermore, Otto argues this contributes to the justification of exclusion of certain groups from legal personality because the human subject of IHRL is the “autonomous individuals [which is] the basic normative unit”.⁹⁹

There have been several attempts to repair such ethical failures in the form of additional IHRL instruments that shed light on the needs, wants and desires of NHHLSs. According to Mutua, some of these additional human rights instruments have been developed by the global South such as the International Convention on the Elimination of all Forms of Racial Discrimination (CERD),¹⁰⁰ the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW)¹⁰¹ and the Declaration on the Right to Development.¹⁰² All of which are indicative of a shift towards “issues affecting groups, and group rights or systemic and deeply embedded social and economic problems that require radical solutions”.¹⁰³ The stipulation of additional

⁹⁵ Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press 2012) 38.

⁹⁶ Davies and Naffine (n 11) 67; Also, see Otto “the autonomous individual as the basic normative unit” in Dianne Otto, ‘Rethinking Universals: Opening Transformative Possibilities in International Human Rights Law’ (1997) 18 *Australian Year Book of International Law* 1, 18.

⁹⁷ Davies (n 80) 36.

⁹⁸ Nedelsky (n 95) 34

⁹⁹ Otto, ‘Rethinking Universals’ (n 96) 18.

¹⁰⁰ *International Convention on the Elimination of All Forms of Racial Discrimination*, UNGA, UNTS 660 (21 December 1965, in force 4 January 1969).

¹⁰¹ *Convention on the Elimination of All Forms of Discrimination Against Women*, UNGA, UNTS 1249 (18 December 1979, in force 3 September 1981).

¹⁰² *Declaration on the Right to Development*, UNGA, Res.41/128 (4 December 1986).

¹⁰³ Makau Mutua, ‘Standard Setting in Human Rights: Critique and Prognosis’ (2007) 29 *Human Rights Quarterly* 547, 577.

instruments sought to introduce perspectives that were silenced by the hegemonic human legal subject and to stretch the meaning of ‘human’ and the rights attached to this category.

Such attempts can also be seen in the Convention on the Rights of Persons with Disabilities (CRPD).¹⁰⁴ The Convention is a great example of a call to re-think the human and the human legal subject in IHRL. Of particular relevance is Article 12 on equal recognition before the law. This Article of the Convention sheds light on some of the exclusionary mechanisms that underlie the seemingly straightforward equation of humanness and legal personality that is implicit in natural law and IHRL’s construction of its narrow yet universalised subject.¹⁰⁵ The hegemonic human legal subject of international law assumes ‘humanness’ and hence legal subjecthood based on what Naffine defines as either “every reasonable being”¹⁰⁶ or as a “responsible subject”.¹⁰⁷ The first type of subject is one that is recognised as having ‘reason’ and being ‘rational’.¹⁰⁸ This is also reflected in the IACtHR jurisprudence where the Court explains that the recognition of human dignity within Article 11 is offered to the human being “understood as a rational being”.¹⁰⁹ Such framing can also be noted in Gray’s work where he explains that every “normal” human being has an ability to will and on the basis of such ability the law grants such person legal personality and the full exercise of rights.¹¹⁰ The second of

¹⁰⁴ *Convention on the Rights of Persons with Disabilities* UNGA, UNTS 2515 (1 December 2006, in force 3 May 2008).

¹⁰⁵ There is a lot of great scholarly work on this topic, see for example: Anna Arstein-Kerslake and Eilín Flynn, ‘The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: A Roadmap for Equality Before the Law’ (2016) 20 *The International Journal of Human Rights* 471; Anna Arstein-Kerslake and Eilín Flynn, ‘The Right to Legal Agency: Domination, Disability and the Protections of Article 12 of the Convention on the Rights of Persons with Disabilities’ (2017) 13 *International Journal of Law in Context* 22; Elif Celik, ‘The Role of CRPD in Rethinking the Subject of Human Rights’ (2017) 21 *The International Journal of Human Rights* 933; Arlene S Kanter, ‘The Law: What’s Disability Studies got to do with it or an Introduction to Disability Legal Studies’ (2011) 42 *Columbia Human Rights Law Review* 403; Gerard Quinn, Abigail Rekas-Rosalbo, ‘Civil Death: Rethinking the Foundations of Legal Personhood for Persons with a Disability’ (2016) 56 *Irish Jurist* 286.

¹⁰⁶ Naffine (n 3) 357-358.

¹⁰⁷ Naffine (n 3) 362.

¹⁰⁸ Naffine (n 3) 362.

¹⁰⁹ *I.V. v Bolivia*, Preliminary objections, Merits, Reparations and Costs (IACtHR, 30 November 2016), para 149.

¹¹⁰ Gray Chipman John, *The Nature and Sources of the Law* (The Macmillan Company, 1924) 28-30.

Naffine's subjects is labelled as responsible because he "is held personally accountable for his civil and criminal actions" which he is able to protect and enforce autonomously.¹¹¹ Both categories of subjects generally exclude persons with cognitive disabilities to various degrees from the category of humanity and legal personhood. The narrow framing of the hegemonic human as an autonomous, choosing subject works to exclude subjects who require support in making choices. The CRPD seeks to change this paradigm. Therefore, Article 12(1) clearly reaffirms the right of persons with disabilities to legal personality,¹¹² and that such right must be given on an "equal basis with others in all aspect of life".¹¹³ One of the most innovative aspects of Article 12 is that it further establishes a shift from the autonomous self-sufficient hegemonic subject so as to require "appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity".¹¹⁴ Article 12(3) is therefore a prime example of re-thinking legal personality to fit NHHLSs that do not conform to the autonomous self-sufficient independent narrow framing of IHRL's human subject. I return to Article 12 in Chapter 4 where I present my definition of the new emerging to individual self-determination in IHRL through the concept of substantive recognition.¹¹⁵

2. Second Layer of Inclusion and Exclusion: The Making of Private and Public Spaces

The first layer of inclusion and exclusion – the making of (a hierarchy of) legal subjects – informs and shapes the second layer – the making of private and public spaces of discretion and regulation. As primary legal subjects of IL, sovereign states have the ability to shape the

¹¹¹ Naffine (n 3) 362.

¹¹² *Convention on the Rights of Persons with Disabilities* (n 104) Article 12(1).

¹¹³ *Ibid* Article 12(2).

¹¹⁴ *Ibid* Article 12(3).

¹¹⁵ See Chapter 4 section 1.1 'Recognition'.

boundaries of this legal field. The Permanent Court of International Justice (PCIJ) decision in the *Lotus case*¹¹⁶ shaped the principle of state sovereignty and demonstrates the link between the primary legal subject and the division of the legal space. In this case the PCIJ was called to deliberate whether the collision of a French ship and a Turkish ship in the high seas allowed Turkish authorities to exercise jurisdiction over the incident.¹¹⁷ In its judgment the PCIJ affirmed that “international law governs the relations between independent states”¹¹⁸ which are premised on “their own free will”.¹¹⁹ Therefore, the PCIJ established that “all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty”.¹²⁰ *Overstepping* implies boundaries – physical or immaterial – between the public sphere of consensual regulation to which states decided to subject themselves and the private sphere of domestic jurisdiction. The principle of state sovereignty therefore sets out a binary division of the legal space into domestic jurisdiction as the private sphere and the international and hence public sphere of regulation.¹²¹ Such spatial division is premised on the idea of clear boundaries and echoes Orford, Charlesworth and Chinkin’s images of the sovereign state as bounded, impenetrable and male which I introduced in the previous section.¹²² MacKinnon explains that the borders of sovereign states themselves are integral to the principle of state sovereignty as they mark the inside and outside – the private and the public in international law.¹²³ These

¹¹⁶ See critique provided with regards to the name of the case, and the re-writing of the judgment through a feminist lens in the work of Christine Chinkin, Gina Heathcote, Emily Jones, and Henry Jones, ‘Bozkurt Case, aka the Lotus Case (France v Turkey): Ships that Go Bump in the Night’, in Loveday Hodson and Troy Lavers, *Feminist Judgments in International Law* (Hart Publishing 2019) 30.

¹¹⁷ S.S. ‘*Lotus*’ case (*France v Turkey*), PCIJ, Judgment (7 September 1927).

¹¹⁸ *Ibid* 18.

¹¹⁹ *Ibid*.

¹²⁰ *Ibid* 19.

¹²¹ For example, Article 8 of the Montevideo Convention on Rights and Duties of States, in principle, supports such argument as it affirms that “No State has the right to intervene in the internal or external affairs of another”. *Convention on Rights and Duties of States* (n 44) Article 8.

¹²² See section 1 of this chapter.

¹²³ Catharine A MacKinnon, *Are Women Human? And Other International Dialogues* (Harvard University Press 2006) 6.

boundaries are gendered and serve to protect the sovereign state's sphere of *private domestic jurisdiction* as "the exclusive domain of the patriarchal order called government".¹²⁴ In this sense, domestic jurisdiction offers a space of discretion in which states are generally understood as best placed to govern their own population and territories without outside interference.

The primacy of the sovereign state is well enshrined in the UN Charter in multiple places, beginning with Article 1¹²⁵ which establishes the centrality of state sovereignty, territorial integrity and political independence of the member states¹²⁶ and affirms the state's domestic jurisdiction and private control over its internal affairs.¹²⁷ The UN Charter embraces the boundaries of the private (domestic) and public (international) spheres of discretion and regulation considering the state, in principle, as the guarantor of rights and administrator of its own private affairs¹²⁸ and limits intervention in its members' sovereignty to "threats to the peace, breaches of the peace, and acts of aggression".¹²⁹ According to Charlesworth, the public sphere in international law is both a space for interaction where states engage with one another and with IOs, and a space for state accountability for specific acts that are regulated under this legal regime.¹³⁰ The private sphere, on the contrary, is that of domestic jurisdiction in which states do not "have to answer internationally".¹³¹ And, while Charlesworth explains that "the site of the line between international and domestic concerns indicated by the Charter has been

¹²⁴ *Ibid.*

¹²⁵ On the sovereign state: "[t]he Organization is based on the principle of sovereign equality of its Members". *Charter of the United Nations and Statute of the International Court of Justice*, 1 UNTS XVI (26 June 1945, in force 24 October 1945) Article 1(2).

¹²⁶ *Ibid* Article 2(4).

¹²⁷ *Ibid* 2(7).

¹²⁸ *Ibid.*

¹²⁹ *Ibid* Article 42; Article 44.

¹³⁰ Hilary Charlesworth, 'Women's International Human Rights?' in Rebecca J. Cook *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994) 70-71.

¹³¹ *Ibid.*

strongly contested, (...) there has been little contention about the principle of a *domain réservé* in international law”.¹³²

At the same time, the creation of IHRL as a specialised branch of international law has furthered the shift away from complete or near to complete discretion to sovereign states’ exercise of control over their nationals and individuals who reside in their territory, to a somewhat universally recognised regulation of these relationships.¹³³ For example, by establishing international and regional complaints and adjudication mechanisms.¹³⁴ These mechanisms allow individuals to challenge the behaviour of states in the domestic (private) by bringing them into the sphere of international adjudication. However, while IHRL places states primarily under obligations regarding their treatment of individuals within their domestic jurisdiction,¹³⁵ which is premised on the idea of territorial jurisdiction,¹³⁶ such obligations do not fundamentally undermine or disrupt the division of space into public and private spheres of regulation and discretion.¹³⁷ One example of this is the use of the margin of appreciation doctrine in the jurisprudence of the ECtHR.¹³⁸ According to Shany, the doctrine “establishes a methodology for scrutiny by international courts of the decisions of national authorities”, which

¹³² Hilary Charlesworth, ‘Worlds Apart: Public/Private Distinctions in International Law’ in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press 1995) 244.

¹³³ Shaw (n 7) 258.

¹³⁴ Charlesworth and Chinkin also support the view that IHRL provides for a space to challenge “the traditional state-centered scope of international law” by providing individuals and collectives with international legal lanes for advancing their claims. Charlesworth and Chinkin (n 15) 201.

¹³⁵ Charlesworth, ‘Women’s International Human Rights?’ (n 130) 70.

¹³⁶ IHRL also arguably places states under extraterritorial obligations. See Hugh King, ‘The Extraterritorial Human Rights Obligations of States’ (2009) 9 *Human Rights Law Review* 521; Mark Gibney, Gamze Erdem Türkelli, Markus Krajewski and Wouter Vandenhole (eds) *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022); Chenwi Lilian, Bulto Takele Soboka (eds), *Extraterritorial Human Rights Obligations from an African Perspective* (Cambridge University Press 2018).

¹³⁷ Charlesworth, ‘The Public/Private Distinction’ (n 32) 194.

¹³⁸ For a deeper analysis on the margin of appreciation doctrine within the ECtHR see: Arai-Takahashi Yutaka *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002); Elena Abrusci, *Judicial Convergence and Fragmentation in International Human Rights Law: The Regional Systems and the United Nations Human Rights Committee* (Cambridge University Press 2022) 196-227; Eva Brems, ‘Positive Subsidiarity and its Implications for the Margin of Appreciation Doctrine’ (2019) 37 *Netherlands Quarterly of Human Rights* 210-227.

is primarily based on the core assumption that “international courts ought not to replace the discretion and independent evaluation exercised by national authorities [and therefore] exercise judicial restraint”.¹³⁹ In examining Article 10(2) on freedom of expression in *Handyside v United Kingdom*, the ECtHR reaffirmed its subsidiary role and stated that states and states authorities are “[b]y reason of their direct and continuous contact with the vital forces of their countries (...) in principle in a better position than the international judge to give an opinion on the exact [content and requirement of Article 10(2)]” and therefore reaffirmed the margin of appreciation “both to the domestic legislator (...) and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force”.¹⁴⁰ Thus, the doctrine is often framed as upholding a balance between state consent to be bound by IHRL (the public), specifically the ECHR, whilst preserving its discretion as to how to interpret and implement its legal obligations within its jurisdiction (the private).

The domestic (private) and international (public) spheres contain a further binary division of space. Each sovereign state has an internal division of the legal space into private and public spheres. According to Charlesworth and Chinkin, the public and private binary “has long played a central part in Western legal and political theory”¹⁴¹ and in liberalism more specifically.¹⁴² Charlesworth explains that according to Liberalism, the public and private are inclusive categories in that they operate “generally and neutrally with respect of individuals”.¹⁴³ Much like Charlesworth and Chinkin, Olsen also contests liberal legalism’s neutrality and inclusivity and argues that the category of the private “is not a natural attribute nor descriptive

¹³⁹ Yuval Shany, ‘Toward a General Margin of Appreciation Doctrine in International Law?’ (2006) 16 The European Journal of International Law 906, 909-910.

¹⁴⁰ *Handyside v United Kingdom* App no. 5493/72 (ECtHR, 7 December 1976), para 48.

¹⁴¹ Charlesworth and Chinkin (n 15) 30.

¹⁴² *Ibid.*

¹⁴³ Charlesworth, ‘Women’s International Human Rights?’ (n 130) 69.

in a factual sense, but rather is a political and contestable designation”.¹⁴⁴ The making and upholding of the private/public binary within the confines of the sovereign state is integral to unpacking the challenges that NHHLSs face because this binary determines which “areas [are] appropriate for legal regulation from those which come within the sphere of personal autonomy”.¹⁴⁵ The acts of including and excluding certain subjects, objects, actions and spaces from the private or the public means that these are placed under different regulatory regimes between discretion and regulation.

While liberal legalism constructs the private sphere as a space of discretion and freedom, the reality is more complicated. MacKinnon, who focuses her analysis on the experience of white cis-women,¹⁴⁶ explains that the private, rather than being a space for freedom, is a space of oppression for subjects who “have historically been relegated to and identified with the private, excluded from and, when present, subordinated in public”.¹⁴⁷ Similarly, the Committee on Elimination of Discrimination Against Women (CEDAW) explained in General Recommendation 23 on Political and Public Life that

women have been assigned to the private and domestic sphere, associated with reproduction and the raising of children, and in all societies these activities have been treated as inferior. By contrast, public life, which is respected and honoured, extends to a broad range of activity outside the private and domestic sphere. Men historically have both dominated public life and exercised the power to confine and subordinate women within the private sphere.¹⁴⁸

¹⁴⁴ Frances Olsen, ‘Constitutional Law: Feminist Critiques of the Public/Private Distinction’ (1993)10 *Constitutional Commentary* 319, 319.

¹⁴⁵ Charlesworth, ‘The Public/Private Distinction’ (n 32) 192.

¹⁴⁶ See the important critique of Angela P Harris in her seminal article ‘Race and Essentialism in Feminist Legal Thought’ in which she argues that Catherine MacKinnon and Robin West scholarship is based on gender essentialism which silences the voices of black women among others in its attempt to advance arguments that speak with one voice for ‘all women’. Angela P Harris, ‘Race and Essentialism in Feminist Legal Theory’ (1990) 42 *Stanford Law Review* 581, 581-616.

¹⁴⁷ MacKinnon (n 123) 4.

¹⁴⁸ *CEDAW General Recommendation No 23: Political and Public Life*, UN Committee on the Elimination of Discrimination Against Women (1997), para 8.

In this sense, when the private is understood as replicating sexed and gendered hierarchies, the upholding of the private and public does not, on its own, imply discretion nor freedom for non-hegemonic human legal subjects,¹⁴⁹ as this is a space in which many NHHLSs were historically and still are oppressed in the private precisely because of the lack of its regulation. For these subjects, the private is often “a sphere not of freedom but of uncertainty and insecurity”.¹⁵⁰ The discretion that is found within the private sphere is not immediately material to the NHHLS as it was constructed to facilitate the discretion of the hegemonic human legal subject of IHRL.

Moreover, discretion has long been used as a silencing tool for NHHLSs – the freedom to exist only in the confines of the private produces material effects for NHHLSs precisely because upholding a clear binary division between the public and the private without harming NHHLSs is at times near to impossible. This is because the private and the public are both material spaces and abstract spaces *with* material implications. In *Rees v United Kingdom*, for example, the ECtHR recognised that by not allowing the applicant, a transgender man, to change his birth certificate, the state “does not recognise [him] as a man for all social purposes” and that this “might also prevent him from entering into certain types of private agreements as a man”.¹⁵¹ The logic of the private/public binary operates to cut the applicant’s life into two – to have the right to be transgender *only in some aspects of life*. Similarly, *S.A.S v France*, a key judgment by the ECtHR which is at the centre of this thesis, shows both the materiality of the private and the public spaces and the material effects that the insistence on separating the two has on NHHLSs precisely because of their non-hegemonic identity. In this case, the ECtHR was called to deliberate on the French legal ban on concealing one’s face in public spaces. The public space in *S.A.S. v France* stretches from “public highway[s] and any place open to the public or

¹⁴⁹ Charlesworth, ‘Women’s International Human Rights?’ (n 130) 68.

¹⁵⁰ Olsen (n 144) 325.

¹⁵¹ *Rees v United Kingdom* App n 9532/81 (ECtHR, 17 October 1986), para 40.

assigned to a public service”¹⁵² and includes, among other places, “hospitals, post offices, educational institutions (primary and secondary schools, universities), family benefit offices, health insurance offices, job centres”.¹⁵³ The ban therefore prevents the applicant from accessing any of these fundamental public services and essentially prevents her from existing in the public space if she continues to wear her niqab and burqa which were deemed a prohibited form of face-concealment. The harmful effects of this binary division of space on NHHLSs is captured in S.A.S.’s own words when she explains to the ECtHR that the ban made her feel “‘as if she were a prisoner’, she was forced to adopt a ‘Jekyll and Hyde personality’”.¹⁵⁴ If S.A.S. were to leave the private sphere of her home in which she is allowed to exercise discretion and conceal her face, she would be in contravention of French law and, hence “expose herself to a risk not only of sanctions but also harassment and discrimination”.¹⁵⁵

There is a tension within a tension: S.A.S. is barred from existing in the public sphere as part of the private/public binary of discretion and regulation. This binary, however, is located within another binary – that of the domestic sphere of discretion/international sphere of regulation which in this case is governed by the ECHR. Cases like *S.A.S. v France* demonstrate the harmful effects of both binaries. The ECtHR allows for the domestic private/public binary to exclude S.A.S. from the public sphere and the essential services which are located in that sphere. This resulted from the lack of European Consensus which allowed the ECtHR to rule that France is best placed to decide how its society should live together and granted it a wide margin of appreciation. The application of the margin of appreciation as a result of the lack of

¹⁵² See definition of public places in the Prime Minister’s Circular on the implementation of Law no. 2010-1191 of 11 October 2010 prohibiting the concealment of the face in public places in *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014), para 31.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid* para 79.

¹⁵⁵ *Ibid* para 69.

European Consensus therefore advances the idea France is best placed to decide how its society should ‘live together’.¹⁵⁶

Finally, the private/public binary operates to uphold the hierarchies of subjecthood¹⁵⁷ also by generating a secondary binary whereby the private/public binary turns to ‘the individual’ versus ‘society/collective needs and will’. This informs the basis of balancing exercises in IHRL, where different qualified rights are arguably in conflict.¹⁵⁸ According to Çali, the balancing of rights and interest has erroneously become a mechanical calculation that frames IHRL as a constant source of tension between the individual and the collective.¹⁵⁹ That is, it follows a conception of IHRL as benefitting only the “claim-holder at the expense of a majority and all important concerns have a common currency”.¹⁶⁰ This binary further complicates the implications that the private/public distinction has for NHHLSs who sit uncomfortably within the private/public divide. I return to the balancing of individual (private) versus collective (public) in Chapter 2, where I explain the challenges of the right to privacy vis-à-vis NHHLSs.

Conclusion: International Human Rights Law Creates and Upholds a Hierarchy of Legal Subjects

In this chapter, I introduced the primary analytical frame that I apply throughout this thesis – framing IHRL as operating through inclusion and exclusion of subjects, objects, actions, and

¹⁵⁶ *Ibid* paras 154-157.

¹⁵⁷ Or as Olsen argues: “Although it might be possible to have a gender hierarchy without any public/private distinction, the particular manner in which our present society draws distinctions between public and private perpetuates the subordination of women”. Olsen (n 144) 327.

¹⁵⁸ Başak Çali, ‘Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions’ (2007) 29 *Human Rights Quarterly* 251, 260.

¹⁵⁹ *Ibid* 270.

¹⁶⁰ *Ibid* 269.

spaces. I explained two foundational acts of inclusion and exclusion – the making of legal subjects and the division of the legal space to private and public spheres of discretion and regulation. In particular, they work to create and uphold the non-hegemonic position of some human subjects that are identified or self-identify as different to IHRL’s primary *human* legal subject- the hegemonic, heteronormative-cisgender-bodily-abled-adult-wealthy-Christian-Western-white-man.

The acts of inclusion and exclusion function as layers - one on top of the other that reinforce each other and build the foundations of the structure and operation of IHRL. I argued that they inform each other and together uphold the hierarchy of legal subjects. In a sense, what emerges from this chapter is the notion of a tension within tension. This is seen in the first layer of exclusion and inclusion where the human legal subject of IHRL is located in relation to international law’s primary legal subject - the sovereign state - and how this relationship produces the non-hegemonic position of NHHLs. And, within the second layer of inclusion and exclusion – where the sovereign state divides the legal space to domestic (private) and international (public) which upholds an additional binary within the sovereign state – the private sphere of discretion and public sphere of regulation. This second layer of inclusion and exclusion shows how NHHLs sit uncomfortably within both binaries.

Thus, I began my thesis with the critical introspection of the discipline I work within as a discipline of tensions and limitations. While the categories of the legal subject, the human, the public and the private enjoy a façade of neutrality and generality, they are all rightly contested. The insistence on the particularity and the material effects of upholding these categories as if they were general and neutral is integral to doing critical legal work. This initial identification of the two acts of inclusion and exclusion guides this thesis from beginning to end. It is the

analytical frame that I employ in all subsequent analysis. In particular, it guides me on my study of the right to privacy in Chapter 2, where I argue that the structure and interpretation of this right renders it a vulnerable, if not precarious, avenue for NHHLSs. And, more broadly, it guides my approach to looking for solutions that can be brought and implemented within IHRL – recognising that every construction that is brought to IHRL has the risk of operating along these lines. This guides me also in devising my proposal in Chapter 4 regarding the shaping of the emerging right to individual self-determination so to require a contextualisation-based approach to finding violations of this emerging right. By advocating for a context-led approach, I highlight the need to refuse law's general and neutral application – the inclusive subjecthood and the division of spaces.

Chapter 2: The Boundaries of Inclusion and Exclusion – Non-Hegemonic Human Legal Subjects’ Right to Privacy and Role of Adjudicative Bodies

Introduction

The right to privacy became a creative and strategic tool for litigating different human rights concerns of NHHLSs. As a result, it expanded to include various aspects of life, and brought relief to many individuals who became more visible precisely because their claims could now come within its scope. This includes claims regarding reproductive rights, legal gender recognition and non-heterosexual and heteronormative relationships. In this chapter, I apply the analytical frame presented in Chapter 1 to examine the right to privacy in relation to NHHLSs. I focus on questioning whether developing their claims predominately within the right to privacy is strategically and normatively suitable, as well as desirable decision. I do so by analysing the right to privacy, the claim brought by NHHLSs under this right, and the role of adjudicative bodies in setting the boundaries of privacy through judicial interpretation.

Three main issues arise in this chapter: (i) privacy is a precarious framework for NHHLSs precisely because it is a particular expression of IHRL’s acts of inclusion and exclusion; and therefore, upholds Olsen’s argument that “privacy is most enjoyed by those with power”¹; (ii) the right to privacy is an insufficient framework to fully capture the essence of the claims which NHHLSs have thus far brought within its scope. While these claims contain a privacy element, their core regards NHHLSs’ recognition as full human legal subjects; and (iii) although IHRL operates through acts of inclusion and exclusion which create the non-hegemonic position,

¹ Frances Olsen, ‘Constitutional Law: Feminist Critiques of the Public/Private Distinction’ (1993) 10 Constitutional Commentary 319, 325.

IHRL is not static. And therefore, neither are these categories. The role of adjudicative bodies in setting the boundaries of inclusion and exclusion through interpretation underscores the dynamic nature of both categories. This is an inherent tension that must be accounted for when developing alternative avenues to the right to privacy within IHRL.

I begin the first section of this chapter by setting out the right to privacy in IHRL and unpacking three of its features that are relevant to assessing the right's adequacy for NHHLSs. First, I introduce Diggelmann and Cleis's definition of privacy as an umbrella term and problematise its effects. The open-ended and malleable character of this right indeed allows it to expand and accommodate new elements and adapt to a changing world. However, its ability to expand contains an equally built-in ability to contract. The right to privacy is a qualified right and is subject to balancing. Second, while continuing to problematise this quality of the right to privacy, I explain that the right to privacy is premised on spatial notions and dimensions: it protects a space which can be both material and abstract and is sketched to fit the private/public binary which I introduced in Chapter 1. The private space of privacy therefore is a space of discretion in which an individual is protected from the outside gaze of society and as a consequence can act freely. This is in contrast with the public space as a sphere of regulation. Third, I demonstrate that while the right to privacy contains both positive and negative obligations, in practice it operates as a predominately negative right.

In the second section I move to examine how NHHLSs use the right to privacy in IHRL. I cluster their claims under three main categories: claims regarding bodies, identities, and relationships. I examine their claims and argue that (i) the right to privacy can be a precarious avenue for the inclusion of NHHLSs as their claims can be left outside of its protection or only partially recognised (ii) even when adjudicative bodies do establish a violation of their right to

privacy, it is nonetheless insufficient. I demonstrate that NHHLSs have often used privacy in order to demand visibility in IHRL. This is because NHHLSs experience the harmful effects of the gap created by IHRL's acts of inclusion and exclusion: while they are formally recognised as human legal subjects, they do not fit the narrow construction of the human of IHRL and the rights that were tailored to fit the needs of the hegemonic-heteronormative-cisgender-bodily-abled-adult-wealthy-Christian-Western-white-man. Thus, I frame their claims within these three categories (bodies, identities and relationships) as claims regarding their recognition as full human legal subjects. Using the right to privacy to address this issue reduces the totality of the harm of which they complain to only one of its parts.

Lastly, in the third section of this chapter, I re-examine the acts of inclusion and exclusion from a different perspective. In Chapter 1, I explained that acts of inclusion and exclusion of subjects, objects, actions and spaces are inherent in IHRL. At the same time, however, these are not static acts and therefore not static categories. In this final section I focus on the role of IHRL adjudicative bodies in setting boundaries of inclusion and exclusion through the exercise of judicial interpretation. I identify three main attitude or approached to the engagement with boundaries of inclusion and exclusion in the adjudication of the right to privacy of NHHLSs: (i) status quo and inward-looking approaches; (ii) avoiding boundaries to confirm existing ones; and (iii) change-receptive and inward-looking approached to engaging with the setting of boundaries. I conclude that the crafting of a different avenue for NHHLSs that goes beyond the right to privacy should include a dynamic approach to boundaries which is able to work with IHRL's dynamic engagement with acts of inclusion and exclusion.

1. The Right to Privacy a Particular Expression of International Human Rights Law's Acts of Inclusion and Exclusion

In 1890 Warren and Brandies published an article introducing the emergence of the right to privacy as a new right in the common law of the United States.² They emphasised the common law's "eternal youth [which] grows to meet the demands of society"³ and allows for rights to evolve. Their article depicts a pressing need for the law to adapt to the changing nature of society and to the arrival of technological developments which hindered the individual's ability to their control personal information ("Gossip is no longer the resource of the idle and of the vicious, but have become a trade, which is pursued with industry as well as effrontery").^{4,5} Thus, they explained that

Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops."⁶

Accordingly, the right to privacy was framed as a right "to be let alone".⁷ It is a right to distance oneself from society's inspecting eyes. While Warren and Brandies' article is situated in a specific legal, historical and social context, it nonetheless underlines a main feature of many of the subsequent developments of the right to privacy beyond the United States, including within IHRL. The right to privacy protects a space of discretion and non-interference.

² Oliver Diggelmann and Maria Nicole Cleis, 'How the Right to Privacy Became a Human Right' (2004) 14 Human Rights Law Review 441, 441-442.

³ Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 4 Harvard Law Review 193, 193.

⁴ *Ibid* 193-195.

⁵ *Ibid*.

⁶ *Ibid* 195.

⁷ *Ibid* 205-207.

The development of the right to privacy in IHRL has been defined as “highly remarkable and unusual”⁸ since, unlike other rights, it was first recognised on the international plane before being introduced to domestic constitutional systems.⁹ The right to privacy is codified within the European Convention on Human Rights (ECHR),¹⁰ the ICCPR,¹¹ the American Convention on Human Rights (ACHR)¹² and the CRPD.¹³ In addition, it is also found in key soft law instruments such as the Universal Declaration on Human Rights (UDHR),¹⁴ the American Declaration on Rights and Duties of Man¹⁵ and the Yogyakarta Principles.¹⁶

The various framings of the right to privacy in IHRL share for the most part great similarities in terms of their scope, obligations and lawful interference with the right. All codifications include a protection of privacy, family, home, correspondence, honour, and reputation with the exceptions being the ECHR and the ACHR which explicitly include the concept of ‘private life’.¹⁷ The ACHR Article 11 on the right to privacy provides for a further exception to all other codifications of this right as it contains both a right to privacy *and* a right to dignity.¹⁸

⁸ Diggelmann and Cleis (n 2) 441-442.

⁹ *Ibid* 441.

¹⁰ *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)* Council of Europe ETS 5 (4 November 1950, in force 3 September 1953) Article 8(2).

¹¹ Article 17 reads as following: “(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor unlawful attacks on his honour and reputation. (2) Everyone has the right to protection of the law against such interference or attacks”. *International Covenant on Civil and Political Rights*, UNGA, UNTS 999 (16 December 1966, in force 23 March 1976), Article 17.

¹² *American Convention on Human Rights (“Pact of San Jose”)* Organization of American States, TS No 36 (22 November 1969, in force 18 July 1978) Article 11.

¹³ *Convention on the Rights of Persons with Disabilities* UNGA, UNTS 2515 (1 December 2006, in force 3 May 2008) Article 22.

¹⁴ Article 12: “no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interferences or attacks”, *Universal Declaration of Human Rights*, UNGA Res. 217 A (III) (10 December 1948) Article 12.

¹⁵ *American Declaration on the Rights and Duties of Man*, (2 May 1948), Article 5.

¹⁶ *The Yogyakarta Principles Plus 10- Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*, International Commission of Jurists (10 November 2017) Principle 6.

¹⁷ *European Convention on Human Rights* (n 10) Article 8; *American Convention on Human Rights* (n 12).

¹⁸ *Atala Riffo and Daughters v Chile*, Merits, Reparations and Costs (IACtHR, 24 February 2012), para 162.

However, the concept of ‘privacy’ is not defined in IHRL.¹⁹ HRC General Comment 16 on the right to privacy, for example, clarifies the normative content of this right without defining privacy itself.²⁰ According to one of the Individual Opinions given in the HRC case of *A.R. Coeriel and M.A.R. Aurik v The Netherlands*, “Article 17 is one of the more enigmatic provisions of the [ICCPR, and] the term ‘privacy’ would seem to be open to interpretation.”²¹ Similarly, the concept of private life which is integral to the ECHR and ACHR codification and interpretation of the right to privacy is not fully defined. Thus, the ECtHR habitually reaffirms that “private life is a broad term not susceptible to exhaustive definition”.²² The IACtHR also underscores the breadth of private life as

an ample concept that is not subject to exhaustive definitions and includes, among other protected realms, the sex life and the right to establish and develop relationships with other human beings. Thus, privacy includes the way in which the individual views himself and to what extent and how he decided to project this view to others.²³

In this sense, Diggelmann and Cleis definition of the right to privacy as an “umbrella term”²⁴ captures well its ability to expand. They explain that the right to privacy has “the potential of protecting privacy integrally, as opposed to guarantees that cover mere aspects such as secrecy, data or one’s identity”.²⁵ Not being fully defined, the right to privacy has a built-in ability to expand its scope. At the same time, however, the right to privacy in IHRL operates with the assumption that the legal space, and consequently, human life, can be neatly divided into two different spheres: the private sphere of discretion and the public sphere of regulation. Operating

¹⁹ According to Diggelmann and Cleis, “the importance of the right contrasts with the uncertainties about its conceptual basis”. Diggelmann and Cleis (n 2) 442.

²⁰ *CCPR General Comment No.16: Article 17 (right to privacy)*, United Nations, Human Rights Committee (8 April 1988).

²¹ *A.R. Coeriel and M.A.R. Aurik v The Netherlands* Comm no 453/1991 (HRC, 31 October 1994) Individual Opinion by Mr. Kurt Herndl.

²² *Peck v United Kingdom* App no 44647/98 (ECtHR, 28 January 2003), para 57.

²³ *Atala Riffo and Daughters v Chile* (n 18) para 162.

²⁴ Diggelmann and Cleis (n 2) 442. See also: Charilaos Nikolaidis, ‘Unravelling the Knot of Equality and Privacy in the European Court of Human Rights and the US Supreme Court: From *Isonomia* to *Isotimia*’ (2018) 18 Human Rights Law Review 719, 722.

²⁵ Diggelmann and Cleis (n 2) 441.

on the basis of the private/public binary means that the right to privacy is in constant engagement with the setting of boundaries – to determine what and who is included within its protection.

The right to privacy has a spatial dimension, meaning, it encompasses the physical or metaphorical notion of ‘a space’ in which a person is uninterrupted and undisturbed by outside pressures, interests or needs, and can therefore act with a certain degree of liberty. Put simply, the right to privacy protects that which falls within the private space of personal discretion and non-interference.

Some of this right’s elements can be more easily defined as private spaces such as ‘the home’,²⁶ and tangible objects and mediums for communication such as ‘correspondence’.²⁷ The IACtHR’s decision in *Ituango Massacres v Colombia*²⁸ reaffirms the importance of the home as a space for discretion. In this judgment the IACtHR established that the right to privacy includes a “personal sphere that must be protected from interference by outsiders and that personal and family honour and the home must be protected against such interference”.²⁹ It also indicated that “an individual’s home and private life are intrinsically connected, because the home is the space in which private life can evolve freely”.³⁰

However, private life is not confined to the space of the home. In *Von Hannover v Germany*, the ECtHR established that “spatial isolation” is not a requirement for protecting a person’s

²⁶ General Comment 16 defines the home as “the place where a person resides or carries out his usual occupation. *CCPR General Comment No 16* (n 20) para 5. See also ECtHR decision on *López Ostra v Spain* in which the Court explains that “severe environment pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health”. *López Ostra v Spain* App no 16798/90 (ECtHR, 9 December 1994), para 51.

²⁷ On correspondence and compliance with Article 17: *CCPR General Comment No 16* (n 20) para 8.

²⁸ *Ituango Massacres v Colombia*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 148, 1 July 2006.

²⁹ *Ibid* para 193.

³⁰ *Ibid* para 194.

right to privacy.³¹ The ECtHR affirmed that a public figure, such as the princess of Monaco, had a right to private life even in “places that cannot always be described as secluded [and] despite the fact that she is well known to the public”.³² In this sense, discretion can be exercised also in non-secluded places.

While the ECtHR’s approach in *Von Hannover v Germany* shows that the right to privacy extends beyond the private as a secluded space, not every activity which takes place in the private is protected under this right. The ECtHR decision in *Lasky and Others v United Kingdom* demonstrates this. In this case the ECtHR was called to rule on the criminalisation of three gay men for engaging in consensual BDSM with other consenting adults and one person “who was not yet 21 years old – the age of consent to male homosexual practices at the time”³³ in a private space. The applicants in *Lasky and Others* turned to the ECtHR after losing their appeal at the House of Lords in *R v Brown*.³⁴ In the domestic proceedings the House of Lords ruled that consent did not constitute a defence for occasioning “actual bodily harm in the course of a sado-masochistic encounter”.³⁵ That is, the majority determined that “consent is a defence to the infliction of bodily harm in the course of some lawful activities”, activities which do not “breed and glorify cruelty”.³⁶ The *R v Brown* decision thus rendered consent as an expression of individual volition irrelevant when the action or activity to which they have consented to is deemed unlawful. The ECtHR judgment in *Lasky and Others* demonstrates a similar approach. In its reasoning, the Court explained that “not every sexual activity carried out behind closed doors necessarily falls within the scope of Article 8”.³⁷ Furthermore, the Court emphasised that

³¹ *Von Hannover v Germany* App no 5920/00 (ECtHR, 24 June 2004), para 75.

³² *Ibid* para 77.

³³ *Laskey and Others v United Kingdom* App nos 21627/93; 21628/93; and 21974/93 (ECtHR, 19 February 1997), para 8.

³⁴ *R v Brown* [1993] UKHL 19, [1994] 1AC 212.

³⁵ *Ibid*

³⁶ *Ibid*

³⁷ *Laskey and Others v United Kingdom* (n 33) para 36.

the very nature of the sexual activities, including the number of individuals participating, the items that were used and the filming of the acts led them to doubt whether this case fell “entirely” within the scope of the right to privacy.³⁸ Thus, in *Von Hannover v Germany* the right to privacy does not confine a person’s discretion to the seclusion of being behind ‘closed doors’, while in *Lasky and Others v United Kingdom* the ‘closed doors’ themselves are not a sufficient condition to protect any type of activity as private.

The spatial dimensions of privacy go beyond the material space, but they remain within the private/public binary. This is particularly notable in the expansion of the element of private life within the jurisprudence of the ECtHR and IACtHR. For example, in *I.V. v Bolivia*, the IACtHR established that private life “is characterised by being a space of liberty exempt and immune from arbitrary and abusive interference by third parties or public authorities”.³⁹ However, this space of liberty is anything but materially bounded. O’Flaherty explains that the codifications of privacy “reflect a perception of the drafters that there is an autonomous zone within which a person may live a personal life and make choices without interference”.⁴⁰ There is therefore a tension between privacy’s ability to expand and its obligations towards upholding the private/public binary of discretion and regulation.

In *Chapman v United Kingdom* the movement between the material and abstract expansion of privacy and private life is shown. At the centre of this case is a Gypsy woman who after years of moving with her family in their traditional caravan and suffering from harassment, applied for a planning permission right which was refused and consequently led to actions being taken against the applicant and her family. The ECtHR could have simply decided this case based on

³⁸ The Court stated that “It may thus be open to question whether the sexual activities of the applicants fell entirely within the notion of “private life” in the particular circumstances of the case”. *Ibid* para 36.

³⁹ *I.V. v Bolivia*, Preliminary Objections, Merits, Reparations and Costs (IACtHR, 30 November 2016), para 149.

⁴⁰ Michael O’Flaherty, ‘Sexual Orientation and Gender Identity’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edition, Oxford University Press 2018) 299.

the element of home which is an integral aspect of the right to privacy under ECHR Article 8. Instead, the ECtHR established that the case raised issues also under the leg of private life. The ECtHR established that “the applicant’s occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority following a travelling lifestyle”.⁴¹ And, in this sense, the Court indicated that “[m]easures affecting the applicant’s stationing of her caravans therefore have an impact going beyond the right to respect her home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition”.⁴²

The right to privacy therefore has expanded to include various aspects of human life. For example, in *Rosendo Cantú et al. v Mexico* the IACtHR affirmed that the rape of one of the applicants “violated essential aspects and values of her private life”, and it “represented an intrusion in her sexual life and negated her right to decide freely with whom to have intimate relations”.⁴³ This caused her “to lose full control over this most personal and intimate decision and her basic bodily functions”.⁴⁴ While expanding to other aspects of human life, the logics of the spatial dimension of private and private life persists as can be seen in the IACtHR’s use of the concept of ‘intrusion’.

The ACHR codification of Article 11 as containing both a right to privacy and a right to dignity can further facilitate the expansion of the scope of the right to privacy within the IACtHR. For example, the IACtHR explained in *I.V. v Bolivia* that “the protection of the right to private life is not limited to the right to privacy”.⁴⁵ The IACtHR further stated that the protection of the right to private life includes the ability of the individual to develop their personality and

⁴¹ *Chapman v United Kingdom* App no 27238/95 (ECtHR 18 January 2001), para 73.

⁴² *Ibid.*

⁴³ *Rosendo Cantú et al. v Mexico*, (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 216 (31 August 2010) para 119.

⁴⁴ *Ibid.*

⁴⁵ *I.V. v Bolivia* (n 36) para 152.

aspirations, to determine their own identity, as well as to define their personal relations.⁴⁶ Private life also includes “aspects of physical and social identity, including the right to personal autonomy, personal development, and the right to establish and develop relationships with other human beings and with the external world”.⁴⁷

However, these are all aspects of human life that transcend the spatial separation of the public and private spheres. The IACtHR further established in *I.V. v Bolivia* that “[t]he effectiveness of the exercise of the right to private life is decisive for the possibility of exercising personal autonomy over the future course of events that are relevant for a person’s quality of life.” The Court stated that “private life includes the way in which individuals see themselves and how they decide to project themselves towards others, and is an essential condition for the free development of the personality.”⁴⁸ These are decisions that while made in the private sphere cannot be fully differentiated from the public one as it is the same individual who inhabits both spaces.

Even in the absence of an explicit reference to human dignity, the jurisprudence on the right to privacy of the HRC and ECtHR indicates that this right is able to expand and include a range of aspects of human life that can potentially come under its protection. For example, in *Coeriel et al v The Netherlands*, the HRC explained that a person’s surname is protected within the right to privacy as “a sphere of a person’s life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone”.⁴⁹ In this decision, the HRC broadened the protection of the right to privacy to include an individual’s surname, however, a surname transcends the private/public binary and disrupts, to an extent, the idea of a clear division between the private and the public sphere. A similar interpretation of privacy is found

⁴⁶ *Ibid*, para 152.

⁴⁷ *Ibid*.

⁴⁸ *Ibid*.

⁴⁹ *A.R. Coeriel and M.A.R Aurik v The Netherlands* (n 21) para 10.2.

also in the ECtHR's jurisprudence, for example in *Peck v United Kingdom* where the Court established that Article 8 "protects a right to identity and personal development" as well as the "right to establish and develop relationships with other human beings and the outside world".⁵⁰ In other words, the right to privacy and private life includes "a zone of interaction of a person with others" also in public.⁵¹ Similarly, in *Niemietz v Germany* the ECtHR affirmed that "[p]rivate life may also include activities of a professional or business nature".⁵²

The built-in expansive nature of privacy, which I have shown in the previous paragraphs, is balanced against its other built-in feature – the right to privacy is a qualified right that is structurally designed to be able to contract and be lawfully and justifiably interfered with.⁵³ As stated in HRC General Comment 16, "[a]s all persons live in society, the protection of privacy is necessarily relative".⁵⁴ Article 8(2) of the ECHR is a great example of this relativity:

There shall be no interference by a public authority with the exercise of his right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.⁵⁵

What is particularly striking about the ECHR codification is that it contains such an all-embracing and detailed clause on lawful interferences with the right to privacy and does not limit itself to the ordinary tests of arbitrariness⁵⁶ and lawfulness which are found in all of the other IHRL codifications of this right. And, while the core of the right is that of *protecting* the

⁵⁰ *Peck v United Kingdom* (n 22) para 57.

⁵¹ *Ibid.*

⁵² *Niemietz v Germany* App no 13710/88 (ECtHR, 16 December 1992), para 29.

⁵³ Başak Çali, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions' (2007) 29 Human Rights Quarterly 251, 256.

⁵⁴ *CCPR General Comment No 16* (n 20) para 7.

⁵⁵ *European Convention on Human Rights* (n 10) Article 8.

⁵⁶ However, as HRC General Comment 16 explains, also a lawful interference, that is, an interference prescribed by the law can be deemed in certain occasions arbitrary: "[t]he introduction of the concept of arbitrariness is intended to guarantee that even inference provided by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances". *CCPR General Comment No 16* (n 20) para 4.

individual's right to privacy,⁵⁷ Article 8(2) uses the term 'protection' in relation to the public's right to be protected against certain individual's exercise of their right to privacy.⁵⁸ The right to privacy thus further shows the tensions that lay within the upholding of the private and public division of spaces of discretion and regulation as the private is circumscribed by the regulatory powers of the public that can restrict private actions according to the built-in justifications for interference.

However, at the same time, it could be argued that the ECHR's specification of grounds for justification for interfering with the right constitute a further safeguarding of the right precisely because they go beyond the requirements of non-arbitrariness and lawfulness.⁵⁹ All the same, the listing of grounds for justification for interferences with the right *de facto* provides states with framings that they can use to justify their interferences with this right. This is particularly appealing as the grounds themselves are framed in a broad manner and are not defined neither by the ECHR nor by the ECtHR.

The right to privacy is a right to have one's privacy *not arbitrarily or unlawfully interfered with*.⁶⁰ Meaning, that it is framed in predominately negative terms. This may allude to the wrongful assumption that the mere *absence* of state interference means that the right is effectively respected. This is however not an accurate description of the obligations which

⁵⁷ *European Convention on Human Rights* (n 10) Article 8(1).

⁵⁸ *Ibid* Article 8(2).

⁵⁹ For example, the ECtHR's affirms that "the enumeration of the exceptions to the individual's right to respect for his private life, as listed in Article 8 § 2, is exhaustive and that their definition is restrictive. For it to be comparable with the Convention, a limitation of this freedom must, in particular, pursue an aim that can be linked to one of those listed in this provision". *Parrillo v Italy* App no 46470/11 (ECtHR, 27 August 2015), para 163. However, in *S.A.S. v France* the ECtHR also explains that "[t]he Court's practice is to be quite succinct when it verifies the existence of a legitimate aim within the meaning of the second paragraphs of Articles 8 to 11 of the Convention" and, in this sense only in cases such as *S.A.S.*'s does the Court see a "call for an in-depth examination" because of "the substance and the objectives invoked" by the opposing parties. *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014), paras 113 and 114.

⁶⁰ However, not all interferences are deemed as violations of this right. Rather, an interference that is arbitrary or unlawful may amount to a violation. This point is further elaborated in General Comment 16, where the HRC explains that since "all persons live in society", an individual's privacy "is necessarily relative", and therefore there may be incidents in which its limitation may be lawful. *CCPR General Comment No 16* (n 20) para 7.

states have under the right to privacy. For example, in *X and Y v The Netherlands* the ECtHR affirmed that

although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.⁶¹

In this sense, the ECtHR on the one hand reaffirms the predominately negative obligation that is contained in the right to privacy, whilst on the other it recognises in a less affirmative manner (“*there may be*”), that it *also* contains positive obligations. In *Johnston and Others v Ireland* the ECtHR furthered the vague nature of these positive obligations by stating that

especially as far as those positive obligations are concerned, the notion of ‘respect’ is not clear-cut [...] the notion’s requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals.⁶²

Thus, while “the boundaries between the State’s positive and negative obligations under this provision do not lend themselves to precise definition [and the] applicable principles are none the less, similar”,⁶³ examining an alleged breach of positive obligations appears to trigger a higher threshold. As the Court explained in *Christine Goodwin v United Kingdom*, “the margin of appreciation to be accorded to the authorities may be wider than that applied in other areas under the Convention”.⁶⁴

Determining whether a positive obligation arises in a case therefore raises yet again the ‘balancing’ process of the *individual* versus the “*general interests of the community*” as a

⁶¹ *X and Y v The Netherlands* App no 8978/80 (ECtHR, 26 March 1985), para 23.

⁶² *Johnston and Others v Ireland* App no 9697/82 (ECtHR, 18 December 1986), para 55.

⁶³ *Keegan v Ireland* App no 16969/90 (ECtHR, 26 May 1994), para 49.

⁶⁴ *Christine Goodwin v United Kingdom* App no 28957/95 (ECtHR, 11 July 2002), para 72.

whole.⁶⁵ In this sense, the binary of positive and negative obligations, specifically within the ECHR right to privacy, reflects IHRL's acts of inclusion and exclusion – that is, the making of hierarchies of subjects and the construction of the artificial yet naturalized division of spaces into either private or public. As the positive obligation may require additional structural, legislative, budgetary and policy related changes that intervene to an extent with the public, the threshold that the *individual* must prove becomes higher. However, the individual claim is not necessarily *individual* in the sense of *singular*. Yet the framing of the assessment follows a utilitarian calculation.⁶⁶ The test for determining whether a positive obligation has indeed been interfered with is yet another expression of balancing tests of proportionality that qualified rights, such as privacy, are subjected to.⁶⁷ According to Çali this

reduces important questions about human rights to conflict between the rights claims of a particular individual against the community. Human rights protections do indeed benefit certain persons at certain times. The nature of human rights protections, however, is not about the interests of a *specific* person, but those of *each and every person*. Every time a human rights protection is upheld, this does mean that a common interest is simultaneously scarified. It also does not follow that more human rights protections mean less protection of common interests.⁶⁸

The right to privacy has a clear ability to grown and expand its scope precisely because it is an umbrella term. However, its expansion is in constant tension with the private/public binary division of spaces into spheres of discretion and regulation upon which it is premised. Thus the rights ability to expand is equally balanced against is inherent ability to contract and restrict the scope of the private sphere of discretion subject to collective-public needs.

⁶⁵ *Ibid.*

⁶⁶ Çali (n 50) 259.

⁶⁷ *Ibid* 256-257.

⁶⁸ *Ibid* 259.

2. Non-Hegemonic Human Legal Subjects and the Right to Privacy: Precarious Inclusion within an Insufficient Framework

In now turn to examine the claims which NHHLSs make within the framework of the right to privacy. These claims, I argue, can be clustered within one or more of the following categories: (i) claims regarding bodies; (ii) claims regarding identities; and (iii) claim regarding relationships. These categories are important not to show that they are separate, but to demonstrate that the claims which NHHLSs have brought within privacy raise much deeper issues. These are claims regarding NHHLSs' ability to be recognised as full human legal subjects which directly stem from IHRL's acts of inclusion and exclusion. I then move to examine the inclusion of these claims, and of NHHLSs within the right to privacy framework and define their inclusion as precarious. Finally, when these subjects are indeed included, their inclusion is an insufficient answer to their claims. I demonstrate this argument by showing that in their petitions before the relevant adjudicative bodies NHHLSs also present claims regarding violations of non-discrimination and equality rights. This aspect of their petitions exemplifies the need to think beyond privacy. And, considering the ways in which IHRL adjudicative bodies assess these claims once these have established a violation of a right to privacy, furthers the need to go beyond this framework.

2.1 Bodies, Identities and Relationship – Categories of Claims

The open-ended nature of the right to privacy and its ability to expand and include aspects of an individual's life that it previously did not recognise makes this right an appealing instrument for litigation. This is particularly evident in the ECtHR which has ample jurisprudence on the right to privacy, including the right to privacy of NHHLSs. NHHLSs claims under the right to privacy have contributed to its expansion and to the development of its jurisprudence. In this

section, I organise their claims into three main categories: bodies, identities and relationships. It is important to locate every specific claim within these broader categories in order to not lose sight of the core of the claim itself – it regards a central aspect of what it means to be a human subject. More often than not these categories overlap and intersect. A case may raise issues under one or more of these categories. Therefore, I use the three categories not to suggest a total separation between them but to demonstrate that NHHLSs' claims within privacy are centred around core aspects of subjecthood. That they may contain a privacy element whilst also exceeding it.

The first category is that of claims regarding the body or bodies of the applicants. The category of 'bodies' includes harm to the individual's body and the individual's ability to use their body in public and in private, with the body being the *locus* of interaction with oneself and others. The jurisprudence on the right to privacy has an abundance of cases regarding NHHLSs' bodies, as I will exemplify.

Included in the category of bodies are numerous cases regarding sex and intercourse which were primarily brought by gay men.⁶⁹ For example, *Toonen v Australia* in which the applicant contested the criminalisation of sexual contact between consenting homosexual adults in the state of Tasmania before the HRC.⁷⁰ Or, the ECtHR ruling in *Lasky and Others v United Kingdom* on the criminalisation of three gay men who participated in consensual BDSM with other consenting adults.⁷¹

⁶⁹ See for example: *Nicholas Toonen v Australia* Comm no 488/1992 (HRC, 31 March 1994); *Lasky and Others v United Kingdom* (n 34); *Dudgeon v United Kingdom* App no 7525/76 (ECtHR, 22 October 1981).

⁷⁰ *Ibid* (*Nicholas Toonen v Australia*), paras 8.3-8.6.

⁷¹ *Ibid* (*Lasky and Others v United Kingdom*).

The category of bodies includes issues relating to the wearing of clothing items in private and in public spaces.⁷² For example, cases like *Leyla Şahin v Turkey* in which the applicant challenged the ban which prevented her from expressing her religious identity by wearing the Islamic headscarf in public, including in higher education institutions.⁷³

In addition, this category also includes cases regarding reproductive rights and justice. This is a broad sub-category that includes abortion rights,⁷⁴ assisted reproduction rights,⁷⁵ access to antenatal services,⁷⁶ the ability to decide how to give birth,⁷⁷ use of embryos⁷⁸ and forced sterilisation.⁷⁹ For example, cases such *Artavia Murillo and Others v Costa Rica* regarding access to assisted reproduction techniques for persons who are infertile.⁸⁰ These decisions relate to the human body as a space, but they also establish a broader conceptualisation of the private space – that is integral both to the material spaces and to the second type of space – space of discretion.⁸¹

⁷² *Leyla Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005); *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014); *Dakir v Belgium* App no 4619/12 (ECtHR, 11 July 2017); *Belcacemi and Oussar v Belgium* App no 37798/13 (ECtHR, 11 July 2017).

⁷³ *Leyla Şahin v Turkey* App no 4474/98 (ECtHR, 10 November 2005).

⁷⁴ For example: *K.L. v Peru* Comm no 1153/2003 (HRC, 13 November 2005); *Tysiąc v Poland* App no 5410/03 (ECtHR, 20 March 2007); *A, B and C v Ireland* App no 25579/05 (ECtHR, 16 December 2010); *L.M.R v Argentina* Comm no 1608/2007 (HRC, 29 March 2011); *P. and S. v Poland* App 57375/08 (ECtHR, 30 October 2012); *Amanda Jane Mellet v Ireland* Comm no 2324/2013 (HRC, 31 March 2016); *Siobhán Whelan v Ireland* Comm no 2425/2014 (HRC, 17 March 2017).

⁷⁵ See for example: *Artavia Murillo et al. ("In vitro fertilisation") v Costa Rica*, (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 257 (28 November 2012).

⁷⁶ *A.K. v Latvia* App no 33011/08 (ECtHR, 24 June 2014).

⁷⁷ See: *Ternovszky v Hungary* App no 67545/09 (ECtHR, 14 December 2010); *Dubská and Krejzová v The Czech Republic* App nos 28859/11; and 28473/12 (ECtHR, 15 November 2016).

⁷⁸ *Parrillo v Italy* (n 56).

⁷⁹ For example: *Y.Y. v Turkey* App no 14793/08 (ECtHR, 10 March 2015); *A.P., Garçon and Nicot v France* App nos 79885/12; 52471/13; and 52596/13 (ECtHR, 6 April 2017); *V.C v Slovakia* App no 18968/07 (ECtHR, 8 November 2011); *N.B. v Slovakia* App no 29518/10 (ECtHR, 12 June 2012) and *I.G. and Others v Slovakia* App no 15966/04 (ECtHR, 13 November 2012); *I.V. v Bolivia* (n 36); *K.L. v Peru* (n 71).

⁸⁰ *Artavia Murillo et al. ("In vitro fertilisation") v. Costa Rica*, Preliminary Objections, Merits, Reparations and Costs (IACtHR, 28 November 2012), para 272.

⁸¹ *Ibid.*

The category of bodies includes claims that regard medical interventions whether physical or psychological⁸² as well as psychiatric interventions and assisted dying.⁸³ In addition, it contains also claims that regard other harms to the body such as issues related to rape.⁸⁴ For example, the case of *P. and S. v Poland* shows how rape and access to abortion intersect and both harm the applicant's body. In this case an underaged girl was raped and the rape resulted in an unwanted pregnancy.⁸⁵

Lastly, also included in the category of bodies are claims regarding bodies with (dis)abilities.⁸⁶ The case of *Tysic v Poland* demonstrates the intersection of (dis)abilities and abortion rights all of which relate to the body. Before learning that she was pregnant again, the applicant was suffering from a disability defined as "of medium severity"⁸⁷ because of her severe myopia. She brought her case before the ECtHR to challenge the medical personnel who forced her to give birth despite the fact that she was advised by several doctors that a further pregnancy will severely deteriorate her eyesight.⁸⁸

The second category is that of identities. This category can encompass issues that regard a person's sexual orientation, gender identity, gender expression and sex characteristics.⁸⁹ For example, cases such as *Atala Riffo and Daughters v Chile* before the IACtHR regarding the

⁸² See for example: *L. v Lithuania* App no 27527/03 (ECtHR, 11 September 2008); *A.P., Garçon and Nicot v France* (n 76); *Jehovah's Witnesses of Moscow v Russia* App no 302/02 (ECtHR, 10 June 2010).

⁸³ *Pretty v United Kingdom* App no 2346/02 (ECtHR, 29 April 2002).

⁸⁴ *X and Y v The Netherlands* (n 58); *L.M.R v Argentina* (n 71); *Rosendo Cantú et al. v Mexico* (n 40); *P. and S. v Poland* (n 71).

⁸⁵ *Ibid* (*P. and S. v Poland*).

⁸⁶ *Tysic v Poland* (n 71); *Botta v Italy* App no 153/196/772/973 (ECtHR, 24 February 1998); *L.M.R v Argentina* (n 71).

⁸⁷ *Ibid* (*Tysic v Poland*), para 8.

⁸⁸ *Ibid* para 8-31.

⁸⁹ See for example: *Christine Goodwin v United Kingdom* (n 61); *L. and V. v Austria* App nos 39392/94; and 39829/98 (ECtHR, 9 January 2003); *Hämäläinen v Finland* App no 37359/09 (ECtHR, 16 July 2014); *A.P., Garçon and Nicot v France* (n 76); *Rees v United Kingdom* App no 9532/81 (ECtHR, 17 October 1986); *S.V. v Italy* App no 55216/08 (ECtHR, 11 October 2018); *Van Kück v Germany* App no 35968/97 (ECtHR, 12 June 2003); *Atala Riffo and Daughters v Chile* (n 18).

applicant's custody of her daughters that was taken away from her because of her sexual orientation and co-habitation with her same-sex partner.⁹⁰

This category also includes cases regarding ethnic and religious identities and their expression understood also as having a collective dimension are included within the category of claims.⁹¹

For example, the case of *S.A.S. v France* in which the applicant, a religious, spiritual Muslim woman contested the French ban on wearing of full-face covering in all public spaces.

The last category of claims that NHHLSs bring under the right to privacy is the one regarding their relationships. Relationships are understood as the ability to relate or not to relate to other individuals, such as forming or upholding a legally recognised partnership with another individual,⁹² expanding and protecting one's family⁹³, and engaging in consensual sexual activities with other consenting adults.⁹⁴ In fact, relationships are a protected area within the evolving jurisprudence of the right to privacy. For example, the HRC has established that this right includes also "the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone".⁹⁵

I use the categories of bodies, identities and relationships to show not that they are distinct aspects of life that should be understood as such, but rather the contrary. I use them to show that in essence the claims that NHHLSs bring within the scope of the right to privacy raise serious concerns regarding foundational aspects of their subjecthood. These categories help to

⁹⁰ *Ibid* (*Atala Riffo and Daughters v Chile*).

⁹¹ *A.R. Coeriel and M.A.R Aurik v The Netherlands* (n 21); *Leonid Raihman v Latvia* Comm no 1621/2007 (HRC, 28 October 2010); *S.A.S. v France* (n 56) para??; *Chapman v United Kingdom* (n 38), para 73.

⁹² See for example: *Hämäläinen v Finland* (n 86); *Oliari and Others v Italy* App no 18766/11; and 36030/11 (ECtHR, 21 July 2015); *Pajić v Croatia* App no 68453/13 (ECtHR, 23 February 2016); *Chapin and Charpentier v France* App no 40183/08 (ECtHR, 9 June 2016); *Orlandi and Others v Italy* App nos 26431/12; 26742/12; 44057/12; and 60088/12 (ECtHR, 14 December 2017).

⁹³ *Fretté v France* App no 36515/97 (ECtHR, 26 February 2002).

⁹⁴ *Laskey and Others v United Kingdom* (n 34); *Dudgeon v United Kingdom* (n 66).

⁹⁵ *A.R. Coeriel and M.A.R Aurik v The Netherlands* (n21), para 10.2.

map out the claims that NHHLSs make and see the commonalities they share – they are all raising issues regarding foundational aspects of subjecthood.

2.2 A Precarious Avenue

Numerous cases have been brought by NHHLSs with regards to the right to privacy as offering protection in relation to one or more of the three categories of bodies, identities and relationships. However, the right to privacy, as a particular expression of IHRL's acts of inclusion of subjects, objects, actions and spaces offers precarious inclusion of NHHLSs. The following cases are examples of this precarious inclusion.

The case of *A.P., Garçon and Nicot v France*⁹⁶ is an example of the precarious inclusion of NHHLSs within the right to privacy. In this case the ECtHR was asked to rule on the conditions for legal gender recognition of three transgender women who sought to amend the gender markers in their birth certificates.⁹⁷ In order to have these documents amended, the French law required each of them to demonstrate to have been diagnosed with a gender identity disorder, to have undergone an irreversible change in appearance and to be subjected to an expert medical assessment.⁹⁸ The ECtHR ruled in favour of two of the applicants who contested the requirement of having to demonstrate an irreversible change in appearance as a violation of the right to privacy.⁹⁹ The ECtHR explained that an irreversible change in appearance requirement would *de facto* require sterilisation.¹⁰⁰ And, a sterilisation requirement placed the individuals in a rather impossible position – to be forced to relinquish their “full exercise of their right to

⁹⁶ *A.P., Garçon and Nicot v France* (n 76).

⁹⁷ *Ibid* para 3.

⁹⁸ *Ibid*.

⁹⁹ *Ibid* para 135.

¹⁰⁰ *Ibid* para 116.

respect for their physical integrity”¹⁰¹ in order to fully exercise their right to privacy. Following this specific framing, the Court ruled that although there was no firm consensus among the Council of Europe Member States regarding this requirement, sterilisation had irreversible effects on the individual’s physical integrity and personal autonomy, which narrowed the margin of appreciation that would be normally granted to the state in the absence of a consensus.¹⁰²

However, the ECtHR ruled against two other important aspect of this case: (i) the question of the pathologisation requirement, i.e., to demonstrate the existence of a gender identity disorder,¹⁰³ and (ii) the compatibility of the requirement of a medical examination with the right to privacy.¹⁰⁴ The ECtHR justified its ruling against a violation of the right to privacy on the matter of the pathologisation requirement on the basis that no consensus on the matter existed at the time among the Council of Europe Member States, and that such a condition did not harm the physical integrity of the person.¹⁰⁵ It therefore concluded that “even though an important facet of the identity of transgender persons is at stake in the context of their gender identity, the Contracting Parties retain wide discretion in deciding whether to lay down such a requirement”.¹⁰⁶

This case demonstrates the precarious nature of inclusion of NHHLSs within the right to privacy. It shows the selective protection that this right extends to claims regarding bodies, identities and relationships which NHHLSs bring within its scope. In this case, the NHHLSs received only partial protection by the right to privacy and two important aspects of their claims

¹⁰¹ *Ibid* para 131.

¹⁰² *Ibid*, paras 122-123.

¹⁰³ *Ibid* para 144.

¹⁰⁴ *Ibid* para 154.

¹⁰⁵ *Ibid* para 139.

¹⁰⁶ *Ibid* para 104.

were left outside its scope. Their claims, which regard essential aspects of their subjecthood are not appreciated by the ECtHR fully and are subjected to the finding of consensus among the Council of Europe Member States.

The case of *S.A.S. v France*, also decided by the ECtHR, is another example of the precarious nature of inclusion within the right to privacy of NHHLSs claims regarding their identities, bodies and relationships. *S.A.S. v France* is centred around the applicant's identity as a devout Muslim French-Pakistani woman and her expression of her identity through her clothing and thus her body by wearing the niqab and/or burqa in public.¹⁰⁷ In her arguments under Article 8, the applicant stated that the veil is "an important part of her social and cultural identity" and that the ban violated her right to private life as a zone of interaction and social dimension, while exposing her to criminal sanctions and hostility.¹⁰⁸ In her petition, S.A.S. explained that the French ban on the concealment of one's face in public violated her right to privacy. She also argued that her right to freedom of thought, conscience and religion under Article 9 ECHR was also violated. The Court acknowledged in the beginning of its evaluation that "personal choices as to an individual's desired appearance, whether in public or in private places, relate to the expression of his or her personality and thus fall within the notion of private life".¹⁰⁹ However, although the ECtHR stated it would examine S.A.S.'s petition under both Articles 8 and 9, it did not do so and mostly relied on its jurisprudence on the Article 9 to address this case.¹¹⁰ In this sense, the harm of which S.A.S. complained was mostly formally included within the right to privacy framework but not in a substantive manner. In addition, her formal inclusion was precarious because the ECtHR subjected her arguments regarding the harm to her identity,

¹⁰⁷ *S.A.S. v France* (n 56) paras 15-34.

¹⁰⁸ *S.A.S. v France* (n 56) para 36.

¹⁰⁹ *S.A.S. v France* (n 56) para 107.

¹¹⁰ *Ibid* para 109.

body and relationships to the finding of a European Consensus.¹¹¹ The Court's analysis affirmed that "the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society", a matter in which the State has a wide margin of appreciation.¹¹² I return to this point in my re-imagination of this case in Chapter 5. S.A.S did not receive any protection to their identity, body and relationship within the framework of the right to privacy.

Finally, the case of *Hämäläinen v Finland* is another important example of the precarious nature of the inclusion of NHHLSs within the framework of the right to privacy. Ms. Hämäläinen argued that her right to privacy was violated due to the Finnish law which governed legal gender recognition at time. The applicant was a transgender, religious, married woman and parent who sought to amend her legal gender recognition whilst remaining married to her wife i.e., upholding the legal recognition of her relationship to her wife and their possibility to grow as a family. In this case, the ECtHR ruled that Finland was not in violation of its positive obligations under Article 8 as the applicant had a choice and means to ameliorate her condition, namely, she could have transformed her marriage to a civil partnership and thus amend her gender officially.¹¹³ The Court stated that "while it is *regrettable* that the applicant faces daily situations in which the incorrect identity number creates inconveniences for her, the Court considers that the applicant has a genuine possibility of changing that state of affairs".¹¹⁴ The differences between a registered partnership and the current marriage of the applicant were adjudicated by the Court as minor, therefore Finland was not found in breach of its positive obligations.¹¹⁵ While the Court established that the margin of appreciation is to be restricted in

¹¹¹ *Ibid* para 156.

¹¹² *Ibid* paras 153-154.

¹¹³ *Hämäläinen v Finland* (n 86) para 87.

¹¹⁴ *Ibid* (emphasis added).

¹¹⁵ *Ibid*.

cases where “a particularly important facet of an individual’s existence or identity was at stake”,¹¹⁶ it also quickly affirmed that should the issue at the core of the matter also raise moral concerns, the question of whether there is a consensus among the Council of Europe should be taken into consideration.¹¹⁷ *Hämäläinen v Finland* is yet another proof of the precarious nature of inclusion of NHHLSs within the framework of the right to privacy as the applicant’s harm to her identity and relationships were left outside of the right’s protection.

As these cases demonstrate well, while the three categories of claims – bodies, identities and relationships – all come within the scope of the right to privacy, the protection it offers to NHHLSs is precarious. For example, cases regarding identities which the ECtHR recognised as an integral part of the protections offered by the right to privacy and private life.¹¹⁸ Nevertheless, issues that arise within the category of “particularly important facet[s] of an individual’s existence or identity”, do not trump, *per se*, the State’s ability to interfere with this category in a manner which is compatible with the right to privacy. It remains unclear which aspects of the individual’s identity have reached this level of importance and who determines the evaluation leading to this qualification. This ambiguity arguably has a detrimental effect on the adjudication of NHHLSs. Understanding identities and establishing which facets of the individual’s identity are perceived as important enough to restrict the State’s margin of appreciation is a difficult task. This task essentially perpetuates the public and private division and the hierarchy of legal subjects. It is the state as the primary legal subject which has control and discretion over its territory and society by virtue of the doctrine of sovereignty. The self-regulation of the state is not easily contested by IHRL subjects, even if at stake is the human legal subject.

¹¹⁶ *Ibid*, para 67.

¹¹⁷ *Ibid*.

¹¹⁸ *Christine Goodwin v United Kingdom* (n 61), para 77.

2.3 An Insufficient Avenue

The claims that NHHLSs bring within the right to privacy have a privacy aspect. However, privacy alone cannot acknowledge the harms of which they complain in its totality because these harms exceed its scope. Their claims regard their non-hegemonic position within IHRL – in which they occupy a space in which they are formally recognised as human legal subjects within a structure that is tailored to fit the needs of a narrow construction of the human – the hegemonic one- to which they do not fit. This I argue is expressed in the fact that their petitions, more often than not, contain also an allegation of a violation of their rights to non-discrimination and/or equality.

The right to privacy jurisprudence of the ECtHR demonstrates that this adjudicative body is developing a practice of dismissing right to discrimination claims upon confirming or rejecting that a violation of the right to privacy took place. In *X and Y v The Netherlands*, the ECtHR established that

An examination of the case under Article 14 (art. 14) is not generally required when the Court finds a violation of one of the former Articles taken alone. The position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case, but this does not apply to the breach of Article 8 (art. 8) found in the present proceedings.¹¹⁹

An example of such an approach can be seen in *L. v Lithuania*.¹²⁰ In this case regarding access to legal gender reassignment and legal gender recognition of a transgender man, the applicant argued the violation of his rights to not be subjected to torture, inhuman or degrading treatment or punishment (ECHR Art 9), to privacy (ECHR Art 8), to marry and found a family (ECHR Art 12) and to non-discrimination (ECHR Art 14).¹²¹ However, the ECtHR established that

¹¹⁹ *X and Y v The Netherlands* (n 58), para 32.

¹²⁰ *L. v Lithuania* (n 79).

¹²¹ *Ibid* para 2.

an examination of the facts of the present case, whilst revealing the applicant's understandable distress and frustration, does not indicate circumstances of such an intense degree (...) The Court considers it more appropriate to analyse this aspect of the applicant's complaint under Article 8.¹²²

When turning to examine the applicant's complaint within the right to privacy the ECtHR determined that there was an evident gap in the legislation governing the law regulating legal gender reassignment "which [left] the applicant in a situation of distressing uncertainty *vis-à-vis* his private life and the recognition of his true identity"¹²³ and established that there had been a violation of Article 8. However, while the right to privacy included the applicant in this case within its protection and a violation was indeed found, the ECtHR's refusal to engage with the applicant's arguments regarding Article 14 on non-discrimination shows the insufficiency of his inclusion within privacy. When approached with the task of assessing the applicant's arguments regarding the alleged violation, the ECtHR established that it "finds that, in the circumstance of the present case, the applicant's complaint of discrimination is essentially the same, *albeit seen from a different angle*, as that which it has considered above under Articles 3 and 8 of the Convention".¹²⁴ *L. v Lithuania* demonstrates the insufficiency of bringing a complaint regarding one's identity, body and relationships within the right to privacy.

A similar approach is noted in *V.C v Slovakia*, *N.B. v Slovakia* and *I.G. and Others v Slovakia*,¹²⁵ all cases regarding forced sterilisation of Roma women in Slovakia which were brought before the ECtHR within a short time span from one another. Upon finding a violation of the right to privacy, as well as a violation of the right to not be subjected to torture, inhuman or degrading treatment or punishment, the ECtHR declared that a separate examination of the

¹²² *Ibid* para 47.

¹²³ *Ibid* para 59.

¹²⁴ *Ibid* para 68 (emphasis added).

¹²⁵ *V.C v Slovakia* (n 76); *N.B. v Slovakia* (n 76) and *I.G. and Others v Slovakia* (n 75).

allegations of non-discrimination was uncalled for in all three cases. Thus, in *N.B. v Slovakia*, for example, the ECtHR explained that while forced sterilisation of women

affected vulnerable individuals from various ethnic groups (...) it cannot be established that the doctors involved acted in bad faith, that the applicant's sterilisation was part of an organised policy, or that the hospital staff's conduct was intentionally racially motivated. At the same time, the Court finds no reason for departing from its earlier findings that shortcomings in legislation and practice relating to sterilisations were liable to particularly affect members of the Roma community.¹²⁶

The refusal to examine allegations of non-discrimination means to not fully examine the harm of which an applicant complained even if the complaint “is essentially the same, *albeit seen from a different angle*.”¹²⁷ As reaffirmed in the 1994 Vienna Declaration and Programme of Action- “[a]ll human rights are universal, indivisible and interdependent and interrelated”.¹²⁸ Precisely because of the interrelation and interdependence of rights, when one right is violated, another right may be violated as well. Therefore, while the ECtHR seems to imply that analysing the different facets and effects of the facts of a case on multiple human rights may be repetitive, quite the contrary – it would be the right approach to fully recognising the harm suffered by the applicant.

A similar approach can be found also in the HRC. For example, in the case of *Leonid Raihman v Latvia*.¹²⁹ The applicant in this case belonged to the Jewish and Russian minority and complained that the State's decision to change his name to match Latvian spelling without his consent, violated Article 2(1) and Article 26 in relation to Article 17. He argued that though the Language Law appeared to be “neutral”, its implementation may result in adversely impacting a certain category of persons,¹³⁰ specifically minorities like the Russian speaking and the Jewish ones, two groups that also intersect at times. In the merits, the Committee

¹²⁶ *Ibid* (*N.B. v Slovakia*) para 121.

¹²⁷ *L v Lithuania* App no 27527/03 (ECtHR, 11 September 2007), para 68 (emphasis added).

¹²⁸ UN General Assembly, *Vienna Declaration and Programme of Action* UNGA, A/CONF.157/23 (12 July 1994) para 5.

¹²⁹ *Leonid Raihman v Latvia* (n 88).

¹³⁰ *Ibid* para 3.3.

decided not to examine violations under Articles 2(1) and 26 after it found Latvia in violation of Article 17 without giving any further explanation.¹³¹

Instances in which the HRC, upon establishing a violation of the right to privacy and decided to proceed with an examination of the alleged violations of rights to non-discrimination and equality also demonstrate notable insufficiency. For example, the HRC found a violation of the right to privacy in *Amanda Jane Mellet v. Ireland*¹³² and *Siobhan Whelan v. Ireland*.¹³³ These are cases regarding access to abortion procedures for non-viable pregnancies. At the time, the Constitution of Ireland protected the unborn regardless of its viability and criminalised any person who sought an abortion as well as medical staff willing to perform one. Both applicants were forced to seek a termination procedure abroad. Upon returning to Ireland, they did not receive any bereavement support and counselling to assist them in processing their grief. In their petitions to the HRC, both cases raised issues under the right to privacy but also on the prohibition on cruel, inhuman and degrading treatment, freedom of information and the rights to non-discrimination and equal enjoyment of ICCPR rights.¹³⁴ For example, in *Amanda Jane Mellet v. Ireland* the applicant complained that her right to privacy was violated because she

had to choose between, on the one hand, letting the State make the deeply intimate reproductive decisions for her to continue with a non-viable pregnancy under conditions of considerable suffering and, on the other hand, having to travel abroad for a termination. Neither option had the potential to preserve her reproductive autonomy and mental well-being.¹³⁵

In deciding both cases, the HRC cited to its previous decisions regarding reproductive rights and to General Comment 28 and stated that a woman's "decision to request" a termination

¹³¹ *Ibid* para 8.4.

¹³² *Amanda Jane Mellet v Ireland* (n 71), para 7.8.

¹³³ *Siobhán Whelan v Ireland* (n 71), para 7.9.

¹³⁴ *Amanda Jane Mellet v Ireland* (n 71), para 1; *Siobhán Whelan v Ireland* (n 71), para 1.1.

¹³⁵ *Ibid* para 3.5

procedure falls under the scope of the right to privacy and private life.¹³⁶ The HRC established in both cases that Ireland interfered with the applicants' *decision* as to how best cope with the fact that their pregnancies were not-viable.¹³⁷ The HRC also stated that "the balance that the State party has chosen to strike between the protection of the fetus and the rights of the woman in the present case cannot be justified".¹³⁸ The cases resulted in a strong recommendation that Ireland should amend its law on termination of pregnancy and consider amending its constitution "to ensure compliance with the Covenant".¹³⁹

Both Amanda Jane Mellet and Siobhan Whelan were denied a termination of their pregnancies even though they were carrying a non-viable foetus and by doing so, risked their mental and physical health and suffered serious economic burdens. After establishing a violation of their right to privacy, the HRC proceeded to examine the rest of their petitions. Both argued that Article 2(1) on the obligation to respect and ensure the Covenant rights without any distinction, Article 3 on the right to equality between men and women with regards to the Covenant rights and Article 26 on non-discrimination were violated by the State.

However, in both cases, the HRC examined only Article 26 on non-discrimination which necessitates a comparator. That is, for discrimination to be found, the applicants need to show that another person who is similarly placed has received better treatment. The HRC decided in both cases to compare the applicants' situation to that of other Irish women with non-viable foetuses who, nevertheless, decide to bring the pregnancy to term, in order to establish whether Article 26 was violated or not. The HRC noted that in the case of the latter, the women received access to a series of fundamental services that help them throughout the pregnancy and after. Such services could be also translated in monetary terms as well as in general assistance in the

¹³⁶ *Ibid* para 7.7

¹³⁷ *Amanda Jane Mellet v Ireland* (n 71), para 7.7; *Siobhán Whelan v Ireland* (n 71), para 7.8,

¹³⁸ *Ibid* (*Amanda Jane Mellet v Ireland*) para 7.8; *Ibid* (*Siobhán Whelan v Ireland*), para 7.9.

¹³⁹ *Ibid* (*Siobhán Whelan v Ireland*), para 9.

maintenance of health, including mental health. By contrast, the two applicants had to incur grave suffering to their mental and physical health as well as demanding financial expenses to terminate their non-viable pregnancies. The comparison led the HRC to determine that Article 26 was violated and decided not to examine the alleged violations of Article 2(1) and 3.

Considering its decision, it is important to note that both applicants made serious allegations against what can be defined as an almost blanket ban on abortions under Irish law. The applicants argued that this ban established a harmful stereotyped role for women as reproductive instruments, and thus subjected them to gender discrimination.¹⁴⁰ In addition, in *Amanda Jane Mellet*, the applicant argued that the abortion law discriminated against her “both as an individual woman and against women as a group”.¹⁴¹ The lack of explanation on why the Committee decided to stop its examination after finding that Article 26 on non-discrimination was violated remains rather vague and, to a certain extent, arguably demonstrates the lack of clarity on the question of reproductive rights under the right to privacy. It shows that even when both privacy and non-discrimination violations are found, something is still missing. Both rights do not go to the heart of the harm of which these applicants complain. Something else is needed.

Another example can be found in the *K.L. v Peru*,¹⁴² where the HRC did examine at least one non-discrimination provision. In this case the applicant was legally qualified to terminate her pregnancy without being subjected to any criminal charges. In *K.L. v Peru* the HRC claimed that Article 26 and Article 3 were inadmissible¹⁴³ and proceeded to examine only Articles 24 on the non-discrimination of minors.¹⁴⁴ This is another example of a case in which the

¹⁴⁰ *Ibid* (*Amanda Jane Mellet v Ireland*), para 3.19; *Siobhán Whelan v Ireland* (n 71), para 4.15.

¹⁴¹ *Ibid* (*Amanda Jane Mellet v Ireland*), para 3.20.

¹⁴² *K.L. v Peru* (n 71).

¹⁴³ *Ibid* para 5.3.

¹⁴⁴ *Ibid* para 6.5.

applicant's arguments were fairly centred on discrimination and equality. In fact, the applicant argued that Article 3 was breached because "her different and special needs were ignored because of her sex" and aggravated by the fact that she was also a minor, as well as because of "social attitudes and prejudice "that deny her right to equality with men."¹⁴⁵ This case further demonstrates the insufficiency of privacy in order to fully accommodate harm to NHHLSs' bodies, identities and relationships.

3. Interpretation and Boundaries: The Role of Adjudicative Bodies

I now turn to examine the right to privacy of NHHLSs from the perspective of adjudicative bodies. I examine how these bodies approach the task of engaging with the interpretation of this right as an act of setting legal boundaries of inclusion and exclusion. I identify three main attitudes to the engagement with boundaries of inclusion and exclusion in the adjudication of the right to privacy of NHHLSs: (i) status quo and inward-looking approaches; (ii) avoiding boundaries to confirm existing ones; and (iii) change-receptive and outward-looking approaches to engage with the setting of boundaries.

This analysis has no comparative scope as I am not interested in determining the attitudes of a particular IHRL adjudicative body or assessing fragmentation and convergence.¹⁴⁶ Instead, the scope of this section is to map the available approaches to examine the right to privacy when brought by NHHLSs, in order to assess the benefits of further litigating their claims primarily under this right.

¹⁴⁵ *Ibid* para 3.2.

¹⁴⁶ For an analysis of fragmentation and convergence in IHRL in the work of IHRL adjudicative bodies see Elena Abrusci, *Judicial Convergence and Fragmentation in International Human Rights Law: The Regional Systems and the United Nations Human Rights Committee* (Cambridge University Press 2022).

3.1 Status Quo and Inward-Looking Approaches: Reaffirming Existing Boundaries

When Dworkin introduced Hercules, his fictional super-judge, he told us that Hercules has a very difficult task before him – to decide hard cases by applying principles that fit the system and make sense of the system as a whole.¹⁴⁷ However, the super-judge recognises that there will be cases that will necessitate departure from precedent. While this is a very simplified brief of a long and convoluted piece of academic work, I find it useful for establishing the inner tension in adjudication that can be found in inward-looking and status quo approaches of interpretation. I couple inward-looking approaches and status quo because the act of looking within a system usually means an attempt to stay within a defined practice, both in the sense of the practice of the court as well as the practice of the member states to a specific convention. Inward-looking attitudes, therefore, seek to conform to the hegemonic and/or widespread approaches to understanding a specific issue.

Inward-looking framings of boundary-investigation can be observed in the work of the ECtHR. The development and deployment of the margin of appreciation doctrine and its relevant legal tests are an elaborate boundary-framing exercise for adjudication, which at times reaffirms existing legal boundaries and preserves that status quo. The ECtHR's margin of appreciation doctrine arguably preserves the sovereign and democratic nature of each of the Council of Europe member States under the ECHR. This doctrine has boundaries which can be widened and narrowed.

In *Hämäläinen v Finland*, for example, the ECtHR approaches the question of legal recognition as a positive obligation under the right to privacy and private life by applying a wider

¹⁴⁷ Ronald Dworkin, 'Hard Cases' (1975) 88 Harvard Law Review 1057, 1083-1109.

consideration – striking a balance “between competing private and public interests of the Convention rights”.¹⁴⁸ This is an example of yet another framing of boundary-dynamics: while evaluating whether a positive obligation exists, the ECtHR measures the boundaries between societal needs and wants and the private individual’s needs and wants under the ECHR. This framing of boundaries between the individual and the group underlines what is arguably the eternal struggle of intentional human rights law, that is, the difficulty in reconciling the fact that one is an individual, but also forms part of several collectives all of which exist at the same time in the same place under the protection of the same instruments.

In addition to balancing these competing interests, the ECtHR turns to examine the question of consensus among the member states. If consensus exists then the margin of appreciation, and hence legal boundaries, can be narrowed down. The search for consensus means to observe the practice of other member States and deduce whether their behaviour signifies that a consensus has been met which is especially important for the ECtHR in cases which raise ethical and moral considerations.¹⁴⁹ In *Hämäläinen v Finland* the ECtHR found no consensus neither with regards to same-sex marriage nor as to “how to deal with gender recognition in the case of pre-existing marriage”.¹⁵⁰ The ECtHR ruling in this case reaffirms existing legal boundaries as a direct response to its own inward-looking approach to interpretation. But it is not only a question of reaffirming boundaries, this can also be read as a boundary-avoidance approach. The search for consensus, whether clear-cut or just-about-right, relays on the behaviour of member States to decide *de facto* what the legitimate standards are. In this sense, if followed in a very strict manner, the adjudicative body’s interpretation of legal boundaries may end up being as an act of avoiding discussions on legal boundaries. Simply put, inward-looking and

¹⁴⁸ *Hämäläinen v Finland* (n 86), para 67.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid* para 74.

status-qua approaches to setting boundaries can intersect and overlap with boundary-avoidance approaches.

However, in certain cases the ECtHR looks to its member States for consensus, and while not finding one, it nevertheless decides to shift the legal boundaries. According to O'Hara, "there is a tension between sexual alterity and the very concept of 'consensus' [this concept] seeks to oust, or at least tame, difference".¹⁵¹ Thus, O'Hara explains, when the ECtHR uses consensus in relation to these subjects "it either attempts to expunge them from European society or it seeks to consume them through a process of sanitation and normalisation. The outcome suggests that queer freedom may be better sought away from the European Court of Human Rights and its insistence on consensus".¹⁵² Such is the case of *A.P., Garçon and Nicot v France*, where the ECtHR discusses whether sterilization is a legitimate requirement for legal recognition of transgender people.¹⁵³ The ECtHR observes that "the Contracting Parties are divided as regards the sterility requirement" and that "there is therefore no consensus on the subject".¹⁵⁴ In addition to the lack of consensus, the ECtHR categorizes the case regarding legal recognition of transgender people as one that bring about questions of "public interests" and "raises sensitive moral and ethical issues".¹⁵⁵ However, the legal boundaries in this case are narrowed by the ECtHR as it frames sterilization as an act that impairs one's personal integrity and concerns¹⁵⁶ "a particularly important facet of an individual's existence or identity".¹⁵⁷ In this sense, inward-looking boundary-interpretation approaches do not necessarily impede the legal boundaries from shifting and stretching. However, it is important to note that the

¹⁵¹ Claerwen O'Hara, 'Consensus, Difference and Sexuality: Que(e)rying the European Court of Human Rights' Concept of 'European Consensus' (2021) 32 Law and Critique 91, 111.

¹⁵² *Ibid.*

¹⁵³ *A.P., Garçon and Nicot v France* (n 76).

¹⁵⁴ *Ibid* para 122.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid* para 123.

¹⁵⁷ *Ibid* para 106.

“particularly important facet of an individual’s existence or identity” threshold is vague. Also, it appears to be a high threshold that is measured under a framing of identity and existence that is arguably narrow and to a certain extent biased.

3.2 Avoiding Boundaries: When Boundaries Stay the Same

I label the second interpretative approach as ‘boundary avoidance’. This happens when an adjudicative body avoids any substantive engagement with legal boundaries when deciding a case. The effect of the decision to not examine boundaries, or to avoid them, effectively reaffirms the existing boundaries. Such an approach is adopted both by the ECtHR and HRC in cases regarding NHHLSs where claimants alleged that not only their right to privacy was violated but also that non-discrimination and equality Articles were violated as well.

In *V.C. v Slovakia*, the ECtHR engages with the allegation of a violation of non-discrimination in conjunction with the violation of the right to privacy and private life.¹⁵⁸ It was called to rule on the legal boundaries of non-discrimination and determined that they were not violated as the “information available is not sufficient to demonstrate in a convincing manner that the doctors acted in bad faith with the intentions of ill-treating the applicant” as well as that “the objective evidence is not sufficiently strong in itself to convince the Court that it was part of an organized policy or that the hospital staff’s conduct was intentionally racially motivated”.¹⁵⁹ It did nevertheless establish that the Roma community, in general, is “severely disadvantaged in most areas of life”.¹⁶⁰

¹⁵⁸ *V.C. v Slovakia* (n 76), para 176.

¹⁵⁹ *Ibid* para 177.

¹⁶⁰ *V.C. v Slovakia* (n 76) para 178.

When the ECtHR had to examine the other two petitions regarding forced sterilization of Roma women in Slovakia, it excluded the examination of the boundaries of non-discrimination in both even though it did recognise that “Roma women had been at particular risk due to a number of shortcomings in domestic law and practice at the relevant time”.¹⁶¹ These cases are a clear example of boundaries that are avoided, and as such, the effect is maintaining the existing boundaries. While the Court explained in *V.C. v Slovakia* that there is lack of evidence to support an examination of Article 14, the threshold it followed in order to decide whether such examination was called for is exceptionally high. In particular, when it referred to the inability to establish that the forced sterilisation of V.C. was “part of an organised policy or that the hospital staff’s conduct was intentionally racially motivated”.¹⁶² The test of ‘intent’ in this ECtHR ruling resonates with international criminal law thresholds rather than with IHRL ones.¹⁶³ This is an issue that I return to in Chapter 5 when I re-imagine the case of *I.G. and Others v Slovakia* which shared many similarities with *V.C. v Slovakia*.¹⁶⁴

However, when the ECtHR’s approach in *V.C. v Slovakia* is compared with that taken by the IACtHR in *I.V. v Bolivia* on forced sterilisation, the test applied by the ECtHR to Article 14 seem less reasonable. In *I.V. v Bolivia* the applicant was a poor Peruvian refugee woman who claimed to have been forcibly sterilised without her full, prior and informed consent in a non-life-saving tubal ligation.¹⁶⁵ In addressing the question of violation of non-discrimination in this case the IACtHR did not seek to establish that the medical personal who performed the forced sterilisation on Ms. I.V. had done so as part of an ‘organised policy’ or that it was ‘intentionally racially motivated’. Instead, the IACtHR established that there is a need to

¹⁶¹ *N.B. v Slovakia* (n 76) para 96; *I.G. and Others v Slovakia* (n 76)143.

¹⁶² *V.C. v Slovakia* (n 76) para 177.

¹⁶³ *Rome Statute of the International Criminal Court*, UNTS 2187 (17 July 1998, in force 1 July 2002) Article 30.

¹⁶⁴ See Chapter 5, section 1, *I.G. and Others v Slovakia*.

¹⁶⁵ *I.V. v Bolivia* (n 36) para 1.

examine the alleged violation of the duty to not discriminate when respecting and ensuring the ACHR rights because it recognised the historical legacies of discrimination of women, in particular with regards to reproductive rights and decision-making.¹⁶⁶ In this sense, the IACtHR concluded that the non-consensual tubal ligation “annulled I.V.’s decision-making power and her autonomy in a discriminatory manner because the physician only took into account his criteria and failed to take into consideration the specific wishes and needs of his patient”.¹⁶⁷ The IACtHR established that the serialisation was “unjustified [and] paternalistic” because it did not take “into account her wishes and (...) grave consequences for her personal integrity based on the fact that she was a woman”.¹⁶⁸ In this case therefore, the IACtHR found a violation of non-discrimination without having to apply such a high-threshold as that taken by the ECtHR in *V.C. v Slovakia*.¹⁶⁹

Another example of boundary-avoidance can be found in the HRC cases regarding access to termination of pregnancies. In *Amanda Jane Mellet v Ireland*, the HRC simply concluded that the right to privacy and private life was violated alongside Articles 7 and 26 but chose to not address the applicant’s arguments regarding a violation of Articles 2(1) and 3.¹⁷⁰ Thus it avoided examining Article 2(1) on the obligation to respect and ensure the Covenant rights without any distinction, as well as Article 3 on the right to equality between men and women with regards to the convention rights. This is interesting as examining an alleged violation of Article 2(1) goes beyond a comparison-based examination of Article 26 prohibition on discrimination. That is, Article 26 has been interpreted as requiring a simple comparison which in this case is a comparison between pregnant Irish women who carry unviable fetuses and

¹⁶⁶ *Ibid* para 243.

¹⁶⁷ *Ibid* 246.

¹⁶⁸ *Ibid* para 246.

¹⁶⁹ *Ibid* para 249.

¹⁷⁰ *Amanda Jane Mellet v Ireland* (n 71), para 8.

seek an abortion, and pregnant Irish women who carry similar fetuses but do not wish to abort. In arguing that her right under Article 2(1) was violated, the applicant sought a broader, perhaps more radical examination of legal boundaries in the case that the HRC didn't engage with. When a similar case was raised before the HRC shortly afterwards, the case of *Siobhán Whelan v Ireland*, the HRC found the same violations only that this time it explicitly held that "in light of the findings above, the Committee will not separately examine the author's allegations under Articles 2(1), 3 and 19 of the Covenant".¹⁷¹ Thus, the legal boundaries were reaffirmed by the absence of their interpretation.

3.3 Change Receptive and Outward-Looking Approaches: when Old Boundaries are Stretched and New Boundaries Come to Life

The decision to couple change-receptive approaches and outward-looking approaches is not absolute, but rather stems from the general view that when an institution is willing and able to look beyond its own practice it may be more receptive to change. The IACtHR is an example of an adjudicative body that demonstrates a notable receptiveness towards change as well as an outward-looking approach to adjudication. In privacy and private life related cases regarding NHHLSs, the IACtHR has turned to examine a myriad of extra-systemic instruments to reach its conclusions regarding the boundaries in question. For example, in the case of *Atala Riffo and Daughters v Chile* the IACtHR raises the 'living instruments' doctrine¹⁷² whilst applying an outward-looking approach:

The Court has established, as had the European Human Rights Court, that human rights treaties are living instruments, whose interpretation must go hand in hand with evolving times and current living conditions. This evolving interpretation is consistent with the

¹⁷¹ *Siobhán Whelan v Ireland* (n 71), para 7.12.

¹⁷² *Ibid* para 7.13.

general rules of interpretation set forth in Article 29 of the American Convention, as well as those established in the Vienna Convention on the Law of Treaties.¹⁷³

The IACtHR informs its understanding of private life by observing ECtHR decisions which emphasise the breadth of the scope of the right to private life.¹⁷⁴ This case is especially important in the IACtHR jurisprudence on the right to privacy and private life specifically and to the general understanding of legal matters regarding sexual orientation. This is because in *Atala Riffo and Daughters v Chile* the IACtHR creates new links and expands the boundaries as it establishes that “a person’s sexual orientation is also linked to the notion of freedom and a person’s right to self-determination and to freely choose the options and circumstances that give meaning to his or her existence, in accordance with his or her own choices and convictions”,¹⁷⁵ as it asserts that emotional life with a partner is related to the “realm or circle of intimacy”.¹⁷⁶ In the same judgment the IACtHR establishes that sexual orientation is part of private life.¹⁷⁷

Artavia Murillo v Costa Rica offers an interesting example of examining legal boundaries. The case concerns access to In Vitro Fertilisation techniques (IVF) which was available and subsequently declared unconstitutional by the Constitutional Chamber of Costa Rica on the grounds that it threatened the life of the unborn.¹⁷⁸ The IACtHR examines this prohibition under the right to private life where the category private life includes reproductive autonomy. It weighs the “severity of the limitation of the rights involved (...) as compared to the importance of the protection of the embryo” and establishes that there is a severe violation as no access to IVF means that individuals who are infertile cannot access treatment and therefore

¹⁷³ *Atala Riffo and Daughters v Chile* (n 18) para 83.

¹⁷⁴ *Ibid* para 135.

¹⁷⁵ *Ibid* para 136.

¹⁷⁶ *Ibid*.

¹⁷⁷ *Ibid* para 165.

¹⁷⁸ *Artavia Murillo et al. (“In vitro fertilisation”) v Costa Rica* (n 72).

exercise their reproductive autonomy among other things.¹⁷⁹ In addition, this judgment establishes that infertility implies disability, and the IACtHR demonstrates both an outward-looking approach and a change receptive one by adopting the World Health Organisation's approach on the matter which defines infertility as a disease.¹⁸⁰ It also stretches the boundaries to argue that not only does this affects negatively those who suffer from infertility as disability, but that there are negative financial aspects and gender stereotyping that relate to this prohibition.¹⁸¹

Conclusion: It's Time to Think Beyond the Right to Privacy

The right to privacy became a space of precarious expansion and inclusion for NHHLSs. While it has brought relief to many NHHLSs, it should not limit our legal imagination and legal claims. This is because privacy alone cannot fix IHRL's acts of inclusion and exclusion which create and uphold a hierarchy of subjects, including that of human legal subjects. By framing the trend towards using privacy as an attempt to make space in IHRL for NHHLSs, I underscore the limitations of this right, both in terms of structure and interpretation.

Fixing privacy will not make it a better legal instrument for these claims as it cannot accommodate them fully. This is because the claims regarding bodies, identities and relationships which have thus far been brought predominantly within the right to privacy, are claims regarding NHHLSs' recognition as full human legal subjects. These claims are a constant reminder of IHRL's acts of inclusion and exclusion. At the same time, as my analysis of the role of adjudicative bodies shows, while IHRL operate through acts of inclusion and

¹⁷⁹ *Artavia Murillo et al. ("In vitro fertilisation") v Costa Rica*, (n 32) para 314.

¹⁸⁰ The IACtHR expressly notes the World Health Organization definition of infertility in para 288 of this judgment. *Ibid* para 288.

¹⁸¹ *Ibid* para 314.

exclusion, these are not static categories but rather dynamic. I highlighted the role of adjudicative bodies have in IHRL as bodies tasked with interpretation of IHRL and therefore an ongoing engagement with legal boundaries. I therefore explained that this dynamic aspect of IHRL needs to be taken such into account when developing potential new avenues that go beyond the right to privacy. Any new approach needs to be informed by the tensions of working within IHRL and part of these tensions is the role of adjudication in setting boundaries. Therefore, the main ‘problem’ with privacy is not that it needs fixing, but that we need to not limit ourselves to thinking that it is all that we have.

In the next chapter I explore a concept that has been linked to the right to privacy but is being used in various ways, within privacy and outside of privacy, in relation to NHHLSs: individual self-determination. Chapter 3 is dedicated to exploring the trajectories of this concept and affirming its growing uses by various IHRL actors so to argue that it is an *emerging right*. The scope of the next part of this thesis is therefore to imagine what we can have beyond privacy that could protect the harms that has thus far have been brought by NHHLSs under the right to privacy. In Chapter 4, I present my approach to shaping this emerging right around the concept of recognition of subjects and demonstrate how to determine its limits. Finally, Chapter 5 is the third and conclusive part of this thesis, where I apply the framework of the right to individual self-determination to cases that were previously decided under privacy.

Part II: Conceptualising an Emerging Right to Individual Self-Determination

Chapter 3: Tensions and Opportunities in Identifying an Emerging Right to Individual Self-Determination

Introduction

I concluded the first part of my thesis by answering one core aspect of the research question: namely what the limitations of the right to privacy vis-à-vis NHHLSs are. I therefore applied the analytical framework of IHRL as operating through inclusion and exclusion which I introduced in Chapter 1 to the right to privacy and claimed that privacy is a particular expression of these broader structural limitations. I examined the claims that NHHLSs bring within privacy and explained that not only is this right a precarious avenue for these human legal subjects and their claims, but it is also inadequate. Privacy, can, at best, accommodate only a part of the harm of which they complain. This is because the harm may have a privacy element, but relates in its essence to the lack of substantive recognition of NHHLS as full human legal subjects. Harm which results from the structural and interpretative exclusion of these human legal subjects from IHRL. At the same time, I also explained that the categories of inclusion and exclusion are dynamic by observing the role of adjudication in IHLR and the task of interpretation. This chapter builds on these conclusions and presents an initial scoping of the concept of individual self-determination.

In the last two decades, the term self-determination has become more frequently used within IHRL in relation to individuals. In the following chapter, I present and problematise the concept of individual self-determination by tracing its trajectories and examining its status in IHRL. The main argument I present is that individual self-determination is developing into a new and emerging right to individual self-determination. This development is notable within the jurisprudence of the ECtHR and the IACtHR as well as in different soft law instruments. However, it is not emerging as a unified concept nor as a right with a clear trajectory: with one exception – it is predominantly used in relation to NHHLS.

By analysing the trajectories of its uses and development in IHRL, I conclude that these are indicative of its ongoing process of emergence as a right. I demonstrate this by showing that it is not uncommon for human rights judgments to refer to the self-determination of individuals, as well as in academic scholarship and advocacy materials and reports by NGOs. However, on the face of it, these different sources and actors use individual self-determination in a fragmented or compartmentalised manner. Nonetheless, these fragmented or compartmentalised uses of individual self-determination suggest at least one primary common denominator – individual self-determination is emerging in relation to NHHLSs and thus constitutes an opening for re-imagination of IHRL. Therefore, constructing a holistic understanding of this evolving concept in IHRL is warranted. In this chapter, I present an overview of the various uses and developments of this concept and weave together its fragmented conceptualisations.

At the same time, in line with the critical legal scholarship that I engage with in this thesis, I contend that the concept of individual self-determination is emerging as a right while being *embedded with tensions*. These tensions are centred around the concept's ties with the right to

privacy and framings of atomised human legal subjects that engage in abstracted choice and decision-making. Tensions which are part of the broader critique to the IHRL's acts of inclusion and exclusion that my thesis engages in. At the same time, I agree with Spade who, while having serious reservations on the concept of self-determination in relation to low-income gender-transgressive people because it is "bound up in understandings of individuality that support capitalist concepts like individual 'freedom to sell labour' that obscure the mechanisms of oppression we are seeking to overcome", argues that it can be strategically developed as "a tool to express opposition to the coercive mechanisms of the binary gender system".¹ I therefore set out the tensions as a necessary condition to engaging with the shaping of the emerging right to individual self-determination in a responsive and responsible manner. I argue that a strategic use and development of the emerging right is possible only when it is informed by the tensions it brings and when these tensions shape its future uses and understandings. This is precisely what I canvass in Chapter 4, where I approach the task of shaping the emerging right to individual self-determination by bringing its tensions to the forefront.

This chapter is divided into two main parts. The first is dedicated to exploring the concept of individual self-determination in IHRL. I set out two starting points for the development of individual self-determination in IHRL soft law instruments and jurisprudence: a chronological starting point – the 1994 Cairo Programme of Action² – and a substantial starting point – the 2002 ECtHR judgment in *Pretty v United Kingdom*.³ I explain the complicated legacy of each of these starting points that shapes the trajectory of this concept. I then move to weave together

¹ Dean Spade, 'Compliance is Gendered: Struggling for Gender Self-Determination in a Hostile World' in Paisley Currah, Richard M. Juang and Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press 2006) 235.

² *International Conference on Population and Development Programme of Action Cairo*, United Nations Population Fund (UNFPA) A/CONF.171/13 (5-13 September 1994).

³ *Pretty v United Kingdom* App no 2346/02 (ECtHR, 29 April 2002).

the various points of convergence and fragmentation within the uses and developments of individual self-determination. I underline the main common denominator – namely, the different sources and actors all use this concept in relation to different NHHLSs. Outside of this shared feature, two main themes arise. First, in many of these instances individual self-determination is symbiotic with the right to privacy, and thus, with the tensions and challenges I highlighted in Chapter 2. At the same time, the second theme that arises is that individual self-determination is being used and framed also outside the seemingly symbiotic relationship it has with the right to privacy, and hence with many of its tensions and challenges.

In the final part of this chapter, I re-examine the uses and developments of the concept of individual self-determination which I presented in the first part of this chapter as evidence in support of an emerging right in IHRL. I examine this evidence within the doctrine of sources of international law, in particular through Article 38 of the Statute of the International Court of Justice.⁴ In particular, the evidence falls within the category of subsidiary sources of international law as well as within soft law more broadly; a source that is only partially accounted for in Article 38. I conclude that the trend towards including individual self-determination in subsidiary sources, as well as in soft law instruments satisfies the threshold of an ‘emerging’ right. This process of ‘emergence’ constitutes a possibility to shape the content of individual self-determination in a responsive and responsible manner for NHHLSs.

⁴ *Charter of the United Nations and Statute of the International Court of Justice*, 1 UNTS XVI (26 June 1945, in force 24 October 1945) Article 38.

1. The Concept of Individual Self-Determination: Context and Trajectories

1.1 Finding a Starting Point: Individual Self-Determination's Appearance in International Human Rights Law

1.1.1 A Chronological Starting Point: The Cairo Programme of Action

The first time self-determination was considered in IHRL outside of the recognised and accepted meaning of peoples' self-determination is in the 1994 Cairo Programme of Action. This soft law instrument was signed by 179 states during the International Conference on Population and Development, which was organised by the United Nations Population Fund (UNPF).⁵ The Conference is often remembered in a positive light due to the engagement and role of NGO's,⁶ especially women's organisations and the increased participation of non-Western countries and organisations both in the drafting of the Programme as well as in preparatory events and side events to the conference itself.⁷ It is also positively framed as an important moment for women's reproductive rights,⁸ as according to some the Cairo Programme of Action marks the "first time, the needs and perspectives of women took centre stage in the population debate at the international level".⁹

⁵ *International Conference on Population and Development Programme of Action Cairo* (n 2).

⁶ Alison C McIntosh and Jason L Finkle, 'The Cairo Conference on Population and Development: A New Paradigm?' (1995) 21 *Population and Development Review* 223, 223.

⁷ Jocelyn DeJong, 'The Role and Limitations of the Cairo International Conference on Population and Development' (2000) 51 *Social Sciences and Medicine* 941, 944-945.

⁸ Cook writes in 1995 about various UN conferences including the Cairo one and states that: "These conferences will provide important opportunities to recognise the abuses that women have suffered through denials of reproductive self-determination, physical integrity, and social justice, and to characterise such abuses as violations of particular human rights". Rebecca J Cook, 'Human Rights and Reproductive Self-Determination' (1995) 44 *American University Law Review* 975, 977.

⁹ Barbara B Crane and Stephan L Issacs, 'The Cairo Programme of Action: A New Framework for International Cooperation on Population and Development Issues' (1995) 36 *Harvard International Law Journal* 295, 296.

The Programme of Action came into being as a means to address the problem of “overpopulation” and to find different strategies to achieve population control.¹⁰ It is often described as a “paradigm shift” in population policies and discourse.¹¹ McIntosh and Finkle similarly point out that the Programme of Action “avoids a demographic and populationist approach and endorses an individualistic plan that gives pride of place to women’s rights, status, and empowerment”.¹² The Programme thus places reproductive rights at its centre as an issue of primary relevance to tackling population and development issues.¹³ In this sense, the Programme constitutes a shift “from a macro concern with rapid population growth to individual rights in sexuality and reproduction”.¹⁴ In addition to bringing women’s reproductive rights and health to the forefront, the Programme also reaffirmed the importance of women’s perspectives to addressing population and development issues.¹⁵

It is in this context where self-determination of individuals first emerges in IHRL. The concept is mentioned in a section dedicated to the reproductive health and rights of adolescents which explained the importance of educating “young men to respect women’s self-determination”.¹⁶ It creates a direct nexus between educating men on sexual health and women’s self-determination and the “efforts to slow the momentum of population growth”.¹⁷ In this sense, women’s self-determination is not an end to itself, but a means for addressing population growth. It is important to note that the Programme of Action doesn’t explain nor define self-

¹⁰ Rajani Bhatia, Jade S Sasser, Diana Ojeda, Anne Hendrixson, Sarojini Nadimpally and Ellen E Foley, ‘A Feminist Exploration of ‘Populationism’: Engaging Contemporary Forms of Population Control’ (2020) 27 *Gender, Place and Culture* 333, 333.

¹¹ DeJong (n 7) 941.

¹² McIntosh and Finkle (n 6) 235.

¹³ Bhatia, Sasser, Ojeda, Hendrixson, Nadimpally and Foley (n 10) 343.

¹⁴ DeJong (n 7) 941.

¹⁵ Crane and Issacs (n 9) 296; DeJong (n 7) 947.

¹⁶ *International Conference on Population and Development Programme of Action Cairo* (n 2) 74 Reproductive Rights and Reproductive Health, E Adolescents, point 7.41.

¹⁷ *Ibid.*

determination and its role in IHRL or how to access and protect it. It simply states that women ‘have it’ and that it relates to their reproduction and sexuality.¹⁸

Setting the Programme of Action as the chronological starting point for the emergence of individual self-determination onto IHRL landscape is uncomfortable and imbued with tensions. On the one hand, it locates self-determination in relation to NHHLSs, i.e., women, and ties self-determination to the ability to be part of reproductive health and sexuality related choices. On the other hand, these sexual and reproductive health related choices were solely discussed in relation to cis-heterosexual choices, as the Programme’s primary concern was with a limited category of ‘women’ -as cis-hetero-pre-menopausal ones through the focus on population growth. Therefore, instead of advancing women’s reproductive health and sexuality, it is advancing a very narrow framing and meaning of these concepts and excludes non-cis and non-heterosexual women from the discussion. The protection of ‘choice’ within self-determination of women therefore protects a very limited set of choices. This is important to note as many subsequent uses of the concept of self-determination also include a notion of choice as part of its core meaning albeit without any clear reference to the Programme of Action. Furthermore, not only does the Programme of Action set out self-determination as protecting a very limited set of choices for women and a very limited definition of who counts as a woman, but it has a primary objective – to avoid overpopulation by population control and management and for the benefit of development. In this sense, the framing of a ‘paradigm shift’ contributes to a responsabilisation process of individuals for their own reproductive related risks.¹⁹ This means

¹⁸ *Ibid.*

¹⁹ For additional perspectives beyond law on what ‘responsibilisation’ means see: Elyse Ona Singer, ‘From Reproductive Rights to Responsibilisation: Fashioning Liberal Subjects in Mexico City’s New Public Sector Abortion Program’ (2016) 31 *Medical Anthropology Quarterly* 445-463; Garry C Gray, ‘The Responsibilisation Strategy of Health and Safety: Neo-Liberalism and the Reconfiguration of Individual Responsibility for Risk’ (2009) 49 *British Journal of Criminology* 326-342 and Nikolas Rose, ‘Government and Control’ (2000) 40 *British Journal of Criminology* 321-339.

that instead of addressing systemic failings and challenges, the responsibility falls back on the individual instead of the state and international organisations. In this sense, women are made at least in part responsible for population issues through the idea of self-determination. Third, while the paradigm shift may have erased the normalised use of the term ‘population control’, this does not mean that the Programme of Action is free of the legacies of population control policies. In this sense, self-determination emerges as an empowering concept of women’s ability to make decisions over their reproduction and (hetero)sexuality but such empowerment is tainted by these legacies and the underlying assumption that less developed and non-Western and poor countries need to tame their reproduction and are ultimately made responsible for the material conditions in which they live. Global structural inequalities are to an extent masked by the new ability to self-determination.

1.1.2 A Substantial Starting Point: *Pretty v United Kingdom*

I mark the second starting point for the trajectory of individual self-determination with the ECtHR judgment in *Pretty v United Kingdom*.²⁰ I set this judgment as the *substantial* starting point for the trajectory of this concept because after *Pretty v United Kingdom* self-determination of individuals enters the jurisprudence on Article 8 at the ECtHR. Furthermore, a conceptual continuity can be traced between the jurisprudence of the ECtHR and that of the IACtHR with regards to the establishment of individual self-determination in relation to the right to privacy in both human rights systems.²¹ Finally, and relatedly, *Pretty v United Kingdom* established a general nexus between individual self-determination and the right to privacy and

²⁰ *Pretty v United Kingdom* (n 3).

²¹ *Atala Riffo and Daughters v Chile*, Merits, Reparations and Costs (IACtHR, 24 February 2012), para 135.

choice. Such nexus, I explain later in this chapter, is also one of the main sources of tension in re-imagining individual self-determination beyond the right to privacy.

In this case the ECtHR was asked to deliberate on the applicant's wish to terminate her life with the assistance of her husband. Mrs Pretty, the applicant, suffered from a terminal illness and a paralysis from her neck down and had a life expectancy of a few months if not weeks, and her paralysis did not allow her to commit suicide without the assistance of another person.²² However, her illness did not affect her cognition and she was able to fully articulate her wants and needs clearly and decisively.²³ She appealed to the ECtHR as the United Kingdom criminalises assisted dying and, should her husband fulfil her wish to do so, he would be faced with criminal charges.²⁴ In its judgment, the Court addressed the notion of self-determination in relation to two ECHR rights. First, in relation to the right to life (Article 2),²⁵ and, second, in relation to the right to privacy (Article 8).²⁶

In Ms. Pretty's domestic appeal to the House of Lords, she argued that the right to life "recognises that it is for the individual to choose whether or not to live and so protects that individual's right to self-determination in relation to issues of life and death".²⁷ However, in her arguments before the ECtHR, Ms. Pretty did not explicitly refer to self-determination. Instead, she argued that the right to life doesn't protect life itself, rather it protects the right to "choose whether or not to go on living".²⁸ Nonetheless, the ECtHR decided to explicitly include

²² *Pretty v United Kingdom* (n 3) paras 7-9.

²³ *Ibid* para 9.

²⁴ *Ibid* para 10.

²⁵ *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)* Council of Europe ETS 5 (4 November 1950, in force 3 September 1953) Article 2.

²⁶ *Ibid* Article 8.

²⁷ *R (on the application of Pretty) v Director of Public Prosecutions* [2002] 1 ALL ER 1 UKHL 61 para 4.

²⁸ Ms. Pretty explained that "Article 2 protected not only the right to life but also the right to choose whether or not to go on living. It protected the right to life and not life itself (...) Article 2 therefore acknowledged that it was for the individual to choose whether or not to go on living and protected her right to die to avoid inevitable suffering and indignity as the corollary of the right to life". *Pretty v United Kingdom* (n 3) para 35.

self-determination when addressing the applicant's claims under Article 2. The Court affirmed that there has been no violation of Article 2 as the right to life does not contain a right to die.²⁹ More specifically, the Court stated that the right to life does not "create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life".³⁰ This is because the right to life places states under the obligation to protect life from "deliberate or intended use of force by State agents" and lawful use of force that "may result, as an unintended outcome, in the deprivation of life".³¹ Thus, the framing of the right to life "is unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life".³² In addressing self-determination within Article 2, the ECtHR clearly set a hard limit – the right to life cannot include in its ordinary meaning a person's self-determination that facilitates a right to choose death.³³

However, in the Court's assessment of the right to privacy and private life self-determination was not ruled out. Ms. Pretty explained that "the right to self-determination ran like a thread through the Convention as a whole"³⁴ of which the primary example is Article 8.³⁵ The right to self-determination, according to the applicant, "encompassed the right to make decisions about one's body and what happened to it",³⁶ which includes the right to die as well as a right to decide how and when to die.³⁷ Ms. Pretty's use of self-determination within the right to privacy

²⁹ *Ibid* para 42.

³⁰ *Ibid* para 40.

³¹ *Ibid* paras 38-39.

³² *Ibid* para 39.

³³ It is important to note that the HRC issued a recent General Comment on the right to life in which it clearly stated that: "The right to life is a right that should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity"; in this sense, the ECtHR interpretation of ECHR article 2 appears to be a very narrow one. *CCPR General Comment No 36: Article 6 (Right to Life)* United Nations, Human Rights Committee (3 September 2019), para 3.

³⁴ *Pretty v United Kingdom* (n 3), para 58.

³⁵ *Ibid*.

³⁶ *Ibid*.

³⁷ *Ibid*.

can be traced to the domestic proceedings and the use of the accepted principle of self-determination in relation to patients' rights in English, US and Canada common law systems which protect the right to refuse treatment, even if lifesaving, when the patient is deemed able to articulate their wishes.³⁸ Thus, patients' self-determination contains notions of liberty to make decisions regarding one's body and health.

Taking her arguments into account, the ECtHR ruled that "[a]lthough no previous case has established as such a right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees".³⁹ I claim that the ECtHR's approach to individual self-determination in this judgment is vague and ambiguous. While the judgment in *Pretty* introduced individual self-determination to the ECtHR jurisprudence ("although no previous case has established as such"), the Court did not clarify the role of self-determination within the right to privacy nor its relationship with the notion of personal autonomy.

However, it appears that the subsequent ECtHR jurisprudence attributes a stronger statement regarding the incorporation of self-determination within the right to privacy to the decision in *Pretty v United Kingdom*. For example, in *Daróczy v Hungary*, where the ECtHR cited to *Pretty v Kingdom* and affirmed that the "purpose of Article 8 of the Convention (...) is to protect individuals' self-determination".⁴⁰ Alternatively, in the case of *Jehovah's Witnesses of Moscow and Others. v Russia*, the Court stated that "[t]he very essence of the Convention is respect for human dignity and human freedom and then notions of self-determination and personal autonomy are important principles underlying the interpretation of its guarantees".⁴¹ Or, in

³⁸ *Airedale NHS Trust v Bland* [1993] 1 All ER 821 at 866.

³⁹ *Pretty v United Kingdom* (n 3) para 61.

⁴⁰ *Daróczy v Hungary* App no 44378/05 (ECtHR, 1 July 2008), para 32.

⁴¹ *Jehovah's Witnesses of Moscow v Russia* App no 302/02 (ECtHR, 10 June 2010), para 135.

Costa Pavan v Italy, the ECtHR referred back to *Pretty v United Kingdom* as a judgment which established the breadth of Article 8 as containing also a “right to self-determination”.⁴² Similarly, in *Parrillo v Italy*, the ECtHR uses the framing “right to self-determination” when establishing that Article 8 was indeed applicable as “the applicant’s ability to exercise a conscious and considered choice regarding the fate of her embryos concerns an intimate part of her personal life and accordingly relate to *her right to self-determination*”.⁴³ The ECtHR further used self-determination in this case to explain that “[t]he Court’s task is not to review the consistency of the Italian legislation in the abstract (...) the applicant must relate to the subject of the complaint that she raises before the Court, namely, the restriction of her right to self-determination regarding the fate of her embryos”.⁴⁴

When these statements regarding the role of self-determination within the right to privacy and the ECHR are compared to the ECtHR decision in *Pretty v United Kingdom*, an evident gap becomes visible. Simply put, there is an evident gap between the text of *Pretty* in which the ECtHR uses self-determination of individuals for the first time and the conclusions that subsequent jurisprudence draws from it. While this gap is important to note, it also evidences the importance of *Pretty v United Kingdom* to the ECtHR jurisprudence on the right to privacy and to the development of self-determination of individuals within the ECHR. And, as I show below, the further effects of the ECtHR’s decision to include the concept of self-determination within the right to privacy.

⁴² *Costa and Pavan v Italy* App no 54270/10 (ECtHR, 11 February 2013), para 55 citing to *Pretty v United Kingdom* (n 3), para 61.

⁴³ *Parrillo v Italy* App no 46470/11 (ECtHR, 27 August 2015), para 159 (emphasis added).

⁴⁴ *Ibid* para 191.

1.2 Finding Shared Meanings

Thus far I introduced two possible starting points to thinking about individual self-determination in IHRL and explained that each of these brings forth tensions that must be accounted for when considering *if* and *how* to re-imagine individual self-determination strategically. I also showed that both starting points use individual self-determination in relation to NHHLSs, and that they relate to the notion of choice and decision-making. I now move to explain how this concept is used and developed after these two starting points.

I identify three main categories within the further development of this concept in IHRL: (i) the continuous development of individual self-determination vis-à-vis NHHLSs; (ii) the nexus between the right to privacy and individual self-determination and (iii) the emergence individual self-determination beyond the right to privacy. Each of these developments presents some tensions and opportunities that I assess in order to determine whether further engagement with this concept is desirable.

1.2.1 *Non-Hegemonic Human Legal Subjects and Individual Self-Determination*

As I explained in the introduction to this thesis, this is a category which I find useful to incorporate all human subjects that self-identify or are identified by others as different to IHRL's universalised narrow human legal subject – the hegemonic, heteronormative-cisgender-bodily-abled-adult-wealthy-Christian-Western-white-man. There is an evident trend in IHRL that employs the concept of individual self-determination in relation to these subjects.

Within the jurisprudence of the ECtHR, individual self-determination is found in judgments relating to the right to privacy of LGBT persons⁴⁵ and persons with (dis)abilities.⁴⁶ In the IACtHR, self-determination is used in relation to LGBT persons,⁴⁷ cis-women⁴⁸ and persons with (dis)abilities as well.⁴⁹ In soft law instruments, such as the Yogyakarta Principles of 2007⁵⁰ and 2017,⁵¹ individual self-determination is used solely in relation to LGBTQI+ persons as the scope and purpose of the Principles is to offer an additional layer of interpretation to the normative content of the ICCPR that fits their needs and lived experiences. The Committee on the Rights of Persons with Disabilities also included the concept of self-determination in its General Comment on Article 19 on the right to live independently and being included in the community.⁵² In addition, the former Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also included individual self-determination in his report when examining the applicability of the prohibition in relation to “the unique experiences of women, girls, and lesbian, gay, bisexual, transgender and intersex persons”.⁵³

This trend can be explained at least in part when understanding the existing uses of individual self-determination as fragmented. The broad categories which I presented in the introduction are therefore relevant here as well: gender self-determination, sexual self-determination,

⁴⁵ For example, *Van Kück v Germany* App no 35968/97 (ECtHR, 12 June 2003) and *Y.Y v Turkey* App no 14739/08 (ECtHR, 10 June 2015).

⁴⁶ *Pretty v United Kingdom* (n 3).

⁴⁷ *Atala Riffo and Daughters v Chile* (n 21); *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, Advisory Opinion OC-24/17 (Inter-American Court of Human Rights, 24 November 2017).

⁴⁸ *I.V. v Bolivia*, Preliminary Objections, Merits, Reparations and Costs (IACtHR, 30 November 2016).

⁴⁹ *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, Preliminary Objections, Merits, Reparations and Costs (IACtHR, 28 November 2012).

⁵⁰ *Yogyakarta Principles – Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, International Commission of Jurists (March 2007) Principle 3.

⁵¹ *The Yogyakarta Principles Plus 10 - Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*, International Commission of Jurists (10 November 2017) Principles 6, 31, 32.

⁵² *CRPD General Comment 5: Article 19 (on Living Independently and Being Included in the Community)* Committee on the Rights of Persons with Disabilities (27 September 2017) paras 8 and 16(a).

⁵³ *Report of Special Rapporteur on Torture and Other Inhuman or Degrading Treatment or Punishment, Juan E. Méndez*, UN, Human Rights Council, A/HRC/31/57 (5 January 2016), para 5.

reproductive self-determination and self-determination of people with disabilities.⁵⁴ Each of these compartmentalised uses of individual self-determination are targeted to the needs of a specific yet heterogeneous group of NHHLs. For example, individual self-determination within the context of *gender* self-determination refers to the domestic and international efforts to set out a simple, quick, and accessible avenue for legal gender recognition that is based solely on self-identification for transgender, gender-non-conforming and non-binary individuals. Amnesty International submitted an Amicus Curiae brief to the Supreme Court of Korea for a case regarding legal gender recognition in which the NGO explained that “legal gender recognition based on self-determination is most protecting of the human rights of transgender persons, and as such increasingly reflected in international legal standards and practice”.⁵⁵ It further affirmed that “the right to gender recognition is established in domestic and international law and is derived from the rights to self-determination and privacy”.⁵⁶ In fact, many states have moved to change domestic laws regarding legal gender recognition to adopt a self-determination model. However, while there is a shift towards individual self-determination-based legal gender recognition, Baars argues that full self-determination of transgender, gender-nonconforming and non-binary persons cannot be reached within the confines of legal gender.⁵⁷

Individual self-determination of NHHLs can be found in reproductive and sexual self-determination where individual self-determination predominately, but not only, refers to the experiences and needs of cis women. This aspect of individual self-determination is already exemplified in the Cairo Programme of Action which I explained earlier in the chapter. Another

⁵⁴ See: Introduction, section 2.2 ‘Individual Self-Determination’.

⁵⁵ *Amicus Curiae Brief of Amnesty International in the Supreme Court of Korea on Legal Gender Recognition (Case No 2020SEU616)* Amnesty International, para 51.

⁵⁶ *Ibid* para 11.

⁵⁷ Grietje Baars, ‘Queer Cases Unmake Gendered Law, or, Fucking Law’s Gendering Function’, (2019) 45 *The Australian Feminist Law Journal* 15, 48-50.

example is that of the centre for Reproductive Health, a prominent international NGO, who in its memo to the Nepalese Supreme Court in 2008 stated that “[w]omen’s right to reproductive self-determination describes several interrelated rights, including the rights to private and family life, and liberty”.⁵⁸

1.2.2 *Individual Self-Determination within the Existing Framework of the Right to Privacy*

Another main feature of the fragmented uses of individual self-determination is that it is growing within the existing framework of the right to privacy. This is primarily expressed in relation to the ability to make choices and to personal autonomy in particular aspects of an individual’s private life. For example, the ECtHR jurisprudence since *Pretty v United Kingdom* suggests that individual self-determination protects a right to be free to make decisions regarding one’s gender identity and sexual identity as expressed in *Van Kück v Germany*⁵⁹ and *Y.Y. v Turkey*.⁶⁰ In *Van Kück v Germany*, a case regarding a transgender woman who complained that the denial of the reimbursement of her gender reassignment and the various proceedings that she had to undergo within the German appeal system harmed her right to privacy and private life. The applicant explained that in making her case for reimbursement before the German Court of Appeal, her sexual identity was disrespected as a transgender person and personal details about her intimate life were constructed to undermine her complex experience with her gender identity.⁶¹ The applicant gave several examples of the offensive framings that the German Court of Appeal constructed of her lived experiences, especially regarding her transition. The German Court of Appeal falsely stated that she transitioned

⁵⁸ *Lakshmi v Government of Nepal: CRR Memo to Supreme Court of Nepal*, Centre for Reproductive Rights, 2.

⁵⁹ *Van Kück v Germany* (n 45).

⁶⁰ *Y.Y. v Turkey* (n 45).

⁶¹ *Van Kück v Germany* (n 45) para 67.

because she discovered that she was infertile when she still married⁶² and, that she “deliberately caused [her] disease [transsexuality]”.⁶³ Therefore, the gender reassignment procedures were not proven to be a necessary part of her treatment of this “disease” and no reimbursement was needed.⁶⁴ In assessing whether the applicant’s right to privacy and private life was breached, the ECtHR stated that “the civil court proceedings touched upon the applicant’s freedom to define herself as a female person, one of the most basic essentials of self-determination”.⁶⁵ The Court further explained that what matters is not the entitlement to reimbursement as such, but the *impact* of the German Court of Appeals’ decisions had on the applicant’s right to respect for her sexual self-determination as part of her right to respect for her private life.⁶⁶ Thus, it frames the concept of self-determination as including both the freedom to define oneself in terms of gender identity and sexual identity. However, both aspects are still within the confines of the right to privacy and in accordance with the Court’s jurisprudence on Article 8, which already includes the right to form an identity.

Y.Y. v Turkey is another example of the ECtHR’s confinement of self-determination within the right to privacy. The applicant in *Y.Y. v Turkey* argued that Turkey breached, among other rights, his right to privacy and private life by denying him access to a gender reassignment surgery based on the fact that he is deemed able to procreate.⁶⁷ He argued that this barrier to accessing gender reassignment surgery, deprived him and individuals like himself from “any opportunity to resolve the discrepancy between their perception of their gender identity and the biological reality”.⁶⁸ When addressing the claim that the fertility condition breached the right

⁶² *Ibid* para 26.

⁶³ *Ibid* para 23.

⁶⁴ *Ibid* paras 22-23.

⁶⁵ *Ibid* para 73.

⁶⁶ *Ibid* para 78.

⁶⁷ *Y.Y v Turkey* (n 45) para 44.

⁶⁸ *Ibid*.

to privacy and private life, the Court reaffirmed its framing of individual self-determination as containing also a gender identity which it established in *Van Kück v Germany*.⁶⁹ It recognised the freedom to define and determine one's gender identity as "one of the most basic essentials of self-determination".⁷⁰

In *Parrillo v Italy*, a case regarding the applicant's wish to donate the embryos she produced via assisted reproduction techniques to scientific research, the ECtHR made further use of the concept of individual self-determination as an evolving aspect of the obligations under the right to privacy.⁷¹ The ECtHR thus affirmed that "the applicant's ability to exercise a conscious and considered choice regarding the fate of her embryos concerns an intimate aspect of her personal life and accordingly relates to her right to self-determination".⁷² Again, individual self-determination is understood as relating to discretion within the right to privacy.

The other main site of jurisprudential developments is that of the IACtHR which has incorporated individual self-determination when deciding on *Atala Riffo and Daughters v Chile*.⁷³ The applicant in the case was a divorced lesbian woman whose daughters were removed from her custody by her ex-husband due to the fact that her same-sex partner was cohabiting with her and her children. When assessing her arguments under Article 11, the Court established that "a person's sexual orientation is also linked to the notion of freedom and a person's right to self-determination and to freely choose the options and circumstances that give meaning to his or her existence, in accordance with his or her own choices and

⁶⁹ *Van Kück v Germany* (n 45) para 73.

⁷⁰ *Ibid* paras 73; 78; *Y.Y v Turkey* (n 45) para 102.

⁷¹ *Parrillo v Italy* (n 43) para 191.

⁷² *Ibid* para 159.

⁷³ *Atala Riffo and Daughters v Chile* (n 21).

convictions”.⁷⁴ A similar framing returns as well in the 2017 Advisory Opinion on Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples.⁷⁵

The Advisory Opinion was requested by Costa Rica who asked the Court for guidance on five specific questions regarding recognition of gender identity, and same-sex relationship and patrimonial rights.⁷⁶ In the Advisory Opinion, the IACtHR affirmed that “the protection of private life is not restricted to the right to privacy” and is instead broad “because it comprises a series of factors related to the dignity of the individual, including, for example, the capacity to develop their own personality and aspirations, determine their identity, and define their personal relationships”.⁷⁷

Lastly, the 2017 Yogyakarta Principles+10 also refer to individual self-determination in relation to the right to privacy.⁷⁸ More specifically, the Principles employ the concept of self-determination in relation to privacy as informational privacy rather than privacy as a bigger sphere of decision-making in one’s life which is where most of the development of self-determination has occurred. The Principles set limits to requests for data and information regarding a person’s sex and/or gender for LGBTQI+ individuals. The notion of self-determination is employed as a standard to comply with to ensure that such requirements do not harm or compromise the privacy, safety and wellbeing of LGBTQI+ individuals and groups. Therefore, Principle 6 explicitly states that any requirement for this type of information has to “respect all persons’ right to self-determination of gender”.⁷⁹ This approach to the nexus

⁷⁴ *Ibid* para 136.

⁷⁵ *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples* (n 47) para 88.

⁷⁶ *Ibid* paras 3-5.

⁷⁷ *Ibid* para 87.

⁷⁸ *The Yogyakarta Principles Plus 10* (n 51) Principle 6.

⁷⁹ *Ibid* Principle 6(G).

between self-determination and privacy highlights the breadth of the former as a broader principle that informs and shapes the latter.

While the framework of the right to privacy is a primary site of production of individual self-determination, it includes different approaches to constructing this concept. The ECtHR's approach is privacy-centred, which is shaped according to its particular understanding of choice and decision-making in the private sphere of personal discretion. The IACtHR instead approaches individual self-determination within the right to privacy as a right that is composed also of human dignity. Meaning, that even though it upholds the nexus between privacy and individual self-determination, its framing of privacy is already by default broader than that of the ECtHR. Lastly, the Yogyakarta Principles¹⁰ also frame individual self-determination in relation to the right to privacy, but privacy itself is understood as informational privacy, rather than upholding the right to privacy as a sphere of freedom to make choices and to self-determine.

1.2.3 *Individual Self-Determination Beyond the Right to Privacy*

While the nexus between individual self-determination and the right to privacy appears to be strong, individual self-determination has been developing in relation to other human rights which suggests that there is a possibility to re-imagine this concept beyond this right. These rights include the right to be recognised as a person before the law, the right to dignity, the right to liberty, the right to live independently and to be included in the community, the right to health, the right to be free from torture and cruel, inhuman and degrading treatment or punishment.

The Yogyakarta Principles use self-determination in relation to the right to be recognised before the law.⁸⁰ More specifically, the Principles further the understanding of the right to be recognised as a person before the law as relating to gender self-determination and sexual self-determination. Principle 3 of the 2007 Principles states that “persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life”⁸¹ and that “Each persons’ self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom”.⁸² It therefore affirms the ways in which different requirements for gender recognition are incompatible with this interpretation of ICCPR Article 3 such as conditioning it upon “medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy” as well as conditioning it upon “marriage or parenthood”.⁸³ This is supplemented in the 2017 Principles document under Principle 31 which underscores that legal recognition cannot depend on either reference, assignment, or the disclosure of one’s “sex, gender, sexual orientation, gender identity, gender expression or sex characteristics”.⁸⁴ And, in this sense, Principle 31 suggests that the preferred procedures for legal recognition must be “based on the self-determination of the person”.⁸⁵

As I explained in the previous section, the IACtHR is developing individual self-determination in relation to the right to dignity as well as the right to liberty. The framing of individual self-determination that emerges first in *Atala Riffo and Daughters v Chile* cites to the IACtHR’s approach in its analysis of liberty in *Chaparro Álvarez and Lapo Iñiguez v Ecuador* where it affirms that

⁸⁰ *Yogyakarta Principles* (n 50) Principle 3.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *The Yogyakarta Principles Plus 10* (n 51) Principle 31.

⁸⁵ *Ibid* 31(b).

In its broadest sense, liberty is the ability to do or not to do all that is lawfully allowed. In other words, it is the right of every person to organise his individual and social life in keeping with his own choices and beliefs, and in accordance with the law (...) Thus, each human right protects an aspect of the liberty of the individual.⁸⁶

While in *Atala Riffo and Daughters v Chile* the IACtHR frames self-determination as liberty related, it begins paragraph 136 in which it addresses self-determination by stating “in this regard”. Thus, indicating that the content of paragraph 136 flows and relates to the previous paragraph, (i.e., paragraph 135) in which the Court analyses the scope of the right to private life.⁸⁷ It follows, the liberty aspect of individual self-determination is not framed as a fully separate approach to this concept, but rather as shaping its content within the right to privacy. In *Artavia Murillo et al. v. Costa Rica*, the Court also referred to self-determination within ACHR Article 11 on the right to privacy and dignity.⁸⁸ However, as I explained earlier, ACHR Article 11 includes both a protection of human dignity and a right to privacy. The IACtHR explains in *I.V. v Bolivia*, that individual self-determination is “a crucial aspect of the recognition of dignity”.⁸⁹ What emerges from the Court’s analysis is that individual self-determination relates to liberty and is located within the right to privacy in a way that isn’t limited to privacy alone, but is rather integral to the dignity of all human beings as well as to the principle of autonomy.⁹⁰ This intersection between liberty, privacy, dignity and autonomy within the use of individual self-determination is contained in the Court’s analysis of consent in the case of *I.V. v Bolivia* where it establishes that

States have the international obligation to obtain informed consent before performing any medical act based, above all, on the autonomy and self-determination of the individual, and as part of respecting and ensuring the dignity of every human being, as well as their right to personal liberty.

⁸⁶ *Chaparro Álvarez and Lapo Iñiguez v Ecuador*, Preliminary Objections, Merits, Reparations, and Costs (IACtHR, 21 November 2007) 52.

⁸⁷ *Atala Riffo and Daughters v Chile* (n 21) 135-136.

⁸⁸ *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica* (n 49) para 142.

⁸⁹ *I.V. v Bolivia* (n 48) para 150.

⁹⁰ *Ibid* paras 150, 165.

The IACtHR also develops this approach to individual self-determination in the Advisory Opinion which I introduced in the previous section. More specifically, it does so in relation to gender identity in the context of the right to identity⁹¹ which is based on a “broad interpretation”⁹² of the right to liberty. The IACtHR establishes that “a crucial aspect of the recognition of dignity is the possibility accorded to all human beings for self-determination and to freely choose the options and circumstances that give meaning to their existence based on their own preferences and convictions”.⁹³ The Court concluded that gender recognition must “be centred on the complete rectification of the self-perceived gender identity”⁹⁴ and that “gender and sexual identity are linked to the concept of liberty, the right to privacy, and the possibility of all human beings for self-determination”.⁹⁵

Another approach to using individual self-determination outside of the right to privacy is that of the Committee on the Rights of Persons with Disabilities (CRPD Committee). The Committee introduces this concept in General Comment 5, which unpacks the normative content of Article 19 on the right to live independently and to be included in the community. The CRPD Committee explains that “Article 19 is one of the widest ranging and most intersectional Articles of the Convention and has to be considered as integral to the full implementation of the Convention”.⁹⁶ Moreover, the Committee states that it “entails civil and political as well as economic, social and cultural rights and is an example of the interrelation, interdependence and indivisibility of all human rights”.⁹⁷ Article 19 affirms “the equal right of

⁹¹ See OAS, The Inter-American Judicial Committee, Opinion “on the scope of the right to identity”, Resolution CJI/doc. 276/07 rev. 1, August 10, 2007, paras 18-18.3.6

⁹² *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples* (n 47) para 89.

⁹³ *Ibid* 88.

⁹⁴ *Ibid* 171(a).

⁹⁵ *Ibid* 101(e).

⁹⁶ *CRPD General Comment 5* (n 52) para 6.

⁹⁷ *Ibid* para 7.

all persons with disabilities to live in the community, with choices equal to others”⁹⁸ and that states are under the obligation to “take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community”.⁹⁹ In the General Comment, the Committee explains that

Living independently and being included in the community are concepts of human living across the globe, applied to the context of disability. They mean exercising freedom of choice and control over decisions affecting one’s life with the maximum level of self-determination and interdependence within society.¹⁰⁰

This use of individual self-determination carries tensions and opportunities. The tensions lie within the continued nexus between individual self-determination and decision-making. However, the spatial dimension of choice is framed here beyond the private and public as the CRPD General Comment and CRPD Article 19 clearly affirm a right to participate in the community and society as a whole. It also furthers the meaning of individual self-determination as not purely an individual as an end to itself, but also as a concept that is tied to ideas of interdependence. Moreover, individual self-determination here is material rather than abstract as the Committee explains that

Independent living/living independently means that individuals with disabilities are provided with all necessary means enabling them to exercise choice and control over their lives and make all decisions concerning their lives. Personal autonomy and self-determination are fundamental to independent living, including access to transport, information, communication and personal assistance, place of residence, daily routine, habits, decent employment, personal relationships, clothing, nutrition, hygiene and health care, religious, cultural and sexual and reproductive rights.¹⁰¹

Individual self-determination, therefore, is a condition for accessing various components of independent living. But the Committee goes further and explains that independent living “does

⁹⁸ *Convention on the Rights of Persons with Disabilities* UNGA, UNTS 2515 (1 December 2006, in force 3 May 2008) Article 19.

⁹⁹ *Ibid.*

¹⁰⁰ *CRPD General Comment* 5 (n 52) para 8.

¹⁰¹ *Ibid* para 16(a).

not necessarily mean living alone [and] should also not be interpreted solely as the ability of carrying out daily activities by oneself”.¹⁰² This further clarifies the particular approach of the Committee and the CRPD to framing human rights of persons with disabilities beyond the ableist approaches to the shaping of the human legal subject which I presented in Chapter 1.¹⁰³

Individual self-determination is also included in a report issued by the Special Rapporteur on the right to health.¹⁰⁴ The report issued by the then Special Rapporteur Grover in 2009, examined the issue of informed consent within the right to health. The Report begins by stating that “guaranteeing informed consent is fundamental to achieving the enjoyment of the right to health through practices, policies and research that are respectful of autonomy, self-determination and human dignity”.¹⁰⁵ The Special Rapporteur further states that the “ethical and legal normative justifications” of informed consent “stem from its promotion of patient autonomy, self-determination, bodily integrity and well-being”.¹⁰⁶ Moreover, the Special Rapporteur reaffirms that

Informed consent invokes several elements of human rights that are indivisible, interdependent and interrelated. In addition to the right to health, these include the right to self-determination, freedom from discrimination, freedom from non-consensual experimentation, security and dignity of the human person, recognition before the law, freedom of thought and expression and reproductive self-determination.¹⁰⁷

Lastly, individual self-determination is included within interpretations of the prohibition on torture and the right to bodily integrity. The former Special Rapporteur on the Prohibition on Torture Méndez also incorporated individual self-determination in his 2016 report on “the unique experiences of women, girls, and lesbian, gay, bisexual, transgender and intersex

¹⁰² *Ibid.*

¹⁰³ See Chapter, section 1.2 ‘Legal Subjects in International Law and International Human Rights Law’.

¹⁰⁴ *Report of Special Rapporteur of Right to Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Anand Grover to Health*, UN, Human Rights Council A/64/272 (10 August 2009) 2; paras 9;19; and 93.

¹⁰⁵ *Ibid* 2.

¹⁰⁶ *Ibid* para 9.

¹⁰⁷ *Ibid* para 19.

persons”.¹⁰⁸ The report sets itself the goal of incorporating a “gendered and intersectional lens” in order to “account adequately for the impact of entrenched discrimination, patriarchal, heteronormative and discriminatory power structures and socialised gender stereotypes”.¹⁰⁹ This report, much like most of the uses of individual self-determination which I mention in this section, is focused on the experiences and needs of NHHLSs.¹¹⁰ In the report, the Special Rapporteur explained the various ways in which transgender persons “face difficulties in accessing appropriate health care”¹¹¹ and states that access to gender reassignment cannot be lawfully granted upon “forced or otherwise involuntary gender reassignment surgery, sterilisation or other coercive medical procedures” which “violates the right to physical integrity and self-determination of individuals and amounts to ill-treatment or torture”.¹¹²

The Yogyakarta Principles+10 also introduces individual self-determination in relation to the right to bodily and mental integrity and states that

Everyone has the right to bodily and mental integrity, autonomy and self-determination irrespective of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to be free from torture and cruel, inhuman and degrading treatment or punishment on the basis of sexual orientation, gender identity, gender expression and sex characteristics. No one shall be subjected to invasive or irreversible medical procedures that modify sex characteristics without their free, prior and informed consent, unless necessary to avoid serious, urgent and irreparable harm to the concerned person.¹¹³

Under this new principle, “states shall (A) guarantee and protect the rights of everyone, including all children, to bodily and mental integrity, autonomy and self-determination”.¹¹⁴ In

¹⁰⁸ *Report of Special Rapporteur on Torture and Other Inhuman or Degrading Treatment or Punishment, Juan E. Méndez* (n 53).

¹⁰⁹ *Ibid* para 5.

¹¹⁰ The Special Rapporteur explains that “the torture and ill-treatment framework can be more effectively applied to qualify human rights violations committed against persons who transgress sexual and gender norms; identify gaps in prevention, protection, access to justice and remedies; and provide guidance to States on their obligations to respect, protect and fulfil the rights of all persons to be free from torture and ill-treatment”. *Ibid* para 5.

¹¹¹ *Ibid* para 49.

¹¹² *Ibid*.

¹¹³ *The Yogyakarta Principles Plus 10* (n 51) Principle 32.

¹¹⁴ *Ibid* Principle 32(A).

addition, point (F) further affirms that the objective of the support services that need to be offered to victims, including the families and communities of victims, is “to enable victims to exercise and affirm rights to bodily and mental integrity, autonomy and self-determination”.¹¹⁵

2. An Emerging Right to Individual Self-Determination

2.1 Article 38(1) of the Statute of the International Court of Justice

Thus far I demonstrated how the concept of individual self-determination is being used and developed in IHRL’s jurisprudence and soft law instruments. These uses and developments, I argue, can be framed as evidence in support of the emergence of a *right* to individual self-determination in IHRL. By emerging right, I mean that the concept of individual self-determination is being used in such a way that indicates that a new norm and principle is being gradually formed.

In order to make this claim I examine the uses and developments I presented in the previous section as evidence within international law’s doctrine of sources. As IHRL is a branch of international law which does not have a centralised legal system, there is no unanimously accepted hierarchy in terms of law-making and law-identifying processes.¹¹⁶ However, within this lack of centralised clarity, Article 38(1) of the Statute of the International Court of Justice

¹¹⁵ *Ibid* 32(F).

¹¹⁶ As Jones explains, international law is “deemed to be a horizontal legal system that is made up of multiple sovereign states which are all said to be formally equal: there is no one overarching law-making authority in international law”. Emily Jones, *Feminist Theory and International Law: Posthuman Perspectives* (Routledge 2023) 28.

is generally accepted and recognised as the starting point for identifying international law and its sources.¹¹⁷

Article 38(1) is viewed as an encapsulation of “formally recognised sources of international law”.¹¹⁸ In this sense, Article 38(1) in itself is not *the* source of international law but rather an Article which provides a list of accepted and recognised sources of international law.¹¹⁹ Meaning, that the Statute itself did not create new sources of international law nor decided on their hierarchy, but is rather describing the existing sources of international law.¹²⁰ At the same time, while the objective of Article 38(1) is to list the sources at the disposal of the International Court of Justice for the purposes of the exercise of its judicial and advisory roles,¹²¹ the Article has a broader importance as “it is the only general text in which states have articulated the authoritative procedures by which they agree to be legally bound to an international norm”.¹²² And in this sense, given the lack of a centralised legal system, Article 38(1) is generally accepted as a general guidance to identifying the rules of IL. At the same time, accepting the doctrine of sources from an intersectional feminist perspective means understanding that such doctrine is informed by and has maintained the exclusion of NHHLSs from IL-making, as

¹¹⁷ Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law – A Feminist Analysis* (2nd edition, Manchester University Press) 62-63.

¹¹⁸ James Crawford, *Brownlie’s Principles of International Law* (9th edition, Oxford University Press 2012) 18.

¹¹⁹ Hugh Thirlway, *The Sources of International Law* (2nd edition, Oxford University Press 2019) 10.

¹²⁰ The International Court of Justice seems to follow a Hartian approach to law that is guided by the rule of recognition. According to Hart “Wherever such a rule of recognition is accepted, both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation. The criteria so provided may, as we have seen, take any one or more of a variety of forms: these include reference to an authoritative text; to legislative enactment; to customary practice; to general declarations of specified persons, or to past judicial decisions in particular cases (...) In a modern legal system where there are a variety of ‘sources’ of law, the rule of recognition is correspondingly more complex: the criteria for identifying the law are multiple and commonly include a written constitution, enactment by a legislature, and judicial precedents”. HLA Hart, *The Concept of Law* (2nd edition, Joseph Raz and Penelope A. Bulloch, University of Oxford Press 1994) 101-102.

¹²¹ Article 38(1): “[t]he Court, whose function is to decide in accordance with International law such disputes as submitted to it, shall apply...”. *Charter of the United Nations and Statute of the International Court of Justice* (n 4) Article 38(1).

¹²² Dinah Shelton, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press 2003) 6.

Romany suggests.¹²³ Charlesworth and Chinkin explain that treaties, for example, “can be regarded with ambivalence by women” as this form of law-making can both work to include their voices and needs whilst at times is “limited by their [treaties] voluntaristic nature based on a model of state consent”.¹²⁴ In addition, similarly to Romany, Charlesworth and Chinkin further explain that both the consent-based nature of treaty law as well as “the modest recognition of a communitarian system of values through the *jus cogens* doctrine is undermined in practice by the male-centred account of fundamental norms”.¹²⁵ In addition, they explain that “[t]he absence of women from the formal treaty-making process (...) also affects the development of custom”.¹²⁶

The main sources listed in Article 38(1) are (a) “international conventions, whether general or particular, establishing rules expressly recognised by the contesting states”,¹²⁷ (b) “custom as evidence of general practice accepted as law”,¹²⁸ (c) “general principles of law recognised by civilised nations”¹²⁹ and (d) “subsidiary means for the determination of rules of law”¹³⁰ which include “judicial decisions and the teaching of the most highly qualified publicists of the various nations”.¹³¹

¹²³ Romany focuses on a critique to IHRL’s exclusion of women and explains that two main aspects of the doctrine of sources – a consensual one “which privileges state agreements” as well as the normative one that is reflected in customary law operate to exclude women. The first does so by relaying of a form of social contract theory “to which women are neither direct nor indirect parties”. The second, Romany explains, excludes the experiences of women from “the accepted practices that build customary law”. Celina Romany, ‘Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law’ (1993) 6 Harvard Human Rights Journal 87, 94.

¹²⁴ Charlesworth and Chinkin (n 117) 122-123.

¹²⁵ *Ibid* 123.

¹²⁶ *Ibid* 64.

¹²⁷ *Charter of the United Nations and Statute of the International Court of Justice* (n 4) Article 38(1)(a).

¹²⁸ *Ibid* Article 38(1)(b)

¹²⁹ *Ibid* 38(1)c

¹³⁰ *Ibid* Article 38(1)d

¹³¹ *Ibid*.

2.1.1 *Subsidiary Sources*

Article 38(1) is generally understood as listing two categories of sources of IL: formal sources which are listed in clauses (a), (b) and (c), and subsidiary sources which are listed in clause (d). It is an accepted view that the role of subsidiary sources is to elucidate existing rules.¹³² This category contains two main sources: “judicial decisions and the teaching of the most highly qualified publicists of the various nations”.¹³³

a. **Judicial Decisions**

Within the meaning of Article 38(1)(d), judicial decisions include, first and foremost, the International Court of Justice’s own jurisprudence, including advisory opinions,¹³⁴ as well as rulings by international, regional and domestic courts.¹³⁵ In the first part of this chapter, I presented the trajectory of individual self-determination in IHRL and explained that it can be found within the jurisprudence of the ECtHR and IACtHR. Most importantly, I showed that the concept of individual self-determination which first appeared in an IHRL judgment in the ECtHR case of *Pretty v United Kingdom*¹³⁶ was picked up by the IACtHR in *Atala Riffo and Daughters v Chile*.¹³⁷ And, when incorporating this concept to its jurisdiction, the IACtHR further developed the substance of individual self-determination in its case-law¹³⁸ and advisory opinions.¹³⁹ However, whether such evidence is sufficient to conclude that individual self-

¹³² Alain Pellet and Daniel Muller ‘Competence of the Court, Article 38’ in Andreas Zimmerman, Christian J Tams, Karin Oellers-Frahm and Christian Tomuschat (eds) *The Statute of the International Court of Justice: A Commentary* (3rd edition, Oxford University Press 2019) 305.

¹³³ *Charter of the United Nations and Statute of the International Court of Justice* (n 4) Article 38(1)(d).

¹³⁴ Thirlway (n 119) 131.

¹³⁵ *Ibid* 104.

¹³⁶ *Pretty v United Kingdom* (n 3).

¹³⁷ *Atala Riffo and Daughters v Chile* (n 21) para 136.

¹³⁸ *Ibid*; *Artavia Murillo et al. (“In vitro fertilisation”) v Costa Rica* (n 49); *I.V. v Bolivia* (n 48).

¹³⁹ *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples* (n 47).

determination is emerging as a right in IHRL is limited due to the fact the judicial decisions are considered as subsidiary sources. Chinkin argues that such a narrow view of adjudicative bodies in international law

ignores the reality that, through interpretation and application of treaties and custom, judicial decisions elucidate and develop international law. In a decentralised legal system that lacks a legislature and where unwritten law is developed through the amorphous processes of state practice and *opinio juris*, judicial decision-making carries great weight through exposition of the law and accelerates the formation of customary international law.¹⁴⁰

According to Chinkin the concept of elucidation itself, and therefore, the meaning of subsidiarity, can be understood as a powerful and active position in the shaping of IL. Jurisprudence in this sense is not only passively discussing that which exists, but also shaping (though not independently creating) future law. This means that the evidence of individual self-determination jurisprudence in two of the main regional human rights law systems, i.e., ECtHR and IACtHR, is indicative of an elucidation process that may give rise to further development in hard law. This becomes stronger considering Chinkin's argument that jurisprudence plays a particularly important role in IHRL as different adjudicative bodies

may turn to the decisions of other bodies in determining their own approach. In all these ways judicial decision-making fleshes out and develops international human rights treaties and custom and, thus, has a greater influence than might be expected of a 'subsidiary means for the determination of rules' of human rights law.¹⁴¹

In this sense, Chinkin explains that while the jurisprudence does not create new law *per se*, at the bare minimum it contributes to the unpacking of existing normative obligations. Thus, the development of a concept of individual self-determination in the jurisprudence of the ECtHR and subsequently in that of the IACtHR is indicative of a process of elucidation. In the ECtHR, the elucidation is inevitably connected to that of the obligations under ECHR Article 8 on the

¹⁴⁰ Christin Chinkin, 'Sources' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds) *International Human Rights Law* (3rd edition, Oxford University Press 2018) 75.

¹⁴¹ *Ibid* 77.

right to privacy. However, within the jurisprudence of the IACtHR, the elucidation process appears to be much broader and deeper. That is, while individual self-determination arises within ACHR Article 11 on the right to privacy,¹⁴² the approach of the IACtHR to this concept brings into play additional rights and principles. For example, in *Atala Riffo and Daughters v Chile*, the IACtHR establishes that “a person’s sexual orientation is also linked to the notion of freedom and a person’s right to self-determination” and, therefore, individual self-determination has a right to liberty aspect as well.¹⁴³ The liberty aspect of individual self-determination is accompanied by the dignity aspect that underlies the ACHR Article 11 on the right to privacy and dignity.

b. Teachings of the Most Highly Qualified Publicists of the Various Nations

The second subsidiary source of international law listed in Article 38(1)(d) is that of ‘teachings of the most highly qualified publicists of the various nations’.¹⁴⁴ According to Sivakumaran, this category is best understood as a “heterogenous” one¹⁴⁵ and can be broken down into three main sub-categories: “entities that have been empowered by states to conclude teachings, such as the international law commissions; expert groups, both standing and ad hoc; and ‘ordinary’ publicists”.¹⁴⁶ In addition to unpacking the meaning of ‘highly qualified publicists’, Sivakumaran also explains the term ‘teachings’ and argues that these may have different formats such as “digests, (...) textbooks, monographs, commentaries, journal articles, and blog posts”.¹⁴⁷ Sivakumaran’s interpretation, however, does not explicitly include entities which

¹⁴² *American Convention on Human Rights (“Pact of San Jose”)* Organization of American States, TS No 36 (22 November 1969, in force 18 July 1978) Article 11.

¹⁴³ *Atala Riffo and Daughters v Chile* (n 21) para 136.

¹⁴⁴ *Charter of the United Nations and Statute of the International Court of Justice* (n 4) Article 38(1)(d).

¹⁴⁵ Sandesh Sivakumaran, ‘The Influence of Teachings of Publicists on the Development of International Law’ (2017) 66 *International and Comparative Law Quarterly* 1, 31.

¹⁴⁶ *Ibid* 1.

¹⁴⁷ *Ibid* 2.

have not been “empowered by states to conclude teachings” and are not necessarily “ordinary publicists” either, such as internationally recognised NGOs like Amnesty International.¹⁴⁸ However, Sivakumaran explains that “[i]ndividual publicists do not create law by themselves. Rather, they constitute part of a community that does create the law”.¹⁴⁹

The role of UN Special Rapporteurs appears to be well within the core meaning of this category of subsidiary sources of international law. Special Rapporteurs satisfy Sivakumaran’s interpretation of this category of subsidiary sources of international law in Article 38(1)(d) since these are experts mandated by United Nations General Assembly resolutions which are based on the equal participation of states members to the UN.¹⁵⁰ Individual self-determination is contained within the work of three UN Special Rapporteurs - two UN Special Rapporteurs on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and one UN Special Rapporteur on the Right to Physical and Mental Health¹⁵¹ as well as within the Committee on the Rights of Persons with Disabilities.¹⁵²

During his mandate as Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Méndez analysed specific harms and obligations which are contained within ICCPR Article 7¹⁵³ in the context of LGBTI persons, and women and girls in health-care settings.¹⁵⁴ In his report, Méndez affirms that enforced sterilisation of transgender people is an unlawful requirement for gender recognition and modification of gender markers;

¹⁴⁸ Chinkin ‘Sources’ (n 140) 78.

¹⁴⁹ Sandesh Sivakumaran (n 145) 31.

¹⁵⁰ *Charter of the United Nations and Statute of the International Court of Justice* (n 4) Chapter IV Article 9

¹⁵¹ See this chapter, section 1.2, ‘Individual Self-Determination Beyond the Right to Privacy’.

¹⁵² *CRPD General Comment* 5 (n 52).

¹⁵³ *International Covenant on Civil and Political Rights*, UNGA, UNTS 999 (16 December 1966, in force 23 March 1976) Article 7.

¹⁵⁴ *Report of Special Rapporteur on Torture and Other Inhuman or Degrading Treatment or Punishment*, Juan E. Méndez (n 53).

such a requirement amounts to ill-treatment or torture as it violates “the rights to physical integrity and self-determination of individuals”.¹⁵⁵ In addition to Méndez, Special Rapporteur Meltzer also included self-determination in his report on psychological torture,¹⁵⁶ where he lists self-determination as a basic psychological need alongside other basic human needs such as dignity, identity and security which are often the target of psychological torture.¹⁵⁷ By psychological torture, Meltzer refers to every practice which is directed towards harming another person’s sense of self-determination so to subjugate them and “disrupt the victim’s sense of control, autonomy and self-determination”.¹⁵⁸

Former Special Rapporteur on the Right to Physical and Mental Health, Grover, also included self-determination in his report on consent and the right to health where he links free and informed consent to the concept of self-determination.¹⁵⁹ Grover affirms that “guaranteeing informed consent is a fundamental feature of respecting an individual’s autonomy, self-determination and human dignity in an appropriate continuum of voluntary health-care services”.¹⁶⁰ Similarly to Méndez, Grover also recognises self-determination as a right and states that free and informed consent is closely tied to “several elements of human rights” where he includes “the right to individual self-determination” and “reproductive self-determination”.¹⁶¹

¹⁵⁵ *Ibid* 49.

¹⁵⁶ *Report of the Special Rapporteur of Torture and Other Inhuman or Degrading Treatment or Punishment, Nils Melzer*, UN, Human Rights Council A/HRC/43/49 (20 March 2020).

¹⁵⁷ *Ibid* 43.

¹⁵⁸ *Ibid* 49-50.

¹⁵⁹ *Report of Special Rapporteur of Right to Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Anand Grover to Health* (n 104).

¹⁶⁰ *Ibid* 18.

¹⁶¹ *Ibid*, 19.

The CRPD Committee is another example of a category of experts that falls within the meaning of Article 38(1)(d). The Committee refers to self-determination in its General Comment 5 on Article 19¹⁶² of the CRPD.¹⁶³ The scope of General Comment 5 is to assist “State parties in their implementation of Article 19 and fulfilling their obligations under the Convention”.¹⁶⁴ In this instrument which I introduced in the previous part on the tracing of shared meaning of individual self-determination, the Committee refers to self-determination when explaining the normative content of the right to live independently and to be included in the community. Again, this use demonstrates the broader relevance of the concept of individual self-determination to other rights, including rights that can be generally defined as economic, social or cultural rights such as the right to live independently and to be included in the community.¹⁶⁵ In particular, this use of self-determination steps outside the predominately negative obligation content which is part of its nexus with the right to privacy.

In addition, the inclusion of individual self-determination to the Committee on the Rights of Persons with Disabilities with CRPD’s General Comment 5 is further proof that self-determination is particularly useful to unpack the specific needs of NHHLSs such as persons with disabilities. While these three UN Special Rapporteurs and the Committee on the Rights of Persons with Disabilities, who work on different human rights, have all made important statements regarding individual self-determination, these statements are still circumscribed within subsidiary sources of IL. That is, within the framework of Article 38(1), these sources can only be used as contributing to the elucidation of existing obligations under the recognised and accepted human rights rather than creating new human rights obligations.

¹⁶² *CRPD General Comment 5* (n 52) para 8 and 16(a).

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid* para 6.

¹⁶⁵ *Ibid* para 16(a).

2.2 Thinking About Soft Law

Charlesworth and Chinkin argue that the doctrine of sources as encapsulated in Article 38(1) “preserves state control over what is deemed law, but is an incomplete reflection of the realities of contemporary international law-making”.¹⁶⁶ For example, Article 38(1) does not explicitly account for soft law as part of the sources of IL, and IHRL more specifically. Soft law is a heterogenous category that contains various types of instruments including recommendations, declarations, reports, programmes of actions and advisory opinions which share the common feature of being non-binding instruments.¹⁶⁷ In a narrow sense, Article 38(1) does not include this category of sources as part of its doctrine of sources. However, Article 38(1)(d) on subsidiary sources of international law contains some instruments that fall within the broad category of soft law such as “judicial decisions and the teachings of the most highly qualified publicists of the various nations”.¹⁶⁸ First, judicial decisions contain both binding judgments as well as advisory opinions, which by their non-binding nature, can easily be classified as part of soft law. Second, as I explained in section 2(1), the broad category of ‘teachings’ arguably includes also reports and recommendations written by leading UN experts, international organisations (IOs), non-governmental organisations (NGOs) which all produce, yet again, non-binding content. In this sense, Article 38(1) simply does not contain the entire breadth of soft law but does include selected sources of soft law in its subsidiary sources of IL.

However, soft law instruments are integral to the continued development and making of IHRL. As Boyle explains, “key instruments [that] nearly all began in soft law form are now

¹⁶⁶ Charlesworth and Chinkin (n 177) 65.

¹⁶⁷ *Ibid* 66; Christine Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38 *The International and Comparative Law Quarterly* 850, 850-852.

¹⁶⁸ *Charter of the United Nations and Statute of the International Court of Justice* (n 4) Article 38(1)(d).

incorporated in the multilateral treaties that today form the corpus of IHRL”.¹⁶⁹ Boyle further argues that

The recognition that non-binding soft-law instruments may have legally significant effects does not entail rewriting the law of treaties or expanding the sources of international law; (...) the point is that treaties, soft law, general principles, and custom interact and supplement each other. What matters is to understand that there is an interaction, even when the instrument itself is formally non-binding.¹⁷⁰

In this sense, Boyle is not suggesting to re-think or re-define the *sources* of international law but to understand that hard law and soft law are in constant dialogue. In this, sense the question of the importance of a source is not limited to its binding or non-binding qualities. A similar stance is also taken by Shelton who argues that there is a “dynamic interplay between soft and hard obligations”.¹⁷¹ Shelton explains that “it is rare to find soft law standing in isolation”.¹⁷² Instead, soft law instruments “often serve to allow treaty parties to authoritatively resolve ambiguities in the text or to fill in gaps”.¹⁷³ In addition, soft law instruments “sometimes have provided the necessary statement of legal obligation (*opinio juris*) to evidence the emergent custom and have assisted to establish the content of the norm”.¹⁷⁴ For example, the Yogyakarta Principles are a prime example of soft law instruments that have been used by various additional IHRL actors to fill in the gap and explain existing and evolving obligations. Brems, Cannoot and Moonen explain that the Yogyakarta Principles and Yogyakarta Principles+10 “enjoy great authority and are often cited by courts, lawmakers, institutional human rights

¹⁶⁹ Alan Boyle, ‘The Choice of a Treaty: Hard Law versus Soft Law’ in Simon Chesterman, David M Malone and Santiago Villapando (eds), *The Oxford Handbook of United Nations Treaties* (Oxford University Press 2019) 107

¹⁷⁰ *Ibid* 106-107.

¹⁷¹ Shelton ‘Introduction: Law, Non-Law and the Problem of ‘Soft Law’’ (n 122) 10.

¹⁷² Dinah Shelton, ‘Normative Hierarchy in International Law’ (2006) 100 *The American Journal of International Law* 291, 320.

¹⁷³ Shelton, ‘Introduction: Law, Non-Law and the Problem of ‘Soft Law’’ (n 122) 10.

¹⁷⁴ *Ibid* 1.

actors and international scholarship”,¹⁷⁵ such as by the IACtHR.¹⁷⁶ In this sense, the non-binding nature of soft law instruments makes them particularly appealing to the advancement of rights of different NHLSs. Chinkin argues that soft law contains notable advantages as “it may facilitate reaching a political consensus, bring an issue onto the international agenda, define the area of international concern, and provide guidelines for behaviour that may generate the requisite practice for a rule of customary international law”.¹⁷⁷ Her argument is even more convincing when considering the frequent transition of content contained in soft law instruments to hard law, either through treaty-making or through customary law.¹⁷⁸ The non-binding character of soft law effectively makes room to expand on hard law obligation and to offer a broader, expansive and perhaps more creative vision of hard law. This is evident in the case of the development of individual self-determination such as the IACtHR advisory opinion that focuses on specific issues relating LGBTQI+ persons,¹⁷⁹ or the two Yogyakarta Principles which do the same.¹⁸⁰

At the same time, the very acceptance of the binary division of ‘hard’ law versus ‘soft’ law means to operate within the exclusionary hierarchies of subjects of the IHRL and international law as Charlesworth and Chinkin explain that

many of the issues that concern women thus suffer a double marginalisation in terms of traditional international law-making: they are seen as ‘soft’ issues of human rights and are

¹⁷⁵ Eva Brems, Pieter Cannoot and Toon Moonen, ‘Introduction’ in Eva Brems, Pieter Cannoot and Toon Moonen (eds), *Protecting Trans Rights in the Age of Gender Self-Determination* (Cambridge University Press 2020) 4

¹⁷⁶ *Duque v Colombia*, Preliminary Objections, Merits, Reparations and Costs (IACtHR, 26 February 2016) para 110; *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples* (n 47) paras 112, 129, 138, 148, 155, 196.

¹⁷⁷ Chinkin ‘Sources’ (n 140) 82.

¹⁷⁸ See for example: Paola Gaeta, Jorge E. Viñuales, and Salvatore Zappalà (eds), *Cassese’s International Law* (3rd edition, Oxford University Press 2020) 202; and Alan E Boyle, ‘Some Reflections on the Relationship of Treaties and Soft Law’ (1999) 48 *International and Comparative Law Quarterly* 901, 906.

¹⁷⁹ *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples* (n 47).

¹⁸⁰ *Yogyakarta Principles* (n 50); *The Yogyakarta Principles Plus 10* (n 51).

developed through ‘soft’ modalities of law-making that allow states to appear to accept such principles while minimising their legal commitments.¹⁸¹

Thus, Charlesworth and Chinkin argue that the very naming of this typology of IL-making is hinged on a gender binary that assigns differential weight and importance to soft law as relating to women versus hard law which is the prerogative of men as the ‘real’ binding law.¹⁸² This is why the rights of NHHLSs are often strategically developed within the confines of soft law. In light of this critique to the binary of soft versus hard law, it is perhaps even more important for intersectional feminist and critical legal scholars to take soft law seriously and go beyond Article 38(1) and the limited doctrine of sources.

The analysis therefore *prima facie* indicates that the evidence in support of an emerging right to individual self-determination is found primarily within the subsidiary sources of IL. These sources have the function to elucidate existing obligations and in and of themselves do not create new law. A strict interpretation suggests that individual self-determination may qualify as part of such elucidation processes. Thus, individual self-determination is arguably part of the normative content of the right to privacy, liberty, dignity, health and the prohibition of torture, inhuman and degrading treatment or punishment. However, even though subsidiary sources do not produce new law, this does not mean that individual self-determination is not *emerging* i.e., is in the *process* of becoming law. The entrance of individual self-determination to the elucidation of existing obligations indicates that there is a trend towards the inclusion of this concept in relation to several human rights. A trend of this sort, I argue, is substantive enough on its own to affirm that individual self-determination is emerging as part of other rights and has the potential to emerge as an independent right.

¹⁸¹ Charlesworth and Chinkin, *The Boundaries of International Law* (n 117) 66.

¹⁸² *Ibid* 70.

Conclusion: The Case for Strategic Development of the Emerging Right to Individual Self-Determination

There is a growing trend towards using self-determination in relation to individuals, and more specifically, in relation to NHHLSs in IHRL. Such trend is evident when examining the work of various IHRL actors and sources such as adjudicative bodies, soft law instruments, reports by specific UN organs entrusted with monitoring particular aspects of IHRL as well as NGOs. I argued that this trend must be understood as indicative of an *emerging* right to individual self-determination in IHRL. The threshold for identifying an ‘emerging right’ is lower than that of identifying a right that has already emerged. My argument is centred around turning our attention to the processes of emergence, and, in particular, to understanding these processes in relation to NHHLSs. Thus, while I engaged with Statute of the International Court of Justice and Article 38(1) as the traditionally accepted test to identifying sources of IL, I emphasised the importance of taking soft law instrument into consideration as well. This is because soft law, which at times overlaps with some of Article 38(1)(d) subsidiary sources of international law, is the main available site for advancing the rights of NHHLSs due to the structurally embedded hierarchy of subjects in international law and IHRL.

This chapter concludes with tensions and questions regarding potentialities. On the one hand, the right to individual self-determination is *emerging* and there is time and space to begin an honest, reflective and critical discussion with regards to its shape and role in IHRL. On the other hand, this opening is accompanied by the tensions as to whether this right can be re-imagined in a responsive and responsible manner because of the ways in which IHRL’s acts of inclusion and exclusion have shaped it and how they may continue to do so. Engaging with intersectional feminist, queer and TWAIL approaches to IHRL *with* the active decision to

continue to engage with IHRL practice, *is* itself a source of tension. In line with these critical theories and approaches, I do not seek to ignore the tensions nor to embellish them. Instead, I conceive of the emerging right to individual self-determination as a tension-related right and argue that it is precisely because of these tensions that a re-imagination of the right becomes more possible, responsible and responsive.

Chapter 4: The (Emerging) Right to Individual Self-Determination as a Recognition-Based Right

Introduction

In this penultimate chapter, I introduce my definition of the new emerging right to individual self-determination and complete the theorisation part of this thesis. The approach I undertake to defining this new emerging right is grounded in the critique I advanced thus far. It places the tensions I identified at the fore in order to shape it as an alternative avenue for NHHLS's claims that have thus far been brought primarily under the right to privacy. In order to do so I define individual self-determination as the right to be recognised as a full human legal subject. This right has the scope of bridging the gap between the human legal subject and the human subject. It also advocates for a substantive recognition of subjects that actively makes space for NHHLSs in IHRL.

The chapter is divided into three main parts. In the first part, I define the emerging right to individual self-determination. I do so by weaving together the critique I advanced in Chapter 1 regarding IHRL's acts of inclusion and exclusion, the critique to the right to privacy in Chapter 2 and finally the current approaches to framing and using individual self-determination in IHRL which I presented in Chapter 3. In particular, I draw on two concepts that emerge from the existing uses of this emerging right – 'recognition' and 'existence', which appear in the Yogyakarta Principles and the jurisprudence of the IACtHR. I examine both concepts and weave them together in order to define the right to individual self-determination as protecting a substantive form of recognition of subjects that works to guarantee access and participation in IHRL and democratic society alongside the formal and procedural right to recognition of

persons before the law. I then move to present the scope of this right and explain that it protects three main areas of recognition: bodies, identities, and relationships, and explain how they relate to recognition and ultimately to participation. These three areas of recognition are based on the critique I advanced to the right to privacy in Chapter 2 as the main categories of claims brought by NHHLSs under that right. Finally, I address the question of limitations to the emerging right to individual self-determination. I do so by first underscoring the deficiencies of one of the predominant approaches to setting limitations to qualified rights, predominantly used by the ECtHR – the harm principle. I critique this approach not from a libertarian perspective, but from a critical intersectional feminist one. That is, I explain that the abstract and general façade of this logic can have adverse effects on the assessment of limitations to rights of NHHLSs. I therefore argue that in order to comply with the obligations under the emerging right to individual self-determination, a different approach to limitations is called for – contextualisation. Advancing a context-focused analysis of limitations to this right means to take into account IHRL's acts of inclusion and exclusion which I have been engaging with throughout this thesis. Thus, the emerging right to individual self-determination is a dynamic tool that through its application can shed light on existing gaps in recognition and participation of NHHLSs.

1. Defining the Emerging Right to Individual Self-Determination

In Chapter 3 I introduced and explained the various ways in which individual self-determination is currently being used in IHRL. I now return to two of these sources – the Yogyakarta Principles and the jurisprudence of the IACtHR – because they offer a possibility of conceptualising the emerging right to individual self-determination beyond the framework

of the right to privacy. Both sources introduce individual self-determination with regards to two concepts: (i) recognition; and (ii) existence, which I examine and assess below.

1.1 Recognition

The Yogyakarta Principles¹ and the IACtHR Advisory Opinion on Gender Identity and Equality and Non-Discrimination of Same-Sex Couples² include individual self-determination in relation to the right to be recognised as a person before the law. The right to be recognised as a person before the law is contemplated in several IHRL treaties,³ in general comments and recommendations to these treaties,⁴ as well as in soft law instruments.⁵ In its simplest form, the right to legal recognition as set out in ICCPR Article 16 establishes that: “[e]veryone has the right to recognition everywhere as a person before the law”.⁶

¹ *Yogyakarta Principles – Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* International Commission of Jurists (March 2007) Principle 3; *The Yogyakarta Principles Plus 10- Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* International Commission of Jurists (10 November 2017) Principle 31.

² *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, Advisory Opinion OC-24/17 (Inter-American Court of Human Rights, 24 November 2017) paras 104-105.

³ It is important to note that the European Convention on Human Rights is the only main regional human rights law treaty that doesn’t include a right to legal personality. All other codifications: *International Covenant on Civil and Political Rights*, UNGA, UNTS 999 (16 December 1966, in force 23 March 1976) Article 16; *American Convention on Human Rights (“Pact of San Jose”)* Organization of American States, TS No 36 (22 November 1969, in force 18 July 1978) Article 3; *African Charter on Human and Peoples’ Rights*, Organization of African Unity, OAU Doc. CAB/LEG/67/3 27 June 1981, rev.5, 21 I.L.M. 58 (27 June 1982) Article 5; *Convention on the Elimination of All Forms of Discrimination Against Women*, UNGA, UNTS 1249 (18 December 1979, in force 3 September 1981) Article 15; *Protocol to the African Charter on Human and People’s Rights of Women in Africa*, Organization of African Unity, OAU (11 July 2003 in force 25 November 2005) Article 3; *Convention on the Rights of Persons with Disabilities* UNGA, UNTS 2515 (1 December 2006, in force 3 May 2008), Article 12.

⁴ *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, United Nations, Human Rights Committee (29 March 2000) para 19; *CEDAW General Recommendation No.21: Equality in Marriage and Family Relations*, United Nations, Committee on the Elimination of Discrimination Against Women (1994) paras 7-10; *CRPD General Comment No 1: Article 12 (Equal Recognition Before the Law)*, United Nations, Committee on the Rights of Persons with Disabilities (19 May 2014).

⁵ *Universal Declaration of Human Rights*, UNGA Res. 217 A (III) (10 December 1948), Article 6; *The Yogyakarta Principles – Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, International Commission of Jurists (March 2007) Principle 3; *The Yogyakarta Principles Plus 10- Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* International Commission of Jurists (10 November 2017) Principle 31.

⁶ *International Covenant on Civil and Political Rights* (n 3) Article 16.

Nowak explains that ICCPR Article 16 protects the right to be a (human) subject thus protecting humans from being “degraded to a mere legal object”⁷. Nowak’s interpretation suggests that the right to legal recognition protects a dualistic/binary essence – one is either a (legal) subject or an object. This dualism/binary is further complicated when Nowak explains that legal recognition of subjects should not be conflated with legal capacity to act as a legal subject because certain limitations on legal capacity are permitted for “children, juveniles or mentally ill persons”.⁸ Accepting this means accepting that some subjects are *less recognised as persons before the law* than others because they may formally be a legal subject without any or with limited legal capacity to act. Later in this chapter I demonstrate how this is challenged in the CRPD.

At the same time, whether the subject has the capacity to act, or only the right to be recognised as a person (non-object), the right to legal personality is a *sine qua non* for accessing IHRL⁹ and no derogations are allowed under this right.¹⁰ Nowak further explains that the right to legal recognition is “[o]ne of the individual’s rights of existence”, meaning that it brings the subject into legal existence, which is necessary and complementary to their “physical and spiritual existence.”¹¹ Recognition before the law, therefore, means access to the law. It is the point of entry for human legal subjects to access IHRL. However, legal recognition is premised on a specific prerequisite – humanness. Thus, while the terms of access to legal recognition in Article 16 are framed in a general, neutral, and inclusive manner (‘everyone’ has this right ‘everywhere’) and set out a universal protection to all human beings, the category of ‘the

⁷ Manfred Nowak, *U.N. Convention on Civil and Political Rights: CCPR Commentary* (2nd edition, N.P. Engel 2005) 369.

⁸ *Ibid* 370.

⁹ *Ibid* 369.

¹⁰ *International Covenant on Civil and Political Rights* (n 3) Article 4(2).

¹¹ Nowak (n 7) 369.

human’ has operated and continues to operate to effectively exclude many humans¹² as I explained in Chapter 1.¹³

The jurisprudence of the HRC on Article 16 shows that the Committee has thus far found violations of this right only in cases of enforced disappearance.¹⁴ For example, in *Naima Boutarsa v Algeria* the HRC found that

the intentional removal of a person from the protection of the law constitutes a refusal to recognise him or her as a person before the law, particularly if the efforts of his or her relatives to obtain access to potentially effective remedies have been systematically impeded.¹⁵

Considering that Article 16 jurisprudence is underdeveloped, the HRC in its capacity as an international adjudicative body has shown that the right operates in an all or nothing sense, meaning that for violations of this Article to occur, the human subject needs to have been removed from the protection of the law.¹⁶ However, Taylor has explained that the HRC addressed Article 16 in a much broader sense when issuing Concluding Observations on specific ICCPR issues in different Member States¹⁷ such as birth registration,¹⁸ legal gender

¹² As I explained in Chapter 1, the category of the human works to order and exclude not only other human beings from it, but also non-human animals and nature for example. See Chapter 1, footnote no 4.

¹³ Chapter 1, section 1, ‘First Layer of Inclusion and Exclusion: The Making of Hegemonic and Non-Hegemonic Human Legal Subjects’.

¹⁴ See among others: *Naima Boutarsa v Algeria* Comm no 3010/2017 (HRC, 8 July 2022) para 8.9; *Ram Kumar Bhandari v Nepal* Comm no 2031/2011 (HRC, 29 October 2014) para 8.8.

¹⁵ *Ibid* (*Naima Boutarsa v Algeria*) para 8.9.

¹⁶ The HRC’s use of the framing “intentional removal of a person from the protection of the law” is also contained in Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance. See *International Convention for the Protection of All Persons from Enforced Disappearance* UNGA UNTS 2716 (adopted 20 December 2006, entered into force 23 December 2010) Article 2; Similarly, *CCPR General Comment No 36: Article 6 (Right to Life)* United Nations, Human Rights Committee (3 September 2019) para 58.

¹⁷ Paul M Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee’s Monitoring of ICCPR Rights* (Cambridge University Press 2020) 449-455.

¹⁸ *Concluding Observations of the Human Rights Committee: Panama*, HRC, United Nations, CCPR/C/PAN/CO/3 Committee (17 April 2008), para 19.

recognition,¹⁹ and participation of persons with disabilities.²⁰ The HRC could have further elucidated its jurisprudence on Article 16²¹ in the case of *Juliet Joslin et al v New Zealand*.²² In this case the applicants who were two lesbian couples argued that by denying them access to marriage, the State violated, among other rights, their rights to be recognised as persons before the law, the right to privacy, the right to marriage and to found a family and the right to equal respect of the Covenant rights.²³ They argued that Article 16 protects a person's dignity "through their recognition as proper subjects of law, both as individuals and as members of a couple",²⁴ thus denying them access to marriage "deprives the authors of access to a significant institution through which individuals acquire and exercise legal personality".²⁵ However, the HRC decided to examine the complaint from the perspective of the right to marry as it deemed it most appropriate considering that the claim involved access to marriage.²⁶ Upon determining that the applicants do not have a right to marry under the Covenant, the HRC did not examine the rest of their application.²⁷ Thus, these NHHLs complained that they were not fully recognised as human legal subjects. However, considering the binary and formal framing of Article 16 as containing either recognition or non-recognition, even had the HRC decided to examine the rest of the communication it is highly unlikely that it would have found a violation of this Covenant right.

¹⁹ *Concluding Observations of the Human Rights Committee: Ireland*, HRC, United Nations CCPR/C/IRL/CO/3 (30 July 2008), para 8.

²⁰ *Concluding Observations of the Human Rights Committee: Uruguay*, HRC, United Nations, CCPR/C/URY/CO/6 (3 October 2022, para 8(c); *Concluding Observations of the Human Rights Committee: Angola*, HRC, United Nations, CCPR/C/AGO/CO/1 (29 April 2013), para 8.

²¹ Article 16 is included also in *Manuel Wackenheim v France*. However, since the applicant did not substantiate his claim for Article 16 violation in before the HRC, I excluded this case from the thesis. *Manuel Wackenheim v France* Comm no 854/1999 (HRC, 15 July 2002), paras 3; 6.3.

²² *Ms. Juliet Joslin et al. v New Zealand* Comm no 902/1999 (HRC, 17 July 2002).

²³ *Ibid* paras 2.1-2.2; and 3.1-3.8.

²⁴ *Ibid* para 3.6.

²⁵ *Ibid*.

²⁶ *Ibid* paras 8.2-8.3.

²⁷ *Ibid* para 8.3.

The applicants in *Juliet Joslin et al. v New Zealand* referred to the notion of dignity when presenting their complaint under Article 16. While the HRC has not elaborated on legal recognition and dignity in its jurisprudence, the ACHPR Article 5 offers a more expansive framing of the right to legal recognition and its relationship with human dignity. Article 5 establishes that

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.²⁸

According to Murray, the decision to include the concept of legal recognition or status “broadens the application of the concept of dignity and includes ‘one’s capacity to be the holder of rights and obligation’s the recognition of which is an ‘indispensable requirement’ for enjoyment of all rights in the African Charter.”²⁹ The importance of the nexus between legal recognition or legal status and human dignity was reaffirmed by the African Commission on Human and Peoples’ Rights such as in the case of *Open Society Justice Initiative v Cote d’Ivoire* in which the Commission affirmed that

some of the rights protected by the Charter have a supreme and dependent relationship with the right to dignity. The same can be said about the right to legal status protected by Article 5 of the Charter (...) dignity and legal status are fundamentally interdependent.³⁰

Legal recognition in the ACHPR is explicitly premised on the inherent respect for the human being and in this sense, a violation of legal recognition is a violation of human dignity.³¹ Article 5 provides slavery and exploitation as examples of extreme violations of legal recognition and

²⁸ *African Charter on Human and Peoples’ Rights* (n 3) Article 5.

²⁹ Rachel Murray, *The African Charter on Human and Peoples’ Rights: A Commentary* (Oxford University press 2020) 137.

³⁰ *Open Society Justice Initiative v Côte d’Ivoire* Comm no 318/06 (ACommHPR, 28 February 2015), para 140.

³¹ See for example: *The Nubian Community in Kenya v The Republic of Kenya* Comm no 317/2006 (ACommHPR 28 February 2015), para 137.

human dignity. This does not mean that only slavery or exploitation would be in breach of Article 5 in terms of the right to legal recognition aspect. The jurisprudence of the African Commission on Human and Peoples' Rights affirmed in *Nubian Community in Kenya v The Republic of Kenya* that Article 5 also contains a right to a nationality as it "is the legal and political bond [which] establishes a formal connection between an individual and the State and brings the individual within the realm of the State's protection".³² The Commission further explained in *Open Society Justice Initiative v Côte d'Ivoire* that "failure to grant nationality as a legal recognition is an injurious infringement of human dignity" which undermines the ability to access rights "because the person no longer fully fits into the fundamental characteristics associated with the status of a subject of law".³³ When a person is not granted a nationality they are taken out of both the legal community and the social one.³⁴ This resonates with Arendt's analysis which I referred to in Chapter 1 where she argues that human rights are not the rights of the human *per se*, rather they are effectively the rights of the human citizen.³⁵

The IACtHR jurisprudence on ACHR Article 3 regarding the right to juridical personality further elucidates the importance of this right.³⁶ In *Bámaca-Velásquez v Guatemala*, the Court established that this right "implies the capacity to be the holder of rights (capacity of exercise) and obligations; the violation of this recognition presumes an absolute disavowal of the possibility of being a holder of such rights and obligations".³⁷ This seems to suggest that unlike the approach to ICCPR Article 16 as containing only a right to recognition and not a right to legal capacity, ACHR Article 3 contains both. In *The Girls Yean and Bosico v The Dominican*

³² *Ibid* paras 139; and 140.

³³ *Open Society Justice Initiative v Côte d'Ivoire* (n 30), para 141.

³⁴ *Ibid*.

³⁵ On Arendt and rights of the citizen see: Chapter 1, section 1 'Legal Subjects in International Law and International Human Rights Law'.

³⁶ For cases regarding Article 3 and enforced disappearances see among others: *Río Negro Massacres v Guatemala*, Preliminary Objection, Merits, Reparations and Costs (IACtHR, 4 September 2012), para 119.

³⁷ *Bámaca-Velásquez v Guatemala*, Merits (IACtHR, 25 November 2000), para 179.

Republic the Court affirmed that harm to judicial personality means harm to human dignity because it denies “an individual’s condition of being a subject of rights and renders him vulnerable to non-observance of his rights by the State or other individuals”.³⁸ In this sense, much like in the ACHPR, the ACHR’s right to legal recognition is intimately connected to the notion of human dignity.

In *Sawhoyamaxa Indigenous Community v Paraguay*, the IACtHR decided to examine Article 3 whilst acting under the principles of *iura novit curiae* and established that the failure to register the births and deaths of numerous members of this community left them in a “legal limbo in which, though they have been born and have died in Paraguay, their existence and identity were never legally recognised, that is to say, they did not have a personality before the law”.³⁹ The Court reaffirmed the general right to juridical personality whilst insisting on the specific importance to guaranteeing this right to “persons in situations of vulnerability, exclusion and discrimination” such as the indigenous community in this case.⁴⁰ It furthermore reaffirmed that States are under an obligation to ensure access to identification documents and registration of birth “ensuring that these processes are, at all different levels, accessible both legally and geographically, to render the right to personality before the law operative”.⁴¹

Another important aspect of this right within the ACHR and the jurisprudence of the IACtHR is its ties to the right to identity. In 2007, the Inter-American Judicial Committee of the Organization of American States issued the *Opinion on the Right to Identity* which, while is not binding in nature, has been consistently referred to in the jurisprudence of the IACtHR also

³⁸ *The Girls Yean and Bosico v The Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs (IACtHR, 8 September 2005) para 179.

³⁹ *Sawhoyamaxa Indigenous Community v Paraguay*, Merits, Reparations and Costs (IACtHR, 29 March 2009), para 192.

⁴⁰ *Ibid* para 189.

⁴¹ *Ibid* para 193.

in relation to Article 3.⁴² In this Opinion, the Inter-American Judicial Committee explained that the right to identity is not the mere sum of its different parts such as the right to a name,⁴³ nationality⁴⁴ or birth registration,⁴⁵ but instead “is consubstantial to the attributes and human dignity”.⁴⁶ It thus established that it is “an enforceable basic human right *erga omnes*”.⁴⁷ This right, the Inter-American Judicial Committee explained, is intimately related to the right to be recognised as a person before the law.⁴⁸

While the right to legal recognition in these three general IHRL treaties is premised on the assumption that it applies to all human beings, the development of specialised treaties⁴⁹ and soft law instruments⁵⁰ that reaffirm a right to recognition to specific NHHLSs suggests that there is a gap. Simply put, not all human subjects come under the protection of this right. For example, the Yogyakarta Principles were drafted precisely because of the gaps in the implementation and interpretation of the seemingly inclusive right to legal recognition. The Yogyakarta Principles illuminate the harm that LGBTQI+ face with regards to their recognition as legal persons and explains in which ways the existing normative content of ICCPR Article 16 can be interpreted in order to address these harms and provide for their full legal recognition.⁵¹ The Yogyakarta Principles affirm the right to define one’s sexual identity and

⁴² E.g., *Gelman v Uruguay*, Merits and Reparations (IACtHR, 24 February 2011), paras 122-123; *Expelled Dominicans and Haitians v Dominican Republic*, preliminary Objections, merits, reparations and costs (IACtHR, 28 August 2014), para 266; *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples* (n 2) para 108.

⁴³ *Opinion on the Right to Identity*, OAS, The Inter-American Judicial Committee, OAE/Ser.Q CJI/doc.276/07 rev 1 (10 August 2007) para 12.

⁴⁴ *Ibid.*

⁴⁵ *Ibid* para14.4.

⁴⁶ *Ibid* para 12.

⁴⁷ *Ibid.*

⁴⁸ *Ibid* para 17.

⁴⁹ *Convention on the Elimination of All Forms of Discrimination Against Women* (n 3) Article 15; *Protocol to the African Charter on Human and People’s Rights of Women in Africa* (n 3) Article 3; *Convention on the Rights of Persons with Disabilities* (n 3) Article 12.

⁵⁰ *CCPR General Comment No. 28* (n 4) para 19; *CEDAW General Recommendation No 21*(n 4) paras 7-10; *CRPD General Comment No 1* (n 4); *Yogyakarta Principles* (n 5) Principle 3; *The Yogyakarta Principles Plus 10* (n 5) Principle 31.

⁵¹ *Ibid* (*Yogyakarta Principles*) Principle 3.

sexual orientation as a protected aspect of the right to be recognised as a person before the law “and one of the most basic aspects of self-determination, dignity and freedom”.⁵² Another example of the gaps are found in Article 3 of the Protocol to the ACHPR on the Rights of Women in Africa (Maputo Protocol) which reaffirms that women are included in the ACHPR Article 5 protections and therefore have a right to dignity *and* legal rights.⁵³ It also establishes the right of women “to respect as a person and to the free development of her personality”⁵⁴ and requires States to ensure their rights.⁵⁵

The most radical example of a response to the gaps in legal recognition is found in the CRPD Article 12 on the equal recognition of persons with disabilities before the law.⁵⁶ CRPD Article 12 does not establish a new right to legal recognition. Persons with disabilities are included within the inclusive wording of ICCPR Article 16 ‘everyone’. However, considering the narrow interpretation of ICCPR Article 16 according to which it grants recognition of personality but not capacity to act, many persons with disabilities were and still are prevented for being recognised as legal subjects with legal capacity.⁵⁷ CRPD General Comment 1 on Article 12 challenges the narrow interpretation of ICCPR Article 16 as protecting a right to legal recognition without legal capacity to act. CRPD General Comment 1 on Article 12 reaffirmed the foundational importance of legal recognition to accessing IHRL and explained that legal recognition implies legal capacity which “is a universal attribute inherent in all persons by virtue of their humanity”.⁵⁸ Thus, denying legal capacity to persons with disabilities

⁵² *Ibid.*

⁵³ *Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa*, (n 3) Article 3(1).

⁵⁴ *Ibid* Article 3(2).

⁵⁵ *Ibid* Article 3(4).

⁵⁶ *Convention on the Rights of Persons with Disabilities* (n 3) Article 12.

⁵⁷ *CRPD General Comment No 1* (n 4) para 5.

⁵⁸ *Ibid* para 8.

means that they cannot access and assert rights.⁵⁹ The CRPD radical quality lays also within its insistence that different human subjects need different assistance to exercise legal capacity and States are under an obligation to “ensure that all measure that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse” as well as to “respect the rights will and preferences of the person”.⁶⁰ Elif argues that CRPD Article 12 is the first IHRL instrument that frames the subject of rights “in some realistic way”⁶¹ by “acknowledging that this subject is embodied in different abilities and interdependent in some respects”⁶² unlike the autonomous self-sufficient subject of rights that liberal legalism advances.⁶³

Although there are gaps in legal recognition, there is no reason to conflate the emerging right to individual self-determination with the right to be recognised as a person before the law. NHHLs already have the right to be recognised as a person before the law. To borrow the HRC framing of violations of Article 16 as the placing of a person outside the protection of the law, NHHLs often find themselves in the uncomfortable and precarious position of both being placed *outside* whilst being *inside* the ‘protection of the law’. My goal is to shape the emerging right to individual self-determination to protect exactly this – the right to be *fully* recognised rather than a right to *some* legal recognition. This means that the right responds to the need to bridge the gap between formal and procedural recognition of the human person before the law as key to becoming a subject of law rather than an object of law. This is what the case-law suggests is needed – a different and additional right to recognition that effectively makes space for a plurality of beings and continuously sheds light on IHRL’s exclusionary structures and

⁵⁹ *Ibid.*

⁶⁰ *Convention on the Rights of Persons with Disabilities* (n 3) Article 12(3) and (4).

⁶¹ Elif Celik, ‘The Role of CRPD in Rethinking the Subject of Human Rights’ (2017) 21 *The International Journal of Human Rights* 933, 948.

⁶² *Ibid.*

⁶³ *Ibid.*

interpretation of its rights to fit the specific needs of its so-called universal human subject of rights. The various NHHLs whose cases before the IHRL adjudicative bodies I have analysed thus far were all recognised as legal subjects to an extent. It is precisely this notion of ‘*extent of recognition*’ that individual self-determination seeks to illuminate. What the right to individual self-determination is set out to do is to examine when human legal subjects are *not fully recognised as the subjects they are*. It goes beyond the binary assumption that either one is a (legal) subject or a (legal) object and examines how subjecthood is undermined in other ways. At this point, the concept of existence can be helpful.

1.2 Existence (Or Exercising Existence)

The ‘*extent of recognition*’ is often hidden by law’s generality and façade of neutrality, especially when NHHLs bring their claims under the right to privacy as I explained in Chapter 2. The jurisprudence on the right to privacy of NHHLs only seldom mentions the question of recognition of subjects as a main issue,⁶⁴ perhaps because such arguments are not within the framework of privacy litigation. Instead, one of the main themes that is raised in these cases relates to choices and the ability to make decisions in relation to one’s body, identity, and relationships which I also explained in Chapter 2. In addition, in Chapter 3 I explained that when individual self-determination is developed as part of the framework of the right to privacy it is bound to reproduce the same lacunas that privacy produces, which are a particular expression of IHRL’s broader acts of inclusion and exclusion. However, some of the developments of individual self-determination within the framework of privacy can also offer a way out of privacy. This is the case of the jurisprudence of the IACtHR beginning with *Atala*

⁶⁴ Cases of legal gender recognition are of course the exception in this sense. However, even such cases do not bring a general claim for recognition or do not necessarily tie legal gender recognition to overall recognition.

*Riffo and Daughters v Chile*⁶⁵ and progressing towards *I.V. v Bolivia*⁶⁶ and the 2017 Advisory Opinion.⁶⁷

In *Atala Riffo and Daughters v Chile*, the IACtHR established that sexual orientation is part of an individual's freedom and right to individual self-determination within the right to privacy. It did so by understanding Article 11 (right to privacy and dignity) through Article 7 (right to liberty), thus producing a freedom-based formula which provides that Ms. Atala Riffo has the right "to freely choose the options and circumstances that give meaning to (...) her existence, in accordance with (...) her own choices and convictions".⁶⁸ The Court's approach in *Atala* is based on its ruling in *Chaparro Álvarez and Lapo Iñiguez v Ecuador* where it established that

In its broadest sense, liberty is the ability to do or not to do all that is lawfully allowed. In other words, it is the right of every person to organise his individual and social life in keeping with his own choices and beliefs, and in accordance with the law (...) Thus, each human right protects an aspect of the liberty of the individual.⁶⁹

Thus, liberty is confined to all that is lawful. This truism is also at times one of the forces which silence NHHLSs. That is, some of the limits that are set by the law harm predominately NHHLSs. In *S.A.S v France*, for example, the ban on wearing full-face covering targeted solely Muslim women who wear a full-face veil in public.⁷⁰ The law did not offer any exceptions that could apply to this category of NHHLSs. Or the limits on legal gender recognition, such as in the case of *A.P., Garçon and Nicot v France* in which three transgender women who sought to amend their legal gender were required by French law to show that they have been diagnosed with a gender identity disorder, to undergone an irreversible change in appearance and to be

⁶⁵ *Atala Riffo and Daughters v Chile*, Merits, Reparations and Costs (IACtHR, 24 February 2012).

⁶⁶ *I.V. v Bolivia*, Preliminary objections, Meris, Reparations and Costs (IACtHR, 30 November 2016).

⁶⁷ *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples* (n 2).

⁶⁸ *Atala Riffo and Daughters v Chile* (n 65), para 135.

⁶⁹ *Chaparro Álvarez and Lapo Iñiguez v Ecuador*, Preliminary Objections, Meris, Reparations, and Costs (IACtHR, 21 November 2007), para 52.

⁷⁰ *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014).

subjected to an expert medical assessment.⁷¹ While the ECtHR ruled in favour of two of the applicants against the requirement of irreversible change in appearance as it related to sterilisation,⁷² it did not rule against the requirement to demonstrate gender identity disorder⁷³ nor against the requirement to undergo a medical examination.⁷⁴ *S.A.S and A.P., Garçon and Nicot* are not cases about a general form of freedom and its containment by the law, these are cases about serious harm to something else. This is where the ruling in *Atala* can be viewed in an even more transformative way – the Court establishes not just any right to freedom, but freedom to *exist*.

However, freedom to make choices is both a powerful and weak framing which is included in the framework of the right to privacy. This is supported by Palacios Zuloaga who, on the one hand agrees that choice-based framings of access to abortion are important because they recognise that pregnant people are “are best placed to make decisions regarding their own reproduction”,⁷⁵ but on the other hand explains that choice is not a sufficiently strong concept.⁷⁶

Palacios Zuloaga argues that

A more comprehensive human rights model of the denial of safe and legal abortion services should also refer to the concrete physical and psychological harm caused to the person who is refused an abortion (...) understanding abortion as choice invisibilises the anguish and the pain caused by being forced to be pregnant and the very real risk to life brought about by unsafe abortion.⁷⁷

She further explains that the discourse of choice has the effect of both misrepresenting the actual individual harm, and the harm to the “broad social group in a structural way”.⁷⁸ In this

⁷¹ *A.P., Garçon and Nicot v France* App nos 79885/12; 52471/13 and 52596/13 (ECtHR, 6 April 2017), para 3.

⁷² *Ibid* para 116.

⁷³ *Ibid* para 144.

⁷⁴ *Ibid* para 154.

⁷⁵ Patricia Palacios Zuloaga, ‘Pushing Past the Tipping Point: Can the Inter-American System Accommodate Abortion Rights?’ (2020) 21 Human Rights Law Review 899, 933.

⁷⁶ *Ibid* 904.

⁷⁷ *Ibid* 922.

⁷⁸ *Ibid* 905.

sense, Palacios-Zuloaga argues that the ruling in *I.V. v Bolivia* on the forced sterilisation of a the applicant who belonged to an intersection of vulnerable groups demonstrates that (i) the Court can use the right to dignity and shape its content considering that it is “an undertheorised right”,⁷⁹ and (ii) that it is able and willing to understand the violations in *I.V.* as part of “structural discrimination and gender stereotypes” instead of a case of an individual violation of an individual’s right.⁸⁰

While Palacios Zuloaga’s critique is situated in the Inter-American System, when stepping outside this regional human rights system, choice also appears to be either a devalued concept or, as she suggests, an inaccurate description of the real harm. In several of the cases which I analysed in this thesis, applicants have also appealed to other rights in addition to the right to privacy. For example, in *Mellet v Ireland* the applicant argued that Ireland also violated ICCPR Article 7 on the prohibition of cruel, inhuman and degrading treatment, Article 2(1) on the obligation to respect and ensure the ICCPR rights without distinction and Article 3 on the right to equality between women and men.⁸¹ Also in *V.C. v Slovakia*, the applicant argued not only that the State violated her ECHR rights to privacy, but also her right to not be subjected to inhuman and degrading treatment and her right to non-discrimination.⁸² In both cases the violation of the applicants’ right to privacy and right to be free from inhuman or degrading treatment were recognised by the two adjudicative bodies.⁸³ Thus, a part of the harm was acknowledged. However, these cases, like many others, contain an additional aspect: an alleged violation of the right to equality or the right to non-discrimination which is often either not

⁷⁹ *Ibid* 917.

⁸⁰ *Ibid* 917.

⁸¹ *Amanda Jane Mellet v Ireland* Comm no 2324/2013 (HRC, 31 March 2016), paras 3.1-3.20.

⁸² *V.C. v Slovakia* App no 18968/07 (ECtHR, 8 November 2011), para 169.

⁸³ *Ibid* paras 106-120; *Amanda Jane Mellet v Ireland* (n 81) paras 7.4-7.6.

addressed⁸⁴ or not fully addressed,⁸⁵ and even less so is it determined to have been violated by the relevant adjudicative body. Thus, I argue that even when applicants attempt to frame their harm outside of the limitations of ‘choice’ and privacy, such as through the right to be free from inhuman or degrading treatment, their harm is not fully acknowledged. They still need something more.

In this sense, using the concepts of ‘existence’ and existence-related-choices establish a distinguishable order of choice to the abstracted and devalued choice that is attached to the right to privacy. However, the ECtHR also applies the notion of ‘existence’ as part of its evaluation of Article 8 margin of appreciation. The Court has affirmed that “particularly important facets of an individual’s existence or identity” may restrict the state’s margin of appreciation.⁸⁶ Therefore, in order to move away from ‘existence’ as a privacy-choice, existence must be understood in relation to recognition. In this sense, an existence-related-choice may be an expression of an individual’s recognition, or better, an expression of the extent of their recognition as a full human legal subject. This means that the objective of the right to individual self-determination is not to protect choice in the abstract sense, but to protect recognition which is at times expressed through existence-related-choices.

Thus, the right to individual self-determination when framed around the notion of recognition actively operates to narrow the gap between the human subject and the human legal subject. This is a gap which NHHLSs experience due to IHRL’s acts of inclusion and exclusion which uphold (yet invisibilise) the hierarchy of subjects. By insisting on recognition, and its expression through ‘existence-related-choices’, NHHLSs can have an alternative avenue for

⁸⁴ *Ibid* (V.C. v Slovakia) para 180.

⁸⁵ *Amanda Jane Mellet v Ireland* (n 81) paras 7.10-7.12.

⁸⁶ *Hämäläinen v Finland* App no 37359/09 (ECtHR, 16 July 2014), para 67.

bringing claims that demonstrate where IHRL fails to recognise them as full human legal subjects. Failure of recognition of full human legal subjecthood may be an expression of IHRL's exclusionary framing of rights that are tailored to fit the needs, wants and desires of the hegemonic, narrow, yet universalised, subject. Thus, by bringing these gaps into the fore, the right to individual self-determination protects the right to access rights and to participate for NHHLSs. It reclaims their space in IHRL.

2. Scope of the Right

2.1 Bodies

The first category which marks the scope of the right to individual self-determination is that of bodies. The body is central to the act of self-determination as it is the locus of interaction with oneself and others. There are three main framings of bodies that are relevant to individual self-determination and are therefore protected by this right. First, the body is a place - the place of the subject where the subject interacts with themselves and with others. Second, it is a means – each body shapes the way in which a subject can engage in an activity or decide to refrain from an activity and in this sense different bodies will require different forms of assistance and accommodation in order to do or not to do certain things. Lastly, the body is also a physical presence – it fills in space in a material, shared existence. This means that the body takes up space in society.

The scope of the right to individual self-determination through the category of bodies can be appreciated in cases regarding access to reproductive health such as *V.C v Slovakia*, *N.B. v*

Slovakia and *I.G. and Others v Slovakia*,⁸⁷ which are explained in several sections of this thesis.⁸⁸ The forced sterilisation of these five Roma women touch the very core of individual self-determination as they underscore the need to qualify the ‘body’ in relation to the recognition of subjects. Forced sterilisation harms and undermines the recognition of a subject as a full human legal subject by the mere denial of free, prior, and informed consent. The obligation to ask for free, prior, and informed consent for non-life-threatening medical procedures is founded on the assumption that a human subject has the right to decide what happens to their body. The denial of such a right is a clear indication that one is not recognised as a full human legal subject. Thus, the right which has been denied poses an obligation on others to obtain consent, within specific conditions, before performing any intervention on their body.

The act of forced sterilisation harms the subject’s right to individual self-determination as it harms the body of the subject in the three framings that have been presented above. First, forced sterilisation harms the body as the locus of interaction with oneself and others. Forced sterilisation alters the subject’s ability to decide on their reproductive health and impedes them from any present or future use of their reproductive system. In fact, the applicants in these cases also reported that the procedure affected their interaction with their loved ones and their communities,⁸⁹ both due to the state of depression that they fell into after the sterilisation,⁹⁰ as well as due to society’s expectations that they will have future pregnancies.⁹¹ Second, the body in these cases directly shaped the treatment that these women received. Their bodies took up

⁸⁷ *V.C v Slovakia* (n 82); *N.B. v Slovakia* App no 29518/10 (ECtHR, 12 June 2012) and *I.G. and Others v Slovakia*, App no 15966/04 (ECtHR, 13 November 2012).

⁸⁸ In particular in Chapter 2, section 2 on ‘Non-Hegemonic Human Legal Subjects and the Right to Privacy: Precarious Inclusion within an Insufficient Framework’.

⁸⁹ *V.C v Slovakia* (n 82) para 134.

⁹⁰ *N.B. v Slovakia* (n 87) para 80.

⁹¹ *I.G. and Others v Slovakia* (n 87) para 21.

space and it is by their mere presence as racialised, gendered, sexed, and classed bodies who did not conform to the standard of the hegemonic human legal subject that their full recognition as human legal subjects was undermined and harmed.⁹²

2.2 Identities

The scope of individual self-determination is further clarified within the category or sphere of identities. Individual self-determination protects the right to have an identity as identity is both a key aspect of a substantive recognition approach to human legal subjects, as well as integral to the act of self-determination itself. Through a self-determination lens which frames this act as inherent, ongoing, and non-linear, identity is also understood as unfixed. The category of identities defines part of the scope of individual self-determination where at its core, identity is both the outcome of self-determination as well as condition for self-determination. This means that one has a right to have an identity, including a fluid and unfixed identity and to be able to enjoy one's identity so to continue in their self-determination.

An example of this framing of identity which defines the scope of the right to individual self-determination can be found in the case of *S.A.S v France*,⁹³ which I presented and analysed in Chapter 1 of this thesis. The non-hegemonic identity of the applicant as a non-white Muslim woman who alternates between wearing a burqa and a niqab in order to express her spirituality is foundational to her complaint.⁹⁴ In her petition she explains that the French ban on face-covering in public interferes with her ability to wear the burqa and the niqab in public spaces.⁹⁵ The applicant centres her argument and narrative of the harm she suffers as one which harms

⁹² *V.C v Slovakia* (n 82), para 170.

⁹³ *S.A.S. v France* (n 70).

⁹⁴ *Ibid* para 11.

⁹⁵ *Ibid* para 14.

her identity. In fact, she argues that the ban caused a split in her identity and personality.⁹⁶ Second, the ban predominantly interferes with the religious, spiritual, and personal expression of Muslim women in France, some of whom are immigrants or descendants of immigrants coming in part from French former colonies.⁹⁷

2.3 Relationships

The last category that defines the scope of individual self-determination within civil and political rights is that of relationships. Relationships form an integral part of one's self-determination when understood as the inherent, ongoing, non-linear act of existing as a human subject. While it is a right to *individual* self-determination: this is not a right that protects atomised subjects but rather the contrary. Much like the categories of bodies and identities, the centrality of relationships to individual self-determination consists in understanding this category as both a means and an end. As a means, relationships are integral to one's ability to exist as a subject. Thus, the denial of full recognition of one's relationships or adverse effects of one's relationships on their own recognition as a full legal human subject harms their ability to engage and their self-determination. As an end to itself, a subject has the right to seek and form relationships as part of their self-determination. A barrier to forming these relationships may be an indication that the right to individual self-determination has been interfered with.

The case of *Hämäläinen v Finland*,⁹⁸ which I presented and discussed in Chapter 1 and will further examine in Chapter 5,⁹⁹ is a good example of the category of relationships as defining

⁹⁶ *Ibid* para 79.

⁹⁷ Sofie G Syed, 'Liberté, Égalité, Vie Privée: The Implications of France's Anti-Veil Laws for Privacy and Autonomy' (2017) 40 Harvard Journal of Law & Gender 324, 237.

⁹⁸ *Hämäläinen v Finland* (n 86).

⁹⁹ See Chapter 5 section 2.

the scope of the right to individual self-determination. In this case the ECtHR examines whether Finland was in breach of its obligations under the right to privacy by conditioning the applicant's ability to change her legal gender and identity number by requiring her to either divorce her wife or change their marriage to a registered partnership. There are three different framings of relationships in this case which come under the scope of this right. First, the applicant's relationship with herself - her own identification that she is seeking to officially amend. Second, the applicant's relationship with state and society taken broadly – in states where gender forms a basic element of a person's identity, amending one's legal gender changes the relationship between the individual and the state. However, it is the third type of relationship that is perhaps the most evident: this case would likely have not arisen had the applicant not been married to a woman. This is because Finnish law did not allow for same-sex marriage and therefore the legal recognition of the applicant's gender appeared to generate tension as it would 'transform' the previously heterosexual marriage into a same-sex one. As I explained above, while I addressed each of the three categories of bodies, relationships, and identities separately, more often than not these categories are interconnected and intertwined, as in the case of *Hämäläinen v Finland* which touches upon relationships and identities at the same time.

3. Limitations

Qualified rights more often than not, follow the logics of the harm principle in setting lawful grounds for limitations which are followed by assessment of necessity and balancing. Mill who coined the harm principle explained that personal liberties may be restricted in a very limited set of cases. He established that

the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. He cannot rightfully be compelled to do or forbear because it will better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right.¹⁰⁰

One of the main tensions that are situated in this principle, I argue, is its invitation for abstraction and generality. This is of course part of making general principles – there will be room for interpretation, and they will be framed in general broad terms, often abstract ones.¹⁰¹ However, on a closer look, the general principle suggests one main test – membership of a civilised community. Once this requirement is satisfied, the harm principle can be applied to a specific ‘civilised’ subject. This binary division of subjects may stem from Mill’s own biography as a functionary of British Imperialism, including his parliamentary role, and the years spent working for the East India Company.¹⁰² Habibi argues that Mill “denied entire nations of people the right to determine their own interests and pursue their own notions of happiness, and instead saw a need to impose his own standards on them” and that in fact for this category of subjects Mill adopted a paternalistic approach.¹⁰³ Habibi further explains that while “[o]ne of the central themes of *On Liberty* is the protection of individual rights against the power of the majority or dominant group (...) this rights-based framework is not applied to the uncivilised”.¹⁰⁴

¹⁰⁰ John Stuart Mill, *On Liberty* (The Floating Press 1909, re-printed 2009) 18-19.

¹⁰¹ See among others: Roland Dworkin, ‘The Model of Rules’, (1967) 35 *The University of Chicago Law Review* 14; Joseph Raz, ‘Legal Principles and the Limits of Law’, (1972) 81 *The Yale Law Journal* 823; Robert Alexy ‘On the Structure of Legal Principles’, (2000) 13 *Ratio Juris* 294; Robert Alexy, ‘Balancing, Constitutional Review, and Representation’, (2005) 3 *International Journal of Constitutional Law*, 572.

¹⁰² For additional work on Mill’s colonialist and imperialist perspective in his work see: David Williams, ‘John Stuart Mill and the Practice of Colonial Rule in India’ (2020) 17 *Journal of International Political Theory* 412; Mark Tunick ‘John Stuart Mill and Unassimilated Subjects’ (2005) 53 *Political Studies*, 833; Duncan Bell, ‘John Stuart Mill on Colonies’ (2010) 38 *Political Theory* 34; Beate Jahn, ‘Barbarian Thoughts: Imperialism in the Philosophy of John Stuart Mill’ (2005) 31 *Review of International Studies* 599.

¹⁰³ Don Habibi, ‘The Moral Dimensions of J S Mill’s Colonialism’ (2002) 30 *Journal of Social Philosophy* 125, 139.

¹⁰⁴ *Ibid.*

However, notwithstanding the Eurocentric, racist, and imperialist framing of the harm principle, its rational has been incorporated into IHRL as a test for setting limitations to rights and freedoms. An example is ECHR Article 8(2) which lists the legitimate aims for lawful interference with the right to privacy and private life.¹⁰⁵ While non-absolute rights, such as the right to individual self-determination can be lawfully limited, the application of the abstract and ‘objective’ assessment of interference must be guided by active contextualisation to avoid the silencing of NHHLSs. This is because the logic of abstraction is one of the ways in which IHRL operates to include and exclude subjects, objects, actions, and spaces. Thus, the only way to work with and within IHRL is to insist on context, embeddedness and lived experiences.

The importance of context in setting out limitations to the right to individual self-determination is based on the ECtHR principle that rights must be guaranteed in a way which is not “theoretical or illusory but (...) practical and effective”.¹⁰⁶ In order to ensure that the right is not theoretical but material, the abstract grounds to limitations need to be examined from a contextual perspective. This aligns with the lens, that I have advanced throughout this thesis, to reject the assumption of neutrality and generality of the law and highlight IHRL as operating through inclusion and exclusion and upholding a hierarchy of subjects. Thus, I argue that if individual self-determination were to offer an adequate alternative avenue to NHHLSs’ claims that have previously been brought under the right to privacy, it must be shaped in a manner that highlights law’s false neutrality and pushes toward full recognition of diverse subjects. This can be done by rejecting the tendency or compliance with abstraction and claiming the importance of context also in the limitations of rights.

¹⁰⁵ *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)* Council of Europe ETS 5 (4 November 1950, in force 3 September 1953) Article 8(2).

¹⁰⁶ *Artico v Italy* App no 6694/74 (ECtHR, 13 May 1980), para 33.

Intersectional Feminist legal theory embraces contextualisation as part of its methodologies.¹⁰⁷ The imperative of contextualisation and concretisation¹⁰⁸ stems from a critique to abstraction, generality and the disguise of neutrality of the law.¹⁰⁹ According to Matsuda, feminist theory rejects “existence abstractions that constrain our vision”.¹¹⁰ This is because “The refusal to acknowledge context – to acknowledge the actual lives of human beings affected by a particular abstract principle – has meant time and again that women’s well-grounded, experiential knowledge is subordinated to someone else’s false abstract presumptions”.¹¹¹ In her critique of Rawls’ theory of justice for its abstractions, Matsuda explains that rejecting abstraction does not mean rejecting theory but simply recognising that “that real people create theory and that real people live their lives in worlds affected by theory. Half of those people are women, and their experiences can teach us something about justice”.¹¹² Harris argues that “[t]o be full subversive, the methodology of feminist legal theory should challenge not only law’s content but its tendency to privilege the abstract and unitary voice, and this gender essentialism also fails to do”.¹¹³ Otto explains that critical approaches to law such as feminist, queer and postcolonial theories expose the political nature of the

supposedly neutral legal method (...) for example, that facts are abstracted and context is considered largely irrelevant, that structural hierarchies of power are ignored despite their influence on the presentation and interpretation of the facts and on the judicial reasoning that follows, and the public/private distinction is used to avoid or disavow human rights abuses suffered particularly by women.¹¹⁴

¹⁰⁷ Dianne Otto, ‘Feminist Judging in Action: Reflecting on the *Feminist Judgments in International Law Project*’ (2020) 28 *Feminist Legal Studies* 205, 207.

¹⁰⁸ As Matsuda explains: “Abstraction as a methodology encompasses the belief that visions of social life can be constructed without references to the concrete realities of social life”. Mari J Matsuda, ‘Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique to Rawls’ Theory of Justice’ (1986) 16 *New Mexico Law Review* 613, 613.

¹⁰⁹ Otto (n 107).

¹¹⁰ Matsuda (n 108) 618-619.

¹¹¹ *Ibid.*

¹¹² *Ibid* 629.

¹¹³ Angela P Harris, ‘Race and Essentialism in Feminist Legal Theory’ (1990) 42 *Stanford Law Review* 581, 586

¹¹⁴ Otto (n 107).

Feminist judgments projects do the exact opposite – they highlight law’s façade of neutrality and generality, also in their decision to use the feminist methodology of contextualisation.¹¹⁵ For example, the feminist bench in *Buzkurt* (previously titled ‘*Lotus case*’ or *France v Turkey*) explained that they have taken context into their considerations which is “a necessity in contemporary feminist thinking”.¹¹⁶ When writing as the PCIJ they established that “[t]his Court believes that, in order to make a fair and reasonable judgment, it is necessary to consider the broader context in which the events occurred”.¹¹⁷ Thus, context for the feminist bench sitting as the PCIJ helps to secure fairness and reasonableness. Or in the re-reading of *Christine Goodwin v United Kingdom* where the feminist bench sitting as the ECtHR Chamber included a section of the judgment titled “the applicant’s life as a transsexual”.¹¹⁸

At the same time, contextualisation is not a new method in IHRL, also outside of feminist lenses. The practice of allowing for third party interventions by way of submitting Amicus Curiae briefs or expert opinions are accepted in all four main adjudicative bodies:

¹¹⁵ Among the various feminist judgment projects see: Rosemary Hunter, Clare McGlynn and Erika Rackley (eds) *Feminist Judgments from Theory to Practice* (Hart Publishing 2010); Heather Douglas, Francesca Bartlett, Trish Luker and Rosemary Hunter (eds) *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing 2014); Kathryn M Stanchi, Linda L Berger and Bridget J Crawford (eds) *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (Cambridge University Press 2016); Máiréad Enright, Julie McCandless, and Aoife O’Donoghue (eds) *Northern/Irish Feminist Judgments: Judges’ Troubles and the Gendered Politics of Identity* (Hart Publishing 2017) Kimberly M Mutcherson (ed) *Feminist Judgments: Reproductive Justice Rewritten* (Cambridge University Press 2020). Whilst not defines as a feminist judgments project, the *Diversity and European Human Rights* project undertook a similar approach. See: Eva Brems (ed), *Diversity and European Human Rights: Rewriting Judgments of the ECtHR* (Cambridge University Press 2012).

¹¹⁶ Christine Chinkin, Gina Heathcote, Emily Jones and Henry Jones, ‘*Buzkurt case*, aka the *Lotus cases* (*France v Turkey*): Ships that Go Bump in the Night’ in Loveday Hodson and Troy Lavers (eds), *Feminist Judgments in International Law* (Hart Publishing 2019) 32-33.

¹¹⁷ *Ibid* 35.

¹¹⁸ Sarah Bengtson, Damian Gonzalez-Salzburg and Loveday Hodson, ‘*Christine Goodwin v the United Kingdom*’ in Loveday Hodson and Troy Lavers (eds), *Feminist Judgments in International Law* (Hart Publishing 2019) 184.

AComHPR,¹¹⁹ IACtHR,¹²⁰ ECtHR¹²¹ and HRC.¹²² Viljoen and Abebe explain that amicus interventions are framed as a friendly assistance to the court “by making available information on issues or law or fact, or any other aspect of a case relevant for a decision”¹²³ which also enhances the “democratic legitimacy [of] the process of adjudication”.¹²⁴ According to Nieminen, the ECtHR “frequently considers contextual empirical information when it determines the scope of the margin of appreciation and ‘European consensus’, and occasionally used contextual evidence, such as statistics, in establishing facts”.¹²⁵ However, while European consensus may be framed as part of a contextualisation process, it is a very limited one that is often given disproportionate power in defining issues such as whether a case regards a particularly important facet of one’s identity and how this should be protected.¹²⁶ Another example of contextualisation can be found in *I.G. and Others v Slovakia*, where the ECtHR decided to add the applicants’ belonging to a vulnerable group as part of its assessment of the ‘minimum level of severity’ requirement under Article 3.¹²⁷ Although this is not an example of examining lawful limitations as Article 3 is a *jus cogens* right to which no derogations are allowed,¹²⁸ it shows that the Court is broadly able and willing to move beyond abstraction to contextualisation.

¹¹⁹ *Rules of Procedure of the African Commission on Human and Peoples’ Rights*, African Commission on Human and Peoples’ Rights, OAU, (19 February to 04 March 2020) Rule 104 and Rule 106.

¹²⁰ *Rules of Procedure of the Inter-American Court of Human Rights*, Inter-American Court of Human Rights, OAS (Approved by the Court during its LXXXV regular period of sessions 2009) Article 44.

¹²¹ *European Convention on Human Rights* (n 105) Article 36; *Rules of the Court*, European Court of Human Rights, COE (20 March 2023) Article 44

¹²² Rules of Procedure HRC Rule 96(1): “When considering communications under the Optional Protocol, the Committee or its special rapporteur may accept information and documentation submitted by third parties which may be relevant to the proper determination of the case”. *Rules of Procedure of the Human Rights Committee*, United Nations Human Rights Committee, CCPR/C/3/Rev.12 (4 January 2021) Rule 96(1)

¹²³ Frans Viljoen and Adem Kassie Abebe, ‘Amicus Curiae Participation Before Regional Human Rights Bodies in Africa’ (2014) 58 *Journal of African Law* 22, 25.

¹²⁴ *Ibid* 26.

¹²⁵ Kati Nieminen, ‘Eroding the Protection Against Discrimination: The Procedural and De-Contextualised Approach to *S.A.S v France*’ (2019) 19 *International Journal of Discrimination and the Law* 69, 79.

¹²⁶ See generally Chapter 5 where I apply the framework of the emerging right to individual self-determination.

¹²⁷ *I.G. and Others v Slovakia* (n 87) para 123.

¹²⁸ *Al-Adsani v The United Kingdom* App no 35763/97 (ECtHR, 21 November 2001), para 61.

The problem therefore is not that of complete rejection, hostility or even indifference to using context in analysing limitations of rights, but that the decision whether to do so and how to do so is not systematic nor is it part of an obligation *per se*. Thus, in framing my approach to the emerging right to individual self-determination I set an obligation to examine limitations from a content-led analysis which is informed by IHRL's acts of inclusion and exclusion. The rationale for such obligation stems from the core of the right as protecting recognition and as a result, protecting the right to participate in a democratic society both at the macro and micro levels. This means that limitations on the emerging right to individual self-determination cannot nullify or undermine its essence – recognition. That is, they cannot interfere with the three areas of recognition to the extent where the individual's ability to participate in society is compromised. Therefore, limitations to this right must always be assessed *in context*. In order to do so, adjudicative bodies should adopt a *pro persona*¹²⁹ led assessment that is, to find the “the most beneficial interpretation and application of norms for individuals”.¹³⁰

It is not sufficient to argue for context rather than abstraction in general. I therefore add two additional requirements to the regular test for limitations of qualified rights: (i) identifying the human legal subjects and (ii) understanding the alleged harm in relation to the recognition of subjects. These two requirements form the basic grounds for a context-based assessment of limitations that is informed by IHRL's acts of inclusion and exclusion.

¹²⁹ I am using *pro persona* as a gender-neutral alternative to *pro homine*.

¹³⁰ Yota Negishi, ‘The *Pro Homine* Principle's Role in Regulating the Relationship between Conventionality Control and Constitutionality Control’ (2017) 28 *The European Journal of International Law* 457, 471.

3.1 Identifying the Human Legal Subject

The first step in assuring that the right is limited lawfully by avoiding abstraction is to make the applicant's subjecthood a concrete part of the assessment of the limitation to their right. It is guided by Ahmed's framing of the 'feminist ear'.¹³¹ According to Ahmed, "[t]o hear with a feminist ear is to hear who is not heard, how we are not heard".¹³² This first requirement ensures that NHHLSs are visible by both listening to how they describe themselves and construct the context in which they are embedded. This second aspect, that of construction of the context in which the subject is embedded, is particularly important for NHHLSs. It makes their non-hegemonic character visible; it locates them in a relationship of power.

The construction of the context can be done by using a variety of sources such as reports by grassroots NGO, international NGOs, thematic report and country reports by various relevant UN treaty bodies, Special Rapporteurs and Working Groups. Regional human rights institutions and bodies are another source for contextualisation. For example, in the case of ECtHR litigation, the work of the Council of Europe Commissioner on Human Rights can be used in order to construct the context. National human rights bodies can also supply insight to the construction of the context if these institutions, such as Ombudsman offices, demonstrate a sufficient degree of independence from the state in accordance with the Paris Principles.¹³³

Contextualisation in part already exists in IHRL adjudication, primarily in the form of third-party interventions. Thus, I am not suggesting new sources *per se*, but rather an intention – a call to systematically use these sources in order to understand the human legal subject as

¹³¹ Sarah Ahmed, *Complaint!* (Duke University Press 2021) 3-23.

¹³² *Ibid* 4.

¹³³ *National Institutions for the Promotion and Protection of Human Rights*, UN Commission on Human Rights, E/CN.4/RES/1993/55 (9 March 1993).

embedded in a legal, social, political, religious, cultural and economic panorama. This is precisely the method that I apply in Chapter 5 to each of the three cases that I analyse through the right to individual self-determination. In each case I show how sources that could have reasonably been available to the ECtHR at the time of deliberation would have assisted the Court in constructing the context of the human legal subject.

3.2 Understanding the Alleged Harm in Relation to the Recognition of Subjects

This second layer of analysis builds on the construction of the subject and their embeddedness. The limitation of the right to individual self-determination is examined under at least one the relevant protected areas of recognition (bodies, identities, relations).¹³⁴ The closer the nexus is between the alleged harm and the area of recognition is, the higher the threshold for limiting the right to individual self-determination.

3.3 Applying the Right to Individual Self-Determination Obligations to the Set Test for Limitations

The assessment begins with the determination of legality, that is, there must be a legal basis for an interference with a right.¹³⁵ Compliance with the requirement of “prescribed by law”,¹³⁶ is further qualified by determining whether the law is “sufficiently accessible, precise and foreseeable”¹³⁷ and whether there is compliance with the principle of the rule of law.¹³⁸ The requirement of precision and accessibility of the law functions as a measure against

¹³⁴ See section 2 ‘Scope of the Right’.

¹³⁵ *Amuur v France* App no 19776/92 (ECtHR, 25 June 1996), para 50.

¹³⁶ *Carbonara and Ventura v Italy* App no 24538/94 (ECtHR, 30 May 2000), para 64.

¹³⁷ *Ibid* para 65; *Lithgow and Others v United Kingdom* App nos 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; and 9405/81 (ECtHR, 8 July 1986), para 110.

¹³⁸ *Ibid* (*Carbonara and Ventura v Italy*) para 64.

arbitrariness.¹³⁹ Likewise, the foreseeability requirement considers whether a law is precise enough to allow for a person to “regulate [their] conduct”.¹⁴⁰ These are all important aspects of the legality test that already exist in the ECtHR. The right to individual self-determination further complicates this assessment by including both a content-rich interpretation of the rule of law which includes human rights and adds the drafting history of the relevant law as part of the contextual analysis of the lawful limitations of this right. This is because “the drafting history of an apparently neutral measure and its practical consequences point to intentional discrimination”.¹⁴¹ At the same time, the contextualisation requires that attention is brought not only to the drafting history but also to the application of a law. As the CRPD Committee explained, “a law which is applied in a neutral manner may have a discriminatory effect when the particular circumstances of the individuals to whom it is applied are not taken into consideration”.¹⁴²

The assessment of legitimate aims for interference with the right are further qualified by the contextual analysis provided in the first part of the assessment – the construction of the context in which the human legal subject is embedded. That is, the broad and abstract grounds are not taken at face value but are examined in each case in concrete terms. Only when a legitimate aim is explained in context can the relevant adjudicative body fully assess whether there has been a pressing social need that requires the limitation of the individual’s right to individual self-determination. This is a lesson from *S.A.S v France* in which, as Nieminen explains, the ECtHR accepted the aim of ‘living together’ although it “acknowledged that the vagueness of the notion of ‘living together’ resulted in a risk of abuse”.¹⁴³ Nieminen further explains that

¹³⁹ *Amuur v France* (n 135).

¹⁴⁰ *The Sunday Times v The United Kingdom* App no 6538/74 (ECtHR, 26 April 1979), para 48.

¹⁴¹ Nieminen (n 125) 76.

¹⁴² *H.M. v Sweden* Comm no 3/2011 (CRPD, 6 December 2010), para 8.3.

¹⁴³ Nieminen (n 125) 72.

“precisely due to the flexibility of ‘living together’, assessing its necessity in relation to the full-face veil ban was an impossible task to begin with”.¹⁴⁴ The need to re-think legitimate aims is also supported by Çali who argues that “[e]mpirical considerations aim to de-personalise the grounds for the restriction of rights as much as possible, however, the choice of which considerations count is in itself an interpretative exercise”.¹⁴⁵

In Chapter 2, I presented Çali’s critique of the concept of the balancing of rights. Her critique guides my development of adequate balancing practice for the right to individual self-determination. As I explained earlier, Çali observes that the common approach to balancing creates an idea of IHRL as a constant conflict between a right holder and the broader public.¹⁴⁶ This is particularly important to problematise in relation to NHHLSs as it measures the individual’s needs against collective broader needs, which, for a non-hegemonic subject is a significant disadvantage. In a sense, it follows the logic of ‘complaint’ of which Ahmed writes. According to Ahmed “you can end up being made to feel that you are the problem, that the problem is you”.¹⁴⁷ When balancing is applied in an abstract sense, whereby the collective needs and wills are measured against the non-hegemonic subject’s right, the balancing is premised on unequal grounds. This does not mean that balancing should be abolished, but that the inequality of power must be acknowledged rather than invisibilised. This is similar to what Brems suggests with regards to cases on conflict of rights. Brems explains that “the first step towards a sustainable approach is the explicit identification of conflict between human rights (...) putting both rights on the table and naming the conflict, is a requirement of transparency

¹⁴⁴ *Ibid* 72.

¹⁴⁵ Başak Çali, ‘Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions’ (2007) 29 *Human Rights Quarterly* 251, 265.

¹⁴⁶ *Ibid* 269.

¹⁴⁷ Ahmed (n 131) 16.

as well as of even-handedness”.¹⁴⁸ In this sense, it is not enough for a State to claim that it is restricting a right by virtue of one of the general aims, but it must explain how the restriction fits the aim to begin with.

The element of ‘democratic society’ is the last one that needs to be re-imagined for a right to individual self-determination to function as an alternative to the right to privacy and accommodate NHHLSs’ claims. To satisfy the requirement of ‘necessary in a democratic society,’ States must show that the interference with the applicant’s right does not deprive them from being fully recognised as a subject *and* as a human legal subject. In fact, if the foundation of a democratic society is understood to be the guaranteeing of substantive participation, such substantive and equal participation is only possible when every individual is recognised as a full human legal subject in a way which is compatible with the human subject they *are*. Thus, the right to individual self-determination affirms that recognition of human legal subjects is not merely procedural or formal but substantive. When the applicant is recognised as the subject they *are*, they can participate in a democratic society. Consequently, a state must show that by restricting this right it is not harming one of the protected areas of recognition to the extent that the individual’s ability to participate in a democratic society is undermined.

Conclusion: Recognising the Human Subject and the Human Legal Subject

In Chapter 3 I argued that the uses of individual self-determination in IHRL suggest that it is an emerging right which can be developed in a strategic manner if informed by the IHRL’s acts of inclusion and exclusion. These tensions guided my approach in this penultimate chapter

¹⁴⁸ Eva Brems, ‘Conclusion- Conflicting Views on Conflicting Rights’ in Stijn Smet and Eva Brems (eds), *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (Oxford University Press 2017) 243.

which closes Part II of my thesis on the conceptualisation of the new emerging right to individual self-determination. I thus defined the emerging right to individual self-determination as a framework that works *with* these tensions. By framing the right as protecting substantive recognition I insisted on the importance of substantive recognition as a guarantee for access and participation in IHRL and in democratic society. Substantive recognition does not undermine or replace the right to be recognised as a person before the law. Instead, the emerging right to individual self-determination actively operates to show where formal and procedural recognition is insufficient precisely because IHRL is based on the inclusion and exclusion of subjects, and in this case, of human subjects. In addition, as a safeguard from IHRL's façade of neutrality and generality which invisibilises these acts of inclusion and exclusion, I incorporated a contextualisation requirement to assessing interferences with this right. Contextualisation is key to materialising substantive recognition as it situates the human legal subject in a particular context and moves away from a formal and abstract understanding of legal recognition. This means that unlike the right to privacy which offers a limited and precarious protection to NHHLSs, the right to individual self-determination reclaims their space and participation in the private and the public sphere and establishes that such participation is integral to any balancing and limitation of the right. Any limitations to this right must show that they do not undermine the individual's full recognition as a human legal subject to the point where their effective participation in a democratic society is undermined.

However, the right to individual self-determination is in the process of emerging, that is, it is not yet a recognised, accepted and hence operational right in IHRL. There is also no certainty that it will indeed fully emerge and materialise. Defining and engaging with its shaping is nonetheless important because the framework itself can be used as an analytical tool to illuminate existing gaps in IHRL and contribute to the collective and disjointed efforts to

articulate responses to these gaps. By articulating this approach to its shaping, I am both contributing to its process of emergence *and* demonstrating how this framework can be useful to illuminate the gaps in recognition. This is precisely the scope of the last Chapter of the thesis in which I return to three ECtHR rulings and re-imagine them through the application of the emerging right to individual self-determination.

Part III: From Theory to Practice

Chapter 5: Re-Imagining Selected Judgments through the Right to Individual Self-Determination

Introduction

In this final chapter of the thesis, I apply the framework of the emerging right to individual self-determination to three ECtHR judgments. Davies explains that “objects are always constructed, and (...) theory is always an act” because it “changes the object under consideration”.¹ In this sense, the re-imagination of the selected judgments through the application of the new emerging right to individual self-determination means to engage with theory *and* practice in IHRL.

The selected judgments have played an influential part in articulating the thesis’s problematisation, theorisation, and responses to the research question. *I.G. and Others v Slovakia*, *Hämäläinen v Finland* and *S.A.S. v France* are all cases regarding NHHLs that shed a light on the inadequacy of the right to privacy as a particular expression of IHRL’s broader acts of inclusion and exclusion and the structural and interpretive limitations that stems from these acts. All three cases raise issues of recognition of subjects within one or more of the areas protected under the emerging right to individual self-determination: bodies, identities and relationships. Taken separately and together, these cases highlight the gaps in recognition and the need to employ a substantive approach to recognition of human legal subjects that is guided by contextualization and moves away from abstraction and formal inclusion. The application therefore shows how the emerging right to

¹ Margaret Davies, ‘Taking the Inside Out’, in Ngaire Naffine and Rosemary J Owens, *Sexing the Subject of Law* (Sweet and Maxwell 1997) 26.

individual self-determination can better detect, name, and accommodate the harms which were previously brought under the right to privacy. This is because when the right to individual self-determination is applied, the non-hegemonic position of these subjects is brought into the fore of the assessment as an active stance of resistance to IHRL's predisposition for abstraction. By re-imagining these cases through the application of the right to individual self-determination I reveal the gaps in the processes of weighing the conflict of rights and interests and introduce a contextualised approach to these processes.

The NHHLSs in all three cases were not fully recognised by the ECtHR this is primarily expressed in the ECtHR's decision to either not examine their claims under Article 14 or to establish that this Article was not breached. This is because many of the cases on which I based the need for developing the right to individual self-determination include claims regarding a violation of privacy and a violation of the prohibition on discrimination. The nexus between a violation of a substantive right and non-discrimination is, more often than not, an invitation to re-examine recognition. In the absence of an accepted, recognised and operationalised right to individual self-determination in IHRL, harm that would be brought under this right can at times be framed as a series of violations which regard at least one of the protected areas of recognition and include a violation of the right to equality or non-discrimination. When taken together these two aspects indicate that a case is also about full recognition of human legal subjecthood. For the purposes of this chapter, I both explained this aspect in the overview of the original judgments and showed how these cases could be re-imagined through the emerging right to individual self-determination.

As the right to individual self-determination is emerging, and, of course, may never fully emerge, the application has also the scope of illuminating existing gaps and shortcomings in the ECtHR approach to claims brought by NHHLSs. It is both an exercise in imagination and an active pursuit of feasible change.

1. *I.G. and Others v Slovakia*

1.1 Facts

I.G. and Others v Slovakia is the third ECtHR case on forced sterilisation of Roma women in Slovakia.² The application was initiated by three Roma women³ who were hospitalised in relation to their pregnancies in the same facility, which at the time was under the authority of the Ministry of Health.⁴ These women were sterilised without their free, prior and informed consent. The sterilisations were performed via tubal ligation during Caesarean surgeries but were not considered life-saving interventions.⁵ The first and second applicants were minors at the time and explained that not only did they not give prior and informed consent to the procedure but neither did their legal guardians.

The applicants said they were rushed by hospital staff and forced to sign documents they did not understand. The first applicant explained that the morning after her Caesarean she was asked to sign a document which she was told was part of the common practice for this type of surgery.⁶ The second applicant stated that neither she nor her parents consented to the sterilisation, nor had they signed any document. They were informed of the sterilisation after her Caesarean. The third applicant was asked to sign a document just before beginning her Caesarean surgery. Although she had informed the medical personnel that she was unable to read the document due to experiencing pre-surgery dizziness from medication in preparation for anaesthetics, she was told she must sign the document to proceed with the Caesarean delivery.

² The first was *V.C v Slovakia* App no 18968/07 (ECtHR, 8 November 2011); followed by *N.B. v Slovakia* App no 29518/10 (ECtHR, 12 June 2012).

³ The third applicant died in 2010 and her children asked to join on her behalf.

⁴ *I.G. and Others v Slovakia* App no 15966/04 (ECtHR, 13 November 2012), para 7.

⁵ *Ibid* para 9.

⁶ *Ibid* 12.

The absence of free, full and informed consent meant that each applicant discovered she had been forcibly sterilised at different moments of her life. The first applicant learned about her sterilisation three years after being sterilised; the second was told the day after her Caesarean; the third was told when she was asked to sign a document before being discharged from the hospital.

The sterilisations affected the applicants in various ways with adverse outcomes to their mental and physical health, intimate relationships and broader relationships within their communities. The first applicant suffered major health complications and five days after her surgery was rushed to another hospital with post-surgery inflammation. She developed sepsis and underwent a life-saving operation and was given a hysterectomy. While it is unclear which type of hysterectomy was performed, all variations of such an operation include some removal of the womb and the reproductive system that at a minimum lead to a permanent inability to become pregnant, and in some cases to an early menopause. The first applicant explained that she is “living in constant fear that her partner will leave her because she is not able to bear him any more children”.⁷ The second applicant also reported to suffer “serious medical side-effects.”⁸ Being unable to bear more children severely affected her relationships with her partner and with her community.⁹

In their application to the ECtHR they argued that Slovakia breached the prohibition on torture under Article 3, right to private life; Article 8, right to marry; Article 12, right to an effective remedy; Article 13, right to an effective remedy; and the prohibition on discrimination under Article 14.¹⁰ They explained that they had “received inferior treatment”¹¹ during their hospitalisation and that this

⁷ *Ibid* para 17.

⁸ *Ibid* para 22.

⁹ She reported that her “social status in the community has fallen” *Ibid* para 21.

¹⁰ *Ibid* para 3.

¹¹ *Ibid* para 30.

stemmed from “racial prejudice on the part of medical personnel”.¹² They were physically segregated from non-Roma women and allocated to “gypsy rooms”, and were prevented from using the same toilets, bathrooms, and dining room as non-Roma women.¹³ Also, the second applicant said she was verbally abused by medical personnel.¹⁴ Due to the death of one of the applicants during the proceedings, her children asked to participate in the litigation on her behalf.

1.2 Overview of the Original Judgment

Two aspects of this judgment are particularly important to consider: (i) the near to total unanimity of the decisions made by the Chamber; and (ii) the way in which the Court linked this case to the previous two cases on forced sterilisation of Roma women which it ruled on shortly before assessing the claims brought in *I.G. and Others*. These two aspects of the original judgment, I argue, are different faces of the same problem – the Court’s inability or unwillingness to fully grasp the importance of the subject matter. This I argue, can be improved through the application of the emerging right to individual self-determination that I present in the next section. In this overview I focus on (i) the ECtHR reasoning with regards to the *Locus Standi* of the third applicant’s children (ii) the violation of Article 3; (iii) the violation of Article 8 and (iv) the refusal to examine the alleged violation of Article 14.

1.2.1 *The Locus Standi*

The ECtHR Chamber ruled unanimously on all but one of the aspects in the case of *I.G. and Others*. Opinions differed on the first admissibility question – the *locus standi* of the third applicant’s children who asked to participate as parties to the case following the death of their mother i.e., the third

¹² *Ibid.*

¹³ *Ibid* para 31.

¹⁴ *Ibid.*

applicant. This decision, I argue, is one of several missed opportunities of the ECtHR ruling in this case. In *Scherer v Switzerland* the Court affirmed that “parents, spouse or children of a deceased applicant are entitled to take his place in the proceedings”¹⁵ i.e., “close relatives”.¹⁶ While in some of its early case-law the Court seemed to accept similar requests in an unchallenged manner,¹⁷ it has since developed two additional tests to determine standing.

According to the first test, the relevant rights must be deemed ‘transferable’, meaning, that some ECHR rights can only be claimed by the person who personally suffered the alleged violation. For example, Article 2 on the right to life is transferable precisely because of “the nature of the violation alleged and considerations of the effective implementation of one of the most fundamental provisions in the Convention system”.¹⁸ However, the Court has been applying the ‘transferable rights’ framing to various cases without explaining why, in general, certain ECHR rights are not transferable. This is demonstrated in the ECtHR’s ruling on *Sanles Sanles v Spain* which became an authority in assessing transferable rights even though the Court does not substantiate why certain rights are non-transferable.¹⁹ Thus, when this test is applied to *I.G. and Others v Slovakia* the Court determines that the third applicant’s children do not have standing because of the nature of the alleged violation as non-transferable.²⁰ At the same time, the Court added that these rights cannot be transferred to the children “also in view of their factual background [and because they are] so closely linked to the person of the original applicant”.²¹ In this sense, determining that the rights at hand were not transferable demonstrate the gap in the ECtHR jurisprudence on this issues. The ECtHR therefore would benefit further jurisprudence on this matter as it is currently underdeveloped.

¹⁵ *Scherer v Switzerland* App no 17116/90 (ECtHR, 25 March 1994), para 31.

¹⁶ *Ibid.*

¹⁷ *Vocaturo v Italy* App no 11891/85 (ECtHR, 24 May 1991), para 2; and *G. v Italy* App no 12787/87 (ECtHR, 27 February 1992), para 2.

¹⁸ *Biç and Others v Turkey* App no 55955/00 (ECtHR, 2 February 2006), para 22.

¹⁹ *Sanles Sanles v Spain* App no 48335/99 (ECtHR, 26 October 2000), para 7.

²⁰ *I.G. and Others v Slovakia* (n 4) para 91.

²¹ *Ibid.*, para 91.

However, when the first test fails, the Court may still grant standing if it finds that the petition satisfies the second test by determining that it yields a “general interest which necessitates proceeding with the examination of the complaints raised by the third applicant”.²² The Court’s assessment of this test, I argue, demonstrates where it failed to grasp the full complexity of *I.G. and Others*. That is, the Court determined that there is no general interest. The Court established that there is no general interest after indicating it had already “addressed similar complaints”²³ – and referred to *V.C.* and *N.B.* – and concluding “it will examine complaints similar to those raised by the third applicant in so far as they were also raised by the first and second applicants in the present case”.²⁴

Considering the gendered and racialised aspect of the case which regards forced sterilisation of Roma women, *and precisely because it is the third case that reaches Strasbourg’s jurisdiction*, affirming that it does not yield a general interest does not cohere with the gravity of the allegations nor with the fact that these could point towards a pattern of violations considering the similarities in the harm itself and the profile of the applicants. The ECtHR could have applied its reasoning in *Karner v Austria* where it determined that some flexibility in the interpretation of ‘victim’ is required because “human rights cases (...) have a moral dimension”²⁵ and therefore some petitions still need to be pursued even after the death of the person who suffered the violation.²⁶ In *Karner v Austria* the ECtHR explained that while its primary task is to “provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States”.²⁷

²² *Ibid* para 92.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Karner v Austria*, App no 40016/98, ECtHR (24 July 2003) para 25

²⁶ *Ibid.*

²⁷ *Ibid* para 26.

The Court is able to grant standing when a petition “would contribute to elucidate, safeguard and develop the standard of protection under the Convention”.²⁸ Some may argue view the Court’s decision to pursue the application in *Karner* simply because, unlike *I.G. and Others*, there were no other petitioners but the deceased. Thus, had the Court not allowed for the petition to be granted, serious matters regarding policy would have not been heard by the Court.²⁹ This, however, does not undermine the request to participate by the third applicant’s children. In a petition such as that of *I.G. and Others* there is importance attached to respecting the number of applicants and the violations for which they seek recognition from the Court. Numbers count: three Roma women were allegedly forcibly sterilised, and this is the third case that is brought before the ECtHR on the same subject matter and the same profile of applicants. Allowing the third applicant’s children to participate means recognising the case for its entirety. Unfortunately, the ECtHR decided six votes to one in the negative and the petition was struck from the list.

1.2.2 Violation of Article 3

As the decision on this first admissibility issue shows, the Court navigates this case in part based on the fact that it already decided on similar cases (*V.C.* and *N.B.*).³⁰ The Court’s analysis of the first and second applicants’ allegations under Article 3 are based on the principles it established in *V.C.*,³¹ which are supplemented by *N.B.* in which the forced sterilisation was on an underaged applicant.³² While the Court found both a substantive and procedural violation of Article 3 in *I.G. and Others*, I focus on the substantive aspect of this right.³³

²⁸ *Ibid* para 27

²⁹ *Ibid.*

³⁰ The ECtHR frequently refers to its rulings in the cases of *V.C v Slovakia* (n 2) and *N.B. v Slovakia* (n 2).

³¹ *I.G. and Others v Slovakia* (n 4) paras 116-117 citing to *V.C v Slovakia* (n 2) paras 106-120.

³² *Ibid* (*I.G. and Others v Slovakia*) para 119 citing to *N.B. v Slovakia* (n 2) paras 74-81.

³³ In terms of the procedural obligations, the ECtHR determined that Slovakia did not comply with the requirements of promptness and reasonable expedition due to the length of the procedures which do not satisfy the obligation to conduct an effective investigation domestically. *Ibid* (*I.G. and Others v Slovakia*), paras 127-134.

Where *I.G. and Others* differs from *V.C.* and *N.B.* is the way in which the Court established the ‘minimum level of severity’ as part of the assessment of whether the sterilisation amounts to ill-treatment. The ECtHR jurisprudence on Article 3 establishes that in order to find a violation of ill-treatment there must be a minimum level of severity, which is necessarily relative and subjective and “depends on all the circumstance of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim”.³⁴ In *I.G.*, unlike the previous two cases, the ECtHR not only takes into consideration the age of the applicants and the lack of immediate necessity in performing the sterilisation without informed consent, but goes further to include her belonging to “a vulnerable population group”³⁵ in the assessment. Interestingly enough, although the Court is citing *V.C.* on this point, it never mentioned ethnicity when examining *V.C.*’s complaint within the ‘minimum level of severity’ test.³⁶ Instead, the Court included a reference to this aspect of *V.C.*’s identity only when explaining the impact that the sterilisations had on her right to privacy and before affirming that there is no need to examine her case under Article 14 on non-discrimination.³⁷ It is the first time that the Court constructs the vulnerability of a subject for the purpose of assessing ill-treatment through their ethnicity. Notwithstanding this, the Court did not depart from its previous decisions in which it affirmed that there is no evidence that the ill-treatment was intentional in these forced sterilisation cases. Thus, the Court unanimously determined that Slovakia breached its substantive obligations under Article 3 as the sterilisation did not comply “with the requirement of respect for (...) human freedom and dignity, similarly to the cases of *V.C.* and *N.B.*”,³⁸ it was not life-saving and caused humiliation and fear³⁹ by performing such an invasive

³⁴ *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006), para 67.

³⁵ *I.G. and Others v Slovakia* (n 4) para 123.

³⁶ The Court instead does take this into consideration in Article 8 and 14 *V.C v Slovakia* (n 2) para 146 and *N.B. v Slovakia* (n 2) para 179.

³⁷ *V.C v Slovakia* (n 2) para 146; *N.B. v Slovakia* (n 2) para 178.

³⁸ *I.G. and Others v Slovakia* (n 4) para 122.

³⁹ *Ibid* para 123.

operation without the informed consent of a “competent adult” or the representative of an underaged person⁴⁰ which is necessary in order to comply with “respect for human freedom and dignity”.⁴¹

The Court’s assessment of the minimum level of severity is a good indication of its ability and willingness to take into consideration a more complex and nuanced approach to understanding the nature of certain harms as it relates to the human legal subject as an embedded subject rather than abstract one. However, the Court does not apply this in a consistent way. In addition, the Court’s assessment of ‘minimum level of severity’ is missing an account of the applicants’ gender as part of the overall consideration.⁴² This would be further supplemented by addressing “the context in which the ill-treatment was inflicted, such as an atmosphere of heightened tension and emotions”⁴³ which in the applicants’ case is that of hospitalisation and birth.

1.2.3 Violation of Article 8

The ECtHR unanimously found a violation of positive obligations under Article 8 on the right to privacy and private life.⁴⁴ The Court’s assessment of Article 8 in this case builds primarily on its decision in *V.C.* in which it examined the alleged violation from a positive obligation perspective which is replicated in *N.B.* as well.⁴⁵ That is, the Court focused its attention in assessing whether Slovakia failed to take steps in order to protect the right to privacy and private life from arbitrary interference, rather than whether it failed to abide by its negative obligations not to interfere with the respect for the right.⁴⁶

⁴⁰ *Ibid* paras 119 citing to *N.B. v Slovakia* (n 2).

⁴¹ *Ibid* para 118 citing to *V.C v Slovakia* (n 2).

⁴² In this sense, the ECtHR can learn from the IACtHR’s approach in dissecting the harm of forced sterilisation from an intersectional perspective in *I.V. v Bolivia*, Preliminary objections, Merits, Reparations and Costs (IACtHR, 30 November 2016) para 247.

⁴³ *Bouyid v Belgium* App no 23380/09 (ECtHR, 28 September 2015), para 86.

⁴⁴ *I.G. and Others v Slovakia* (n 4)146.

⁴⁵ *N.B. v Slovakia* (n 2) para 97.

⁴⁶ *V.C v Slovakia* (n 2) para 140.

In *V.C.* the Court evoked the rule of law and explained that positive obligations mean that “the rules of domestic law must provide a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention”.⁴⁷ It established that “[w]hat has to be determined is whether (...) an individual has been involved in the decision-making process, seen as a whole, to a degree sufficient to ensure the requisite protections of his or her interests”.⁴⁸ On this issue, the Court took *V.C.*’s identity into consideration and determined that “the absence at the relevant time of safeguards giving special consideration to the reproductive health of the applicant as a Roma woman resulted in a failure by the respondent State to comply with its positive obligation”.⁴⁹ Thus, by applying *V.C.* – including the various reports that were considered in that case which attest to the particular vulnerable position of Roma women in Slovakia in relation to sterilisation⁵⁰ – to *I.G. and Others*, the Court determined that the sterilisation was performed in contravention of domestic law. Thus, the ECtHR concluded that Slovakia breached its positive obligations “to secure through its legal system the rights guaranteed by that Article, by putting in place effective legal safeguards to protect the reproductive health of, in particular, women of Roma origin”.⁵¹

In this sense, by using *V.C.* as the basis for its decision, the Court in *I.G. and Others* is effectively reaffirming this crucial point. However, finding a violation of the right to privacy, whether of positive or negative obligations, allows the Court to ignore the structural issues that arise in this case, even if it were the first forced sterilisation case to have ever reached Strasbourg. It also allows the Court to

⁴⁷ *Ibid* para 140.

⁴⁸ *Ibid* para 141.

⁴⁹ *Ibid* para 154.

⁵⁰ In particular *V.C. v Slovakia* contains references to three main reports: (i) *Third Report on Slovakia* (European Commission against Racism and Intolerance, ECRI, 27 June 2004); (ii) *Recommendation of the Commissioner for Human Rights Concerning Certain Aspects of Law and Practice Relating to Sterilization of Women in the Slovak Republic* CommDH(2003)12 (Office of the Commissioner for Human Rights, 17 October 2003); (iii) *Draft Concluding Observations of the Committee on Elimination of Discrimination against Women: Slovakia* CEDAW/C/SVK/CO/4 (CEDAW, 17 July 2008). *Ibid* paras 78-84.

⁵¹ *I.G. and Others v Slovakia* (n 4), para 144.

continue its practice of deliberating only on some of the Convention rights which have entered into admissibility.

1.2.4 Violation of Article 14

The Court's unanimous decision to not examine Article 14 in conjunction with Article 8 in *I.G. and Others*,⁵² is indicative of its inconsistent and erroneous approach to understanding this case in its context and to fully address the alleged violations. In the Court's view, finding a breach of the positive obligations under article 8 was sufficient.⁵³ It is important to note that while the applicants explained that Article 14 should be examined in conjunction with Articles 3, 8, and 12, the Court determined – without giving any reasoning – to assess only whether there was a potential violation of Article 14 in conjunction with Article 8.⁵⁴ The Court stated that it is unable to establish “that the doctors involved acted in bad faith, that the first and second applicants’ sterilisation was part of an organised policy, or that the hospital staff’s conduct was intentionally racially motivated”.⁵⁵

The judgment failed to address the arguments made by the applicants. The two applicants argued that their complaint needs to be understood in the broader context of Roma people in Slovakia who suffer from general intolerance that is also common “among medical personnel”.⁵⁶ This was expressed also in the treatment that they had received in the hospital and their segregation from non-Roma women,⁵⁷ as well as statements made by politicians regarding “high Roma birth rates”.⁵⁸ In addition to their arguments regarding their ethnicity, the applicants added that “they had suffered a double burden of discrimination, as their sex and race had played a decisive role in the violation of their human rights

⁵² *Ibid* para 167.

⁵³ *Ibid* para 166.

⁵⁴ *Ibid* para 164.

⁵⁵ *Ibid* para 165.

⁵⁶ *Ibid* para 159.

⁵⁷ *Ibid* paras 31 and 159.

⁵⁸ *Ibid* para 159.

in issue”.⁵⁹ Furthermore, they argued that “there had been no objective and reasonable justification for their differential treatment. Their non-consensual sterilisation had pursued no legitimate aim. There existed no race-neutral explanation justifying their sterilisation during Caesarean delivery”.⁶⁰

The Court is attributing to Article 14 a threshold that it does not have, nor does it need to. Rubio-Marín and Möschel explain this through what they frame as the ‘Holocaust Prism’. According to THE ‘Holocaust Prims’, in cases that raise issues under Article 2 and Article 3, the ECtHR applies standards “that were developed as a response to the Holocaust experience, articulated mostly around the definition of genocide and crime against humanity”, which are “standards of national and international criminal law”.⁶¹ Thus, they explain, the ECtHR replaced IHRL standards of discrimination, which consist of “any unjustified distinction, exclusion, restriction, preference or other differential treatment that is directly or indirectly based on a set of (non-exhaustive) prohibited grounds of discrimination”.⁶²

Accepting the ‘Holocaust Prism’ seems to provide a more palatable justification as to why the Court is deciding cases such as *V.C.*, *N.B.* and *I.G. and Others* by dismissing itself from the obligation to examine (and possibly, to find) a violation of Article 14. However, when observing the general reluctance of the Court to examine or find violations of Article 14 also in the additional two cases analysed in this chapter, I believe that the Holocaust prism does not necessarily explain this tendency. And, if the Court indeed developed such a prism, consciously or not, it is a limited understanding of what can be labelled as ‘lessons’ from the experience of the Holocaust. For example, as I show in *S.A.S. v France*, arguably the existence of a law which effectively bans only one category of human

⁵⁹ *Ibid* para 161.

⁶⁰ *Ibid*.

⁶¹ Ruth Rubio Marín and Mathias Möschel, ‘Anti-Discrimination Exceptionalism: Racist Violence before the ECtHR and the Holocaust Prism’, (2016) 26 *The European Journal of International Law* 881, 893.

⁶² *Ibid*.

subjects from existing in the public sphere *should be regarded* as incompatible with the ‘lessons’ of the Holocaust and the role of law in shaping exclusionary harmful practices.

This high standard of proof was also critiqued by Judge Bonello in his partly dissenting opinion in *Anguelova v Bulgaria* regarding the death of an underaged Roma youth caused by the Bulgarian police.⁶³ Judge Bonello argued that the threshold of “proof beyond reasonable doubt”, which was set in *Velkova v Bulgaria*,⁶⁴ and the “inability to establish a link between physical abuse and ethnicity [in *Anguelova v Bulgaria*] comes notwithstanding that the red light about the special treatment of Roma by the Bulgarian police in breach of Article 2 and 3 has been flashing insistently and alarmingly: this is the third case of death or brutality of Roma at the hand of Bulgarian police officers decided by the Court”.⁶⁵ Judge Bonello further explained that this threshold is “unrealistic as it is unrealistic and unrealisable” and if the Court persists in requiring it, “it will, in effect, only continue to pay lip-service to the guarantees it then makes impossible to uphold”.⁶⁶ He also noted that the Court has never even explained nor justified why this standard belongs in IHRL.⁶⁷

For these reasons explained above, an examination of this case through a right to individual self-determination is called for. At stake here are not only the single violations of each of the ECHR articles alone, but the totality of the harm to the applicants’ recognition as full human legal subjects and the curtailing of their ability to be members of a democratic society by undermining their human dignity. The Court’s refusal to give recognition to their harm under Article 14 thus constitutes a further harm to their recognition as full human legal subjects.

⁶³ *Anguelova v Bulgaria* App no 38361/97 (ECtHR, 13 June 2002).

⁶⁴ *Velkova v Bulgaria* App no 1849/08 (ECtHR, 13 July 2017), para 94.

⁶⁵ *Anguelova v Bulgaria* (n 63) Partly Dissenting Opinion of Judge Bonello, para 5.

⁶⁶ Partly Dissenting Opinion of Judge Bonello, para 13 in *Anguelova v Bulgaria*, App no 38361/97, ECtHR (13 June 2002) para 13.

⁶⁷ *Ibid* para 10.

1.3 Applying Individual Self-Determination: Re-Imagining *I.G. and Others v Slovakia*

1.3.1 Identifying the Subjects in *I.G. and Others*

The applicants were underaged women of the Roma minority group in Slovakia. The meaning of being an underaged Roma woman in Slovakia, and in particular, in healthcare settings can be constructed and contextualised by the same materials and sources which were at the hands of the ECtHR when it deliberated on this case. This begins by listening to the applicants' description of their experiences. The applicants explained that they were subjected to "a double burden of discrimination, as their sex and race played a decisive role in the violation of their human rights in issue".⁶⁸

A contextualisation-based inquiry to their right to individual self-determination requires the construction of the social, cultural, political, economic and legal panorama in which they are embedded. This can be done by examining sources that the ECtHR could have reasonably made use of, beginning with its own jurisprudence on forced sterilisation of Roma women. *I.G. and Others* is the third case in a series of cases brought before the ECtHR regarding the forced sterilisations of Roma women in Slovakia that took place between 1999-2002.⁶⁹ While the original judgment contains numerous references to these cases, the ECtHR failed to do so in a consistent manner, which is exemplified in its decision not to examine Article 14 in *I.G. and Others*.

The ECtHR could have also taken the report of the Council of Europe Commissioner for Human Rights into consideration where the Commissioner stated that "the Roma population of eastern Slovakia has been at particular risk" of forced sterilisations.⁷⁰ This report was issued subsequent to

⁶⁸ *I.G. and Others v Slovakia* (n 4) para 161.

⁶⁹ *V.C v Slovakia* (n 2) followed by *N.B. v Slovakia* (n 2).

⁷⁰ *Recommendation of the Commissioner for Human Rights Concerning Certain Aspects of Law and Practice Relating to Sterilisation in the Slovak Republic* CommDH(2003)12 (Council of Europe Commissioner for Human Rights, 17 October 2003) 35.

his official visit to Slovakia in 2001,⁷¹ which is within the timeframe in which the applicants were forcibly sterilised. This means that his account of the vulnerability of Roma women could be reasonably argued to reflect, at least in part, the conditions in which the applicants' sterilisation occurred.

In the original judgment the ECtHR also considered the report by the European Commission against Racism and Intolerance (ECRI), which stated that “the Roma minority remains severely disadvantaged in most areas of life” and that “public opinion towards Roma minority remains generally negative”.⁷² More specifically, the ECRI highlighted its concerns regarding the vulnerability of Roma women in relation to forced sterilisations.⁷³ Lastly, draft concluding observations of the Committee on the Elimination of Discrimination Against Women on Slovakia were also available to the Court. In this report, the Committee makes two important findings. First, it clearly states that “Roma women and girls remain in vulnerable and marginalised situations, especially with regard to health, education, employment and participation in public life, and are victims of multiple discrimination”.⁷⁴ Second, the Committee states that there may be additional intersecting aspects to the identity of the applicants in this case as the general disadvantage which Roma women suffer may raise also issues of social status and class. While there is no clear indication in the facts to the present case that the applicants were of low economic status, there is a high probability that they suffered from the economic disadvantage that is attached to the discrimination they experience as Roma women.

Moreover, the original judgment indicates that the applicants referred to the co-authored report by the Centre for Reproductive Rights and the Centre for Civil and Human Rights titled ‘Body and Soul:

⁷¹ *Ibid* 1.

⁷² *V.C v Slovakia* (n 2) para 80.

⁷³ *Ibid* paras 80 and 93.

⁷⁴ *Draft Concluding Observations of the Committee on Elimination of Discrimination against Women: Slovakia CEDAW/C/SVK/CO/4* (CEDAW, 17 July 2008), para 22.

Forced Sterilisation and Other Assaults on Roma Reproductive Freedom in Slovakia'.⁷⁵ Issued in 2003, this fact-finding report includes qualitative and quantitative information collected between August and October 2002 in eastern Slovakia such as “in depth-interviews with more than 140 women who were coercively or forcibly sterilised or have strong indications that they were forcibly sterilised”.⁷⁶ The report establishes that at least 110 women out of the total of 140 women were sterilised or “have strong indication that they have been sterilised” in post-communist Slovakia.⁷⁷ The report states that Roma women “are particularly vulnerable to multiple forms of discrimination because they bear the double burden of both race and gender stereotypes”.⁷⁸ Based on the findings of this report, a criminal investigation regarding the alleged forced sterilisation of women including the applicants in *I.G. and Others* was initiated.⁷⁹

This first step of contextualisation of the applicants’ subjecthood demonstrates that they can be classified under the heterogenous category of NHHLSs. Their positionality within Slovak society shows that they are likely to be vulnerable to adverse and harmful societal attitudes, both by private citizens and public bodies.

1.3.2 Understanding the Alleged Harm in Relation to the Recognition of Subjects

a. Harm to the Recognition of Bodies

The forced sterilisation of the applicants constitutes a severe interference with the applicants’ bodies. Under the right to individual self-determination, bodies are understood as the material locus of

⁷⁵ ‘*Body and Soul – Forced Sterilisation and Other Assaults on Roma Reproductive Freedom in Slovakia*’, The Centre for Reproductive Rights and the Centre for Civil and Human Rights/Poradňa (2003).

⁷⁶ *Ibid* 5 and 14.

⁷⁷ There has been a history of sterilisations under in former Czechoslovakia. *Ibid* 34.

⁷⁸ *Ibid* 14.

⁷⁹ *I.G. and Others v Slovakia*, App no 15966/04, ECtHR (13 November 2012) 34

interaction between a subject and themselves and the subject with other individuals and the world. Thus, the right to individual self-determination also protects the individuals' ability to make decisions over their bodies. This is not because self-determination protects the right to make decisions *per se*, rather it protects choices that relate to an individual's existence which are integral to their right to be fully recognised as a human legal subject. This nexus is exemplified in the alleged harm in *I.G. and Others*. Given that sterilisation must be premised on the patient's informed consent,⁸⁰ the hospital's failure to secure the applicants' informed consent, whether intentionally or not, undermines their recognition as full human legal subjects. This forced intervention caused an irreparable alteration to the applicants' bodies and reproductive capabilities. It didn't just deprive the applicants from being able to decide whether to consent, it deprived them of the ability to make any reproductive decision in the future. Such harm is further aggravated by their age at the time of the events – 16 and 17 years old. Therefore, the interference with the area of bodies consists both in the act of the sterilisation itself as well as in its future effects.

b. Harm to the Recognition of Identities

The harm suffered by the applicants related, in part or in whole, to their identification as Roma women. The forced sterilisation did not constitute an interference with 'neutral' and 'abstracted' bodies. Instead, the applicants' pregnant bodies were gendered, racialised and classed. Framing the harm as relating to the applicants' identities and determining that they require forced sterilisation is harming to the applicants' identity, self-worth and ability to feel safe again in healthcare settings. Protecting identity transcends the private and public division of spaces. The extreme vulnerability

⁸⁰ As the Court noted in the *V.C. v Slovakia*: "It is not for the Court's role to review the assessment by medical doctors of the state of health of the applicant's reproductive organs. However, it is relevant to note that sterilisation is not generally considered as life-saving surgery (...) As there was no emergency involving imminent risk of irreparable damage to the applicant's life or health, and since the applicant was a mentally competent adult patient, her informed consent was a prerequisite to the procedure, even assuming that the latter was a 'necessary' from of a medical point of view". *V.C v Slovakia* (n 2) para 110.

stemming from the forced sterilisations must be understood as broader acts of violence against the applicants' identity. It is the deeming of persons as less than human because of who they are in a medicalised place where the primary objective should be to do no harm.⁸¹

c. Harm to the Recognition of Relationships

Lastly, the forced sterilisation interfered with the area of relationships. The applicants reported that ever since the forced sterilisation they have been anxious and fearful about their intimate relationships. The first applicant reported that she "has been living in constant fear that her partner will leave her because she is not able to bear him any more children".⁸² The second applicant's partner left her upon finding out that she would not be able to become pregnant again; while at the time of the proceedings she had found a new partner, she stated that "she is worried about the future of the relationship because her partner want to have a child together and her partner is complaining about her infertility".⁸³ The second applicant also stated that not only were her intimate relationships harmed due to the forced sterilisation, but that her broader social status in her community suffered a serious deterioration.⁸⁴ Much like the interference to the applicants' bodies as having past, present and future consequences, so did the forced sterilisation alter the applicants' protected area of relationships. These include not only their relationships with their partners and community, but also their relationship with their families. The forced sterilisation denied the applicants the possibility of creating new additional relationships by giving birth to more children if they wanted to. The current and future effects of the forced sterilisation on the applicants' relationships are severe and become even more acute when considering that both applicants were minors at the time of the events.

⁸¹ José M. Zuniga and Imane Sidibé, 'Primum non nocere and the Right to Health', in José M. Zuniga, Stephen P. Marks and Lawrence O. Gostin (eds) *Advancing the Human Right to Health* (Oxford University Press 2013) 349-450.

⁸² *I.G. and Others v Slovakia* (n 4) para 16.

⁸³ *Ibid* para 22.

⁸⁴ *Ibid* para 21.

1.3.3 *Assessing the Interference with the Right to Individual Self-Determination*

The ECtHR's original judgment ruled that the sterilisation failed to stratify the legality requirement, that is, that it did not comply with the domestic law and therefore established that there had been a violation of Article 8.⁸⁵ However, in order to fully recognise the harm to the applicants in this case, it is important to spell out why their right to individual self-determination was harmed – the applicants were not recognised as full human legal subjects and their participation in decision-making process regarding their own protected areas of recognition was violated.

1.4 Conclusion

I.G. and Others illustrates the violation of the right to individual self-determination. In addition to finding this violation due to the harm itself i.e., the forced sterilisation, I argue that the ECtHR's judgment brings forward additional harm to their right to individual self-determination. The Court's continuous avoidant attitude towards the request to examine Article 14 on the prohibition of discrimination is a continuous reminder to the applicants that they are not fully recognised as human legal subjects and that their individual self-determination is of inferior importance. I want to explain why the Court must see itself under an obligation to do so under the emerging right to individual self-determination.

The obligation to respect, protect and fulfil the right to individual self-determination is grounded in a presumption of the right to non-discrimination and substantive equality. Without this basic condition, compliance with the right to individual self-determination is severely undermined. This is because the right to individual self-determination protects the inherent, ongoing non-linear act of being a subject, which is made possible by minimising the gap between the human subject and human legal

⁸⁵ *Ibid* para 142.

subject. Finding a violation of the right to individual self-determination therefore implies finding instances in which human subjects are not fully recognised as such, and the lack of appropriate recognition is reflected in the interference to their bodies, identities and relationships. Therefore, cases such as *I.G. and Others*, where the applicants submit that a violation of a substantive Convention right has directly affected a protected area of recognition, and requested that the prohibition on discrimination be examined, are indicative of structural issues of recognition. Thus, when a case raises issues of individual self-determination there is an obligation to examine a potential breach of non-discrimination whether the applicant themselves presented such a claim or not.

In the present case, the Court had ample information at its disposal to examine whether Article 14 was violated by Slovakia in respect of the applicants or not. The finding of a violation of Article 3 and Article 8 cannot substitute the pressing need to examine a violation of Article 14. By the time the Court is presented with *I.G. and Others* it had already produced the judgments on *V.C.* and *N.B.*, which regarded the forced sterilisation for Roma women in the context of childbirth in Slovakia. In Judge Mijovic's dissent in *V.C.*, she indicated that Article 14 was "the very essence" of the case.⁸⁶ Judge Mijovic further argued what I understand to be the crux of the obligation to examine non-discrimination in this case by stating that

Finding violations of Article 3 and 8 alone in my opinion reduces this case to the individual level (...) the fact that there are other cases of this kind pending before the Court reinforces my personal conviction that the sterilisation performed on Roma women were not of an accidental nature (...) the applicant was 'marked out' and observed as a patient who had to be sterilised just because of her origin (...) that represents the strongest form of discrimination.⁸⁷

The Court's refusal to examine Article 14 does not align with the material at its disposal. Furthermore, when the Court addresses the potential issue of discrimination before rejecting the need to examine

⁸⁶ *V.C v Slovakia* (n 2) Dissenting Opinion Judge Mijović 45.

⁸⁷ *Ibid* 45-46.

Article 14, it produces what appears to be an oddly high threshold for identifying a violation of the right to non-discrimination. The Court states that

In view of the documents available, in the present case, it cannot be established, as in the case of *V.C.* and *N.B.*, that the doctors involved acted in bad faith, that the first and second applicant's sterilisation was part of an organised policy, or that the hospital staff's conduct was intentionally racially motivated.⁸⁸

Thus, the Court arguably frames the prohibition on discrimination as including only intentional harms that are motivated on any of the protected characteristics/grounds for discrimination. It further appears to raise the threshold for finding discrimination as if it required the finding of "an organised policy", which alludes to International Criminal Law standards, and the general requirement for intent and bad faith, which resonates with criminal liability more broadly. However, discrimination does not require premeditation, intent, bad faith or proof of organised policies. Nonetheless, while the Court's approach to discrimination appears to be of an unnecessarily and exceptionally high threshold, there is still sufficient evidence to find a violation of non-discrimination in this case as I argued before.

When the Court refused to examine this case and the two cases which preceded it under Article 14, it failed to give a full recognition of the harm suffered by the applicants and undermined their ability to be fully recognised as human legal subjects. This is because the harm suffered by the applicants in this case cannot be understood outside of the context of their identities and the intersectional discrimination that they had suffered because they were racialised, classed and gendered upon their arrival to the hospital and therefore sterilised. Understanding the harm without recognising the discrimination is a violent abstraction of the applicants' harm and incompatible with their right to individual self-determination. Understanding the harm without recognising discrimination is a *de facto* normalisation of the forced sterilisation as a 'neutral' crime that does not adversely affect

⁸⁸ *I.G. and Others v Slovakia* (n 4) para 165.

marginalised groups. This sends a strong negative signal to NHHLSs and their ability to be recognised before the law and is a further violation of their right to individual self-determination.

2. *Hämäläinen v Finland*

2.1 Facts

Ms. Hämäläinen is a transgender married woman and parent who argued that the Finnish law governing legal gender recognition forced her to choose between being able to obtain legal gender recognition *and* preserving her marriage to her wife. Section 1 of the Finnish Act on Legal Recognition of the Gender of Transsexuals lists the “preconditions for legal recognition” according to which a person who seeks to change their legal gender must show, among other things, that they are not married nor living in a registered partnership.⁸⁹ This is because at the time marriage was only legal for heterosexual couples whereas registered partnerships were reserved to non-heterosexual ones.⁹⁰ Therefore, Section 2 of the Act allowed for exceptions to this precondition whereby a heterosexual marriage will be converted to a registered partnership and vice versa.⁹¹ Since Mr. Hämäläinen entered her marriage before her transition, her union was ‘legally’ defined as heterosexual. While both forms of legally recognised unions generally provided couples similar protection, they differed in the rights and privileges they grant to the family. That is, the rights and protections that are offered to a family that is composed of a married couple was superior to that of a registered partnership. For example, a registered parentship excluded these families from the

⁸⁹ 563/2002 Act on Legal Recognition of the Gender of Transsexuals, Section 1(3).

⁹⁰ In 2017 Finland introduced non-heterosexual marriages. See: 156/2015 Lai Avioliittolain Muutamisesta (Law on the Amendment to the Marriage Act).

⁹¹ Act on Legal Recognition of the Gender of Transsexuals (n 89) Section 2(1)(2).

Adoption Act, thus the only way in which a family can expand is by adopting the child of one of the partners.⁹²

Ms. Hämäläinen explained that by transforming her marriage to a registered partnership she would be relinquishing rights such as the establishment of parenthood and adoption. She further explained that her legal recognition pends upon the consent of her wife who is unwilling to convert the marriage to a civil partnership as they both want to remain married.⁹³ This is because they entered a marriage with the conviction and deep religious belief that a marriage “would last for life”⁹⁴ and they refused to terminate their marriage.⁹⁵ A transformation of the marriage to a civil partnership according to their beliefs would in fact amount to a termination of their marriage.⁹⁶ In addition, she argues that the burden of consenting to transform the marriage to a civil partnership forces her wife “to make an impossible choice between supporting the applicant or preserving their marriage” and to *de facto* identify as non-heterosexual even though in her view the transitioning of her wife did not transform their relationship to a non-heterosexual one.⁹⁷ Thus, she argued that she is *de facto* being required to either divorce her wife and obtain her correct legal gender, or to preserve her marriage at the cost of her legal gender recognition.

Ms. Hämäläinen argued that the law regulating legal gender recognition breached Article 8 and Article 14. In particular, she explained that the current framing of the law forced her “to choose between two fundamental rights (...) namely, her right to sexual self-determination and her right to remain married, with the result that she was effectively compelled to forego one of them”.⁹⁸

⁹² This was explained by both the applicant and the Government in *Hämäläinen v Finland* App no 37359/09 (ECtHR, 16 July 2014), paras 44 and 51.

⁹³ *Ibid* paras 15;37.

⁹⁴ *Ibid* para 44.

⁹⁵ *Ibid*.

⁹⁶ *Ibid*.

⁹⁷ *Ibid*.

⁹⁸ *Ibid* para 41.

2.2 Overview of the Original Judgment

The original judgment demonstrates the precarious nature of Article 8 and the harmful effects of NHHLSs' reliance on it as a primary framework for litigating their claims regarding bodies, identities, and relationships. It also illuminates how 'choice' can be articulated in such an abstract way to mask real concrete harm in denying access to legal gender recognition.

The application was first decided by the Fourth Section (Chamber) who unanimously ruled that there had been no violation of Articles 8⁹⁹ and 14¹⁰⁰ and no need to examine Article 12,¹⁰¹ which the Chamber itself decided to add to the application *ex officio*.¹⁰² The Chamber also ruled that the applicant's arguments regarding a violation of Article 3¹⁰³ and Article 2 of Protocol No. 4¹⁰⁴ were inadmissible.¹⁰⁵ The case was referred to the Grand Chamber.¹⁰⁶ I now turn to examine the Grand Chamber's approach to addressing Ms. Hämäläinen claims under Article 8 and Article 14.

2.2.1 Violation of Article 8

Unlike the Chamber's decision which focused on negative obligations,¹⁰⁷ the Grand Chamber examined the case from a positive and not a negative obligations perspective, and decided to include both private *and* family life to its assessment.¹⁰⁸ Therefore, the Grand Chamber examined whether

⁹⁹ *H v Finland* App no 37359/09 (ECtHR, 13 November 2012), para 52.

¹⁰⁰ *Ibid* para 67.

¹⁰¹ *Ibid* para 53.

¹⁰² *Ibid* 4.

¹⁰³ The applicant argued that "by complicating the judicial side of changing gender the Finnish authorities had made themselves guilty of torture" in *Ibid* para 68.

¹⁰⁴ *Ibid* para 68.

¹⁰⁵ *Ibid* para 69.

¹⁰⁶ A request to refer a case to the Grand Chamber is allowed under the conditions set in ECHR Article 43 of the Convention and Rule 73 of the Rules of the Court. *Hämäläinen v Finland* (n 92) para 5.

¹⁰⁷ *H v Finland* (n 99) para 44.

¹⁰⁸ *Ibid* para 42.

the applicant has a right to legal gender recognition *and* to remain married to her wife.¹⁰⁹ According to the ECtHR's case law on Article 8, if a case places at stake "a particularly important facet of an individual's existence or identity" the margin of appreciation for either negative or positive obligations will be narrow.¹¹⁰ However, while the ECtHR has incorporated the concepts of 'identity' and 'existence' to its Article 8 jurisprudence, it conditions it to further majoritarian and hegemonic tests such as that of European consensus.¹¹¹ It follows that the European consensus therefore determines "the relative importance of the interest at stake or (...) the best means of protecting it".¹¹² It is not the applicant herself who can determine that her identity and or existence are at stake. This is further complicated by the Court's decision to allow a wider margin of appreciation to cases which raise "sensitive moral or ethical issues".¹¹³ As a NHLS, this severely undermines Ms. Hämäläinen's ability to find legal relief at the ECtHR. Her very existence, and the existence of her family is framed as a moral issue as it defies cisnormativity. Indeed, the Court found that there was no consensus among Council of Europe member states regarding same-sex marriage nor the effects of legal gender recognition on pre-existing marriages.¹¹⁴ Indeed, it determined that Finland had a wide margin of appreciation, especially considering the "sensitive moral or ethical issues" that this case raises.¹¹⁵ Thus, Ms. Hämäläinen's identity and existence were abstracted by the contextual analysis of the Court which, instead of looking for the insider's perspective¹¹⁶ as I suggest and show in the next section, turned to that of the outsiders – States.

Choice is further abstracted when the Court deems that Ms. Hämäläinen already has one – she can choose but she is simply *refusing* to choose. I argue that this is one of the many abuses of the concept

¹⁰⁹ *Hämäläinen v Finland* (n 92) para 70.

¹¹⁰ *Ibid* para 67.

¹¹¹ *Ibid*.

¹¹² *Ibid*.

¹¹³ *Ibid*.

¹¹⁴ *Ibid* para 74.

¹¹⁵ *Ibid* para 75.

¹¹⁶ Eva Brems, 'SAS v France: A Reality Check' (2016) 25 Nottingham Law Journal 58, 64.

of choice in liberal legalism. The Grand Chamber reaffirmed that Article 8 does not place states under an obligation neither to provide for non-heterosexual marriages nor for a right of a transgender person to preserve their marriage.¹¹⁷ Much like the Chamber, the Grand Chamber ruled that the applicant had “several options”: she was not forced to divorce her wife and she “has a genuine possibility of changing that state of affairs”.¹¹⁸ It also stated that a civil partnership would not harm her parental rights with regards to her daughter,¹¹⁹ and ruled that there had been no violation of Article 8.¹²⁰ The Court is emptying the concept of choice from its meaning. At stake in this case is the applicant’s daily experience of harm due to Finland’s barriers to accessing legal gender recognition, which is a condition for participating in society and accessing rights. The decision to condition rights and participation upon legal gender *is a decision of a State* and not the individual. According to the Feminist Chamber in the re-writing of *Christine Goodwin v United Kingdom*, the assignment of legal sex at birth and its registration is an interference with Article 8 and therefore, refusing to alter this registration is an additional interference.¹²¹ The ECtHR’s decision to see the Finnish Act on legal recognition of gender as a sufficient guarantee for choice stems from its failure to recognise the applicant as a full human legal subject, and allowing her rights to be placed in conflict with the rights of her family and in particular of her wife to continue to enjoy the legal recognition of their relationship as a marriage. When the applicant is told that she has choice where choice does not exist, she is effectively silenced. Or, in the words of Ahmed: “[t]o be heard complaining is not to be heard”.¹²²

¹¹⁷ *Ibid* (n 92) para 71.

¹¹⁸ *Ibid* (n 92) para 87.

¹¹⁹ *Ibid* (n 92) paras 85-86.

¹²⁰ *Ibid* (n 92) para 89.

¹²¹ Sarah Bengtson, Damian Gonzalez-Salzberg and Loveday Hodson, ‘Christine Goodwin v the United Kingdom’ in Loveday Hodson and Troy Lavers (eds), *Feminist Judgments in International Law* (Hart Publishing 2019) 184.

¹²² Sarah Ahmed, *Complaint!* (Duke University Press 2021) 1.

2.2.1 Violation of Article 14 in Conjunction with Article 8

Lastly, the ECtHR determined that there had been no violation of Article 14 in conjunction with Articles 8 and 12.¹²³ In her arguments regarding the alleged violation of discrimination, the applicant draw a comparison between the treatment she receives as a transgender married women and parent, and that which is granted to cisgendered married persons and parents. She explained that while cisgender persons “obtain legal gender automatically at birth without any additional requirement”, she is faced with the requirement of terminating her marriage in order to obtain legal recognition of her gender which subjects her to “daily problems”.¹²⁴ Moreover, she explained that she and her family “had received less protection than persons in heterosexual marriages owing to stereotypical views associated with the applicant’s gender identity”.¹²⁵

The Grand Chamber was not persuaded by the applicant’s comparison. When non-discrimination is comparison-based, it is indeed extremely difficult for NHHLSs to effectively show that they have been discriminated when they compare their treatment to that of hegemonic human legal subjects. This case is an example of exactly this. The ECtHR ruled that the applicant cannot compare her situation to a cisgender person as they “are not sufficiently similar to be compared with each other”.¹²⁶ Here, abstraction works again against the applicant – it takes ‘too much imagination’ to see how she can compare herself to cisgender persons. The ECtHR’s failure to find discrimination in Ms. Hämäläinen’s case is in line with IHRL’s acts of inclusion and exclusion, which the emerging right to individual self-determination takes into consideration in its scope and obligations. That is, the Court is too hegemonic to recognise that one of the reasons why the applicant is submitting this case before it is because “she is not sufficiently similar” to cisgender persons. She is a NHHLS who is

¹²³ *Hämäläinen v Finland* (n 92) para 113.

¹²⁴ *Ibid* para 104.

¹²⁵ *Ibid* para 105.

¹²⁶ *Ibid* para 107.

trying to make use of ECHR rights which were tailored to fit IHRL's hegemonic human legal subject – the hegemonic, heteronormative-cisgender-bodily-abled-adult-wealthy-Christian-Western-white-man.

2.3 Applying Individual Self-Determination

2.3.1 *Identifying the Subject in Hämäläinen v Finland*

The subject in *Hämäläinen v Finland* is a transgender, married, religious woman and parent living in Finland. In her submission to the Court, it is clear that each of these elements are integral to the way in which she defines herself vis-à-vis the harmful effects of the Finnish Act on Legal Recognition of the Gender of Transsexuals on her ability to protect and preserve her personhood. Several sources could have assisted the Court to construct the applicant's positionality and the broader panorama in which she is embedded. This arguably begins with the Act on Legal Recognition of the Gender of Transsexuals which governs individuals' access to state mandatory legal gender recognition and is of vital importance to those who seek to amend their legal gender. The conditions set in this Act provide insight to how transgender persons are defined by the law. For example, the Act contains pathologising, intrusive, harmful and dehumanising requirements for transition, whereby an individual must provide for "a medical statement stating that he or she permanently feels to belong to the gender opposite to that assigned to him or her and lives in that gender role, and that he or she has been sterilised or is for some other reason infertile".¹²⁷

¹²⁷ Act on Legal Recognition of the Gender of Transsexuals (n 89) Section1(1).

Conditioning legal gender recognition upon medical treatment and sterilisation or infertility is deeply dehumanising.¹²⁸ When legal gender recognition is hinged on intrusive requirements it effectively nullifies the right to individual self-determination in states where legal gender is a requirement for accessing rights and services. While the ECtHR has thus far failed to recognise that a pathologising requirement for legal gender recognition is incompatible with the ECHR, it did establish that sterilisation is incompatible with the ECHR.¹²⁹ Furthermore, both the sterilisation and medicalisation requirements were criticised domestically by the Finnish Ombudsman for Equality as well as regionally by the Council of Europe Commissioner on Human Rights.¹³⁰ The Ombudsman stated that a sterilisation requirement “violates fundamental and human rights”.¹³¹ And, following his visit to Finland in 2012, the Commissioner stated that these requirements should be abolished.¹³² Furthermore, the Commissioner explained that such conditions place “the transgender person in a limbo without any apparent exit. It is great concern that transgender people appear to be the only group in Europe subject to legally prescribed, state-enforced sterilisation”.¹³³

Both the Ombudsman and the Commissioner expressed further concerns regarding the situation of transgender people in Finland and within the broader context of the Member States of the Council of Europe. The Ombudsman annual report of 2013 stated that “people belonging to gender minorities are often more prone than others to gender-based harassment and other forms of discrimination”.¹³⁴ Thus, underscoring the vulnerability of transgender people in Finland due to societal perceptions and

¹²⁸ Matteo E. Bassetti, ‘Human Rights Bodies’ Adjudication of Trans People’s Rights: Shifting the Narrative from the Right to Private Life to Cruel and Inhuman or Degrading Treatment, (2020) 12 European Journal of Legal Studies 291, 320.

¹²⁹ *A.P., Garçon and Nicot v France* App nos 79885/12; 52471/13 and 52596/13 (ECtHR, 6 April 2017), para 135.

¹³⁰ *Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe*, COE, Commissioner for Human Rights (2nd edition, September 2011) 13-14.

¹³¹ *Annual Report 2012 by the Ombudsman for Equality*, Office of the Ombudsman for Equality, Publications On Equality 2013:13, 18.

¹³² *Report by Nils Muižnieks following his visit to Finland from 11 to 13 June 2012* CommDH(2012)27 (Commissioner for Human Rights of the Council of Europe, 25 September 2012), para 2.

¹³³ *Human Rights and Gender Identity (Issue Paper)* COE Commissioner for Human Rights CommDH/IssuePaper(2009)2 (July 2009) 8.

¹³⁴ *Annual Report 2013 by the Ombudsman for Equality*, Office of the Ombudsman for Equality, Publications On Equality 2014:3, 38.

hostile behaviours towards them. Following his visit to Finland, the Commissioner mentioned that “LGBTI persons continue to experience discrimination and hate crimes in Finland”.¹³⁵ In particular, the Commissioner mentioned the Helsinki gay pride event of June 2010, which “was subjected to a violent attack by individuals using tear gas and pepper spray, thereby injuring many participants”.¹³⁶ Furthermore, the 2011 Commissioner’s report and background document stated that there was a “high level of transphobic violence and discrimination”¹³⁷ and “low level of acceptance and understanding of the human rights issues at stake for transgender persons in many member states of the Council of Europe”.¹³⁸ Furthermore, he affirmed that transgender people “face negative attitudes, ridicule and outright reject in public. (...) This may also happen during simple everyday occurrences such as when transgender persons are not addressed with the right pronoun in shops or banks or when they use the toilet fitting their gender identity”.¹³⁹

In particular, the Commissioner highlighted the visibility of transgender people and explained that they “may therefore suffer more from a problem of over-visibility which, in a homophobic and transphobic environment can have severe consequences”.¹⁴⁰ This is just a sample of the evidence¹⁴¹ that the Court could have taken into consideration when constructing the panorama and positionality of the applicant. All of which attest to her positionality as a NHHLS.

¹³⁵ *Report by Nils Muižnieks following his visit to Finland from 11 to 13 June 2012* (n 132) para 87.

¹³⁶ *Ibid* para 88.

¹³⁷ *Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe (Background Document)* Commissioner for Human Rights COE (October 2011) 26

¹³⁸ *Ibid*.

¹³⁹ *Ibid* 34,

¹⁴⁰ *Ibid* 40.

¹⁴¹ *Human Rights and Gender Identity (Issue Paper)* (n 133) 4.

2.3.2 *Understanding the Alleged Harm in Relation to the Recognition of Subjects*

a. Harm to the Recognition of Identities

Finland regulates two aspects that are pertinent to the recognition of identity: the legal regulation of gender and the legal regulation of relationships. The applicant's ability to be who she is i.e., a transgender married religious woman and parent is undermined by Finland's legal regulation of gender and relationships to the point where the applicant is forced to choose between her marriage and her family, and her gender identity. State regulation of gender is an interference with one's area of recognition of identity and while some individuals are not harmed by such regulation, others, much like the applicant, suffer adverse consequences for being legally recognised by their assigned gender at birth. The ECtHR has pointed out in *Christine Goodwin v United Kingdom* that

the stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot in the Court's view be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.¹⁴²

The recognition of Ms. Hämäläinen's identity is continuously harmed by Finland's acts of misgendering which occur every time she is required to provide information or documents containing her assigned gender at birth.¹⁴³ Such information is also included in essential everyday identification documents such as her passport and her identity number. Thus, her identity is harmed every time her assigned gender at birth is revealed and she is required to explain the discordance between her lived gender and her legal gender. In addition, the Court underscored in *Christine Goodwin v United Kingdom* that such discordance severely affects the individual's mental health and wellbeing.¹⁴⁴ Therefore, there is additional harm to her ability to enjoy her identity because simply being who she

¹⁴² *Christine Goodwin v United Kingdom* App no 28957/95 (ECtHR, 11 July 2002), para 77.

¹⁴³ Bassetti (n 128) 301.

¹⁴⁴ *Christine Goodwin v United Kingdom* (n 142).

is places her in an impossible conflict in which she must choose between two aspects of her identity whilst suffering the adverse effects of being misgendered for as long as such conflict is not resolved. In other words, she is forced to choose between continuing to define herself as a married religious woman and being able to obtain full legal gender recognition. The Act governing legal gender recognition thus punishes transgender married people by forcing them to make an impossible choice between their legal gender and legal recognition of their relationships to their families.

b. Harm to the Recognition of Relationships

When a state regulates gender but does not offer an accessible, simple and clear pathway to changing one's legal gender, it interferes with the individual's ability to define their gender but also to establish relationships that are coherent with their gender identity.¹⁴⁵ By regulating gender and assigning rights and duties attached to a gender and using this category as a mandatory aspect of identification of individuals, the State defines the subject's interaction and relationships with any entity or person who may require them to disclose their legal gender.¹⁴⁶ So, while the applicant navigates her life as a woman, her relationships with the state and any entity or person who requires her to present her passport or identity number would legally be allowed to address her according to her assigned gender at birth.

Secondly, her relationship with her wife is harmed due to the different regimes which regulate gender and relationships which create a conflict between the applicant's ability to obtain legal gender recognition and retain her marriage. Since both gender and relationships are regulated in this case,

¹⁴⁵ Bengtson, Gonzalez-Salzburg, Hodson (n 121) 184.

¹⁴⁶ Cf Baars critique on heteronormative law and its sexing mechanism. Grietje Baars, 'Queer Cases Unmake Gendered Law, Or, Fucking Law's Gendering Function' (2019) 45 The Australian Feminist Law Journal 15, 19.

both affect the way in which the applicant and her wife relate to each other and to society. Both legal gender and marriage regulate a multitude of relationships, including the family and the state.

There is an additional future-looking aspect to the harm which concerns the applicant's ability to maintain her parental rights in relation to her daughter, as well as and her family's ability to grow and expand. The conditioning of her full legal recognition upon the conversion of her marriage to a civil partnership *de facto* reduces her rights in terms of adoption and establishment of parenthood. Should her partner give birth, adoption is not automatic. Furthermore, they will not be able to adopt a child unless it is the biological child of one of them. Meaning, their family cannot expand. Lastly, the applicant explained that since the Act does not explicitly contain provisions regarding the continuation of parenthood, which was pre-established before transitioning, she is afraid that she will lose parental rights over her daughter.¹⁴⁷

2.3.3 Assessing the Interference with the Right to Individual Self-Determination

a. In Accordance with the Law

The Act *prima facie* satisfied the requirement of legality as it is indeed prescribed by law.¹⁴⁸ However, it does not fully fulfil the requirement of precision and foreseeability¹⁴⁹ with regards to pre-established parenthood. That is, the Act does not contain any explicit guarantees for these relationships and the only sources of guarantee consist in the State's arguments rather than in the law itself. Such requirement is fulfilled when a law is precise enough to allow for a person to "regulate

¹⁴⁷ *Hämäläinen v Finland* (n 92) para 17.

¹⁴⁸ *Carbonara and Ventura v Italy* App no 24538/94 (ECtHR, 30 May 2000), para 64.

¹⁴⁹ *Ibid* para 65; *Lithgow and Others v United Kingdom* App nos 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; and 9405/81 (ECtHR, 8 July 1986), para 110.

[their] conduct”.¹⁵⁰ In the case at hand, the applicant is assessing how to regulate her conduct in view of the Act which *de facto* governs two essential aspects of her right to individual self-determination – her legal gender recognition and the legal recognition of her marriage and family. The lack of clarity of the Act with regards to her existing parental rights undermines her ability to regulate her conduct. Furthermore, the very existence of this law is also questionable as it contains requirements that are clearly incompatible with ECHR and IHRL more broadly. Thus, although the marriage requirement has received less attention than the sterilisation one, the two follow a similar logic – they unnecessarily make transitioning difficult and harmful.

b. Pursues a Legitimate Aim

However, even if the Act would have satisfied the legality requirement, the State still needs to prove that the interference with the applicant’s right to individual self-determination followed a legitimate aim. The State submitted that the institution of marriage is reserved for heterosexual couples. It thus argued that the protection of the “traditional institution of marriage”¹⁵¹ fell within the legitimate aim of the protection of rights and freedoms of others.¹⁵² However, the State failed to show how Ms. Hämäläinen’s right to individual self-determination effectively harms the rights and freedoms of others, especially considering that she already lives her life as a married woman even if her identity number erroneously contains her assigned gender at birth. While the applicant’s ability to be legally recognised as the woman she is *and* to preserve her right to remain married to her wife may be perceived as undermining the abstract idea of the traditional heterosexual institution of marriage, her right to do so will not harm, in any concrete terms, the rights of heterosexual married couples.¹⁵³ The

¹⁵⁰ *Silver and Others v United Kingdom* App no 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75 and 7136/75 (ECtHR, 25 March 1983), para 88.

¹⁵¹ *Hämäläinen v Finland* (n 92) para 38.

¹⁵² *Hämäläinen v Finland* (n 92) para 28.

¹⁵³ A similar argument was formulated in the Joint Dissenting Opinion of Judges Sajó, Keller and Lemmens “We submit that the rights and freedoms of others would in no way be affected in the applicant and her wife were permitted to remain married despite the applicant’s legal change of gender. Their continued marital relationship would not have detrimental

State's framing of the applicant's concrete right to individual self-determination in conflict with the abstract interest in preserving the institution of marriage as heterosexual is not sufficiently convincing to justify an interference with her right to individual self-determination.

c. Necessary in a Democratic Society

The balancing test stems from the assessment of a pressing social need which is pursued for a legitimate aim and the interference with the right of the applicant. In their Dissenting Opinion, Judges Sajó, Keller and Lemmens argued that no pressing social need existed to begin with.¹⁵⁴ The ECtHR dissenting Judges explained that no one will be adversely affected by the applicant's wish to continue her marriage and change her legal gender recognition,¹⁵⁵ and that as Ms. Hämäläinen lives her life as a woman who is married to a woman "it is difficult to comprehend why the legal recognition of her acquired gender will have any significant (additional) impact on public morals".¹⁵⁶

In addition, the State submitted that the restriction of the applicant's right is proportionate as she was able to choose between different options namely: to remain married at the cost of not changing her legal gender, or with the consent of her wife, she may choose to convert the marriage to a civil partnership and thus obtain legal gender recognition. If the applicant's wife did not consent to the transformation of the marriage to a civil partnership, which was the applicant's wife position, the applicant may ask for a divorce in order to obtain her correct legal gender.

As explained in the section regarding the applicant's areas of recognition, by regulating gender the State is already interfering with an individual's right to self-determination. However, a State may

effects for the rights of others to marry, or for existing marriages". *Ibid*, Joint Dissenting Opinion of Judges Sajó, Keller and Lemmens, para 10.

¹⁵⁴ *Ibid*, Joint Dissenting Opinion of Judges Sajó, Keller and Lemmens, para 12.

¹⁵⁵ *Ibid*, Joint Dissenting Opinion of Judges Sajó, Keller and Lemmens, para 10.

¹⁵⁶ *Ibid* Joint Dissenting Opinion of Judges Sajó, Keller and Lemmens, para13.

regulate gender if it provides for an accessible, simple and clear pathway to the amendment of one's legal gender. If a State decides to regulate gender legally, it is both interfering with the negative obligations under the right to individual self-determination and *de facto* takes upon itself a positive obligation to create legal and administrative avenues that protect the right to individual self-determination and render the right not abstract but concrete. These legal and administrative avenues must ensure that individuals can exercise their right to individual self-determination and amend their legal gender through an accessible, simple and clear process. This is because legal gender conditions their access and participation in society, which is possible due to their full recognition as human legal subjects. However, the legal framework enshrined in the Act is not accessible, simple and clear and places the applicant in a position in which two areas of recognition of her subjecthood are pitted against each other as she is forced to choose between her marriage and her legal gender. Being forced to choose between two areas of one's recognition as a subject defies the notion of choice understood through a human rights prism in which choice qualifies as such when two or more equally valid options can be chosen from. Thus, the State erroneously placed the burden of proving the proportionality of its interference with the applicant's right *on* the applicant and her wife. Adopting a discourse of choice and agency is insufficient to prove that an interference is *in fact* proportionate. It is not for the applicant and her wife to make impossible sacrifices to their right to remain married and for the applicant's legal gender recognition in order for the State to comply with its obligations under the right to individual self-determination. I therefore strongly disagree with the Court's ruling that the applicant has a "real possibility" to change the state in which she is.¹⁵⁷

Furthermore, by regulating relationships and issuing marriages, the State conferred on the applicant, her wife and their family certain rights and privileges which were based on the assumption of heterosexuality and cisgenderism. However, the State is breaching its negative obligation to not

¹⁵⁷ *Ibid* para 50.

interfere with the applicant's right to individual self-determination as the applicant is not asking to enter a new marriage but to preserve an already existing union which is an essential aspect of the recognition of her identity and her relationships. In addition, the Council of Europe Commissioner on Human Rights states in the recommendations to her report on discrimination on grounds of sexual orientation and gender identity in Europe that states should "remove the requirement of being unmarried, or divorce for already married persons, as a necessary condition for the legal recognition of a transgender person's preferred gender".¹⁵⁸

Finally, the law governing legal gender recognition generates a harmful conflict between two aspects of the applicant's individual self-determination that cannot be deemed to be necessary in a democratic society for the purpose of protecting the abstract rights and freedoms of the institution of heterosexual marriage. This becomes even more disproportionate when considering that as long as the applicant is unable to obtain her correct legal gender recognition, her ability to participate on an equal basis in a democratic society is severely undermined. The State failed to provide for a concrete meaningful explanation as to why the applicant's ability to be recognised as subject and a full human legal subject is necessary and proportionate. Therefore, Finland's conditioning of legal gender recognition upon the alteration of the applicant's marriage is in violation of the right to individual self-determination.

2.4 Conclusion

This case exemplified many of the deficiencies of the right to privacy for NHHLs as a right that is based on the hierarchy of subjects and division of spaces. This case demonstrates the precarious nature of the right to privacy, which, while it has been able to expand, and a big part of that expansion has been as a result of LGBTQI+ litigation, it can also contract. The applicant's legal gender, for as

¹⁵⁸ *Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe* (n 130) 13.

long as it continues to be a legal requirement for her identification and access to rights, both in the public and in the private, cannot be adjudicated as a privacy right. Re-imagining her case through the right to individual self-determination means re-placing her identity, relationships and body into the public space of reclaimed visibility as a condition for participation in a democratic society.

Hämäläinen v Finland underscores the core of the right to individual self-determination as bridging the gap between the human subject and the human legal subject and harm that may arise when the gap between these two forms of recognition is deepened. In this case, this gap took the shape of the conditioning of the applicant's full legal gender recognition upon the alteration of her marriage to a civil partnership, a union which offers a lesser form of protection and rights with regards to their family and *de facto* termination of their marriage. This case exemplifies law's power in establishing and governing relationships and identities and the harm that such power may cause when individual self-determination is not at the forefront of the legal analysis as a means to ensure that NHHLSs are visible and adequately accommodated. The case further demonstrates the harm in the fallacy of neutral application of legal tests to measure interference with an individual's right if their contextualised subjecthood is not taken into consideration. Such is the case of re-qualifying what 'necessary in a democratic society' means and what 'rights and freedoms of others' are in the context of each alleged human rights violation. Lastly, the application of a right to individual self-determination allows the Court to carefully examine the notion of 'choice' in concrete terms rather than in an abstracted manner. Thus, the Court could be better equipped in assessing whether a state is in fact complying with its negative and positive obligation or whether it is in fact erroneously placing the burden of justifying its compliance with these obligations on individuals.

3. *S.A.S. v France*

3.1 Facts

The applicant in the case was a religious Muslim French woman who wears the niqab and burqa in public “depending in particular on her spiritual feelings”.¹⁵⁹ She explained that she does not wear these in a systematic manner¹⁶⁰ and was not coerced or pressured by anyone to wear them when she is in public spaces.¹⁶¹ When she does decide to wear the niqab or the burqa in public, she complies with security and identity checks and shows her face whenever she is asked to do so.¹⁶² The applicant complained about Law 2010-1192, which prohibits the wearing of clothing which is designed to conceal the face in public spaces. While this law does list some exceptions to this general ban in Section 2(II), which include items that are prescribed by the law or items that are required for health, labour safety or for “sports, festivities or artistic or traditional events”,¹⁶³ her reasons for wearing the niqab and burqa do not fit any of these exceptions.¹⁶⁴ Therefore, she argued that France was in breach of Article 3, Article 8, Article 9, Article 10, Article 11, and Article 14 in conjunction with these articles.¹⁶⁵

The case was first assigned to the Fifth Section (Chamber) however, the Chamber decided to relinquish jurisdiction to the Grand Chamber.¹⁶⁶ The relinquishment of jurisdiction by a Chamber under Article 30 ECHR and Rule 72 of the Rules of Procedure of the Court is permissible on two grounds: (i) when the case raises “a serious question affecting the interpretation of the Convention or

¹⁵⁹ *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014), para 12.

¹⁶⁰ *Ibid* para 12.

¹⁶¹ *Ibid* 11.

¹⁶² *Ibid* para 13.

¹⁶³ When referring to the relevant French legislation from this point onwards I cite to the specific paragraph in which it is included in the original judgement. *Ibid* para 28, Law no. 2010-1192 Section 2-II.

¹⁶⁴ *Ibid*.

¹⁶⁵ *Ibid* para 3.

¹⁶⁶ *Ibid* para 5.

the Protocols thereto”¹⁶⁷ or (ii) when a decision on a case “might have a result inconsistent with a judgment previously delivered by the Court”.¹⁶⁸ In the decision to relinquish its jurisdiction the Chamber did not substantiate which of these two grounds was the reason for which it did so. While both grounds underscore that the case at hand is of particularly serious importance to require the Grand Chamber, it also effectively takes away the possibility to appeal the decision as there is not higher tier of appeal for the applicant.

3.2 Overview of the Original Judgment

Before the Grand Chamber even began to deliberate on *S.A.S* it already knew that the decision on this case was of particular importance, precisely because it was deferred to its jurisdiction by the Chamber on the accounts introduced in the facts section above. The decision in *S.A.S* has been highly criticised from different perspectives.¹⁶⁹ I analyse this case as an example of why a right to individual self-determination is necessary, which leads my analysis of the original judgment. *S.A.S* is a missed opportunity in many senses and as such, it has been a subject of much scholarly work. One of which, is the Court’s narrow approach to her case, which is demonstrated in its insistence to frame it almost exclusively as a freedom of religion and belief case. This is evident through the Court’s refusal to examine Article 3, its acceptance of Article 8 and 9 for admissibility purposes but its focus on Article 9 jurisprudence, and its refusal to examine Article 14 which I now turn to examine.¹⁷⁰

¹⁶⁷ *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)* Council of Europe ETS 5 (4 November 1950, in force 3 September 1953) Article 30; *Rules of the Court*, European Court of Human Rights, COE (20 March 2023) Rule 72.

¹⁶⁸ *Ibid* (*European Convention on Human Rights*) Article 30; (*Rules of the Court*) Rule 72.

¹⁶⁹ See: Jill Marshall, ‘*S.A.S. v France: Bura Bans and the Control of Empowerment of Identities*’ (2015) 15 *Human Rights Law Review* 377; Eva Brems, ‘*SAS v France: A Reality Check*’ (2016) 25 *Nottingham Law Journal* 58; Sofie G. Syed ‘*Liberté, Égalité, Vie Privée: The Implications of France’s Anti-Veil Laws for Privacy and Autonomy*’ (2017) 40 *Harvard Journal of Law & Gender* 301; Kati Nieminen, ‘*Eroding the Protection Against Discrimination: The Procedural and De-Contextualised Approach to S.A.S. v France*’ (2019) 19 *International Journal of Discrimination and the Law* 68; Nathaniel Fleming, ‘*S.A.S. v. France: A Margin of Appreciation Gone Too Far*’ (2020) 52 *Connecticut Law Review* 917

¹⁷⁰ *Ibid* (Nieminen).

3.2.1 Violation of Article 3

Less subject to academic analysis is the Grand Chamber's unanimous decision to reject the applicant's arguments under Article 3.¹⁷¹ While the Court cites to *Ireland v United Kingdom* where it established the test for 'minimum level of severity', it did not apply it to the facts of the case.¹⁷² That is, the Court's decision is not based on evidence of engagement with the applicant's allegations. According to the Court's jurisprudence,

Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.¹⁷³

For S.A.S to come within the scope of Article 3, the Applicant must show either actual bodily harm or mental suffering or that she was subjected to treatment which "humiliates or debases an individual, show a lack of respect for or diminishing his or her human dignity, or arouses feeling of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, (...) may be characterised as degrading".¹⁷⁴ Moreover, she did not need to show that there had been an intention to "humiliate or debase" in order to come within the scope of the right.¹⁷⁵

I argue that the applicant would have satisfied the admissibility test for Article 3 had the Court taken her arguments into consideration and applied its own jurisprudence to the case at hand. First, as the Court established in *Tyrer*, determining whether humiliation has taken place is necessarily also subjective and it is sufficient that they feel humiliated in their own eyes "even if not in the eyes of others".¹⁷⁶ S.A.S clearly stated that because of the ban, being in public meant to "expose herself to a

¹⁷¹ *S.A.S. v France* (n 159) paras 70-71.

¹⁷² *Ireland v United Kingdom* App no 5310/71 (ECtHR, 13 December 1977), para 162.

¹⁷³ *Bouyid v Belgium* (n 3) para 86.

¹⁷⁴ *Nicolae Virgiliu Tănase v Romania* App no 41720/13 (ECtHR, 25 June 2019), para 118.

¹⁷⁵ *Bouyid v Belgium* (n 43) para 86.

¹⁷⁶ *Tyrer v United Kingdom* App no 5856/72 (ECtHR, 25 April 1978) para 32.

risk not only of sanctions but also of harassment and discrimination”.¹⁷⁷ Being exposed to continuous harassment because of one’s appearance, whether they are in the hospital, crossing the street or in a park, undoubtedly constitutes humiliation, more so, public humiliation. Second, the potential harassment and discrimination in the public sphere created mental suffering in the applicant’s life. As she submitted elsewhere in her arguments before the Court, she felt like a prisoner and “was forced to adopt a ‘Jekyll and Hyde personality’”.¹⁷⁸ The metaphor of ‘Jekyll and Hyde’ demonstrate the severity of her mental suffering as it points out to a necessity to force herself to dissociate from an essential aspect of her identity. Third, she explained that ill-treatment also related to the prohibition on discrimination within the meaning of Article 14. In this sense, the Court could have applied the same framing as it did in *I.G. and Others*, and in addition to the applicant’s sex,¹⁷⁹ it would have considered that she belonged to “a vulnerable population group”¹⁸⁰ within the meaning of the minimum level of severity test. Finally, this test also establishes that ‘the duration of the treatment’ matters.¹⁸¹ The general nature of the ban *de facto* confines S.A.S. indefinitely to the home (the private space) unless she does not wear the burqa or niqab in public. These all constitute sufficient evidence that sits comfortably in line with the jurisprudence of the Court in order to determine that the application falls *prima facie* within the scope of Article 3, for the reasons I present in the following paragraphs.

¹⁷⁷ *S.A.S. v France* (n 159), para 69.

¹⁷⁸ *Ibid* para 79.

¹⁷⁹ *Jalloh v Germany* (n 34) para 67.

¹⁸⁰ *I.G. and Others v Slovakia* (n 4), para 123.

¹⁸¹ *Jalloh v Germany* App no 54810/00 (n 34) para 67.

3.2.2 Violation of Article 8 and Article 9

Although Articles 8, 9, 10¹⁸² and 14 were determined admissible by the Court, the lions' share of the judgment focused on the applicant's allegations vis-à-vis Article 8 and Article 9, in particular on Article 9.¹⁸³ This was not a request of the applicant, but a decision made entirely by the Court. In fact, the applicant drew on the Court's Article 8 jurisprudence, in particular that relating to the rights of LGBTQI+ persons. For example, S.A.S. explained that she is a "potential victim" in a similar sense as many of the applicants in some of the leading decisions on LGBTQI+ persons in the ECtHR jurisprudence on Article 8. That is, she explained that in cases such as *Dudgeon v United Kingdom* and *S.L. v Austria*¹⁸⁴ the ECtHR recognised the applicants as victims "on the account of the very existence of laws imposing criminal sanctions for consensual homosexual activity, on the ground that the choice they faced was between refraining from prohibited behaviour or risking prosecution, even though such laws were hardly even enforced".¹⁸⁵ Although my thesis is based on a critique to the right to privacy, S.A.S.'s privacy arguments should have been taken seriously by the Court and not seen as interchangeable to those under the right to freedom of religion and belief.¹⁸⁶ By making claims under Article 8 and more specifically, comparing her position to that of LGBTQI+ persons she drew attention to the notion of identity and the criminalisation of identity which have become the hallmark

¹⁸² However, after examining Article 8 and 9, the Court ruled that no separate examination of Article 10 was called for. *S.A.S. v France* (n 159) para 163.

¹⁸³ This was also the case in *Leyla Şahin v Turkey* where the Grand Chamber approached a whether banning the wearing of the Islamic headscarf in universities and higher education institutions violated the applicant's right to privacy and private life and the right to freedom of religion. See: *Leyla Şahin v Turkey* App no 4474/98 (ECtHR, 10 November 2005), paras 163-164.

¹⁸⁴ In particular the applicant referred to four ECtHR judgments on the criminalisation of homosexual sexual activities in which the Court established that a violation of the right to privacy has taken place. *Dudgeon v United Kingdom* App no 7525/76 (ECtHR, 22 October 1981); *Norris v Ireland* App no 10581/83 (ECtHR, 26 October 1988), *Modinos v Cyprus* App no 15070/98 (ECtHR, 22 April 1993); *S.L. v Austria* App no 45330/99 (ECtHR, 9 January 2003). *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014), para 54

¹⁸⁵ *S.A.S. v France* (n 159) para 54.

¹⁸⁶ According to Syed, this could have been an opportunity to engage with a "theory of sexual privacy and anti-racist sartorial resistance" as part of the right to bodily autonomy and self-regulation of one's interactions with others. See: Sofie G. Syed 'Liberté, Égalité, Vie Privée: The Implications of France's Anti-Veil Laws for Privacy and Autonomy' (2017) 40 *Harvard Journal of Law & Gender* 324, 324-329.

of Article 8 jurisprudence.¹⁸⁷ Thus, she argued that the ban prohibits her from wearing the burqa and niqab in public which is “an important part of her social and cultural identity”, and therefore violated Article 8 which includes a protection of social interaction in public.¹⁸⁸ In this sense, the Court’s decision to examine her case as if Article 8 and Article 9 were interchangeable affected its ability to fully grasp the breadth of the case and to examine the alleged harm comprehensively. The comparison with LGBTQI+ jurisprudence on criminalisation of consensual adult sexual relations would have made it very difficult for the Court to determine that the ban was in accordance with the law, let alone proportionate. And, even if it would have deemed the ban ‘in accordance with the law’, it would have restricted the margin of appreciation according to the ‘particularly important facet of one’s identity’ test that could have potentially been supported by a European consensus test that would have shown that similar bans are not part of it. However, again, Article 8 is inconsistent in taking the concept of ‘identity’ or ‘existence’ into consideration and, reinforcing the subjugation of these concepts to European consensus undermines the applicant’s ability to self-identify, in particular when their identity is non-hegemonic.

Moreover, I consider the ECtHR’s decision to examine the case of *S.A.S.* – much like *Leyla*¹⁸⁹ and subsequent cases, such as *Dakir v Belgium*,¹⁹⁰ *Belcacemi and Oussar v Belgium*¹⁹¹ – primarily under Article 9 and not addressing their claims within Article 8, an additional support to developing the emerging right to individual self-determination. By allocating their claims as predominately relating to freedom of religion, the Court risks essentialising these applicants. It sees the applicant as *solely* a religious subject who therefore has only a right to religious freedom. Instead, by tracing similarities

¹⁸⁷ One of the leading decisions on this issue is *Toonen v Australia* in which the HRC established that the very existence of criminalisation of sexual contact between consenting adult homosexual men in Tasmania, regardless of their enforcement, constitute an unreasonable and arbitrary interference with the applicant’s right to privacy. See: *Nicholas Toonen v Australia* Comm no 488/1992 (HRC, 31 March 1994), paras 8.3-8.6

¹⁸⁸ *S.A.S. v France* (n 159), para 79.

¹⁸⁹ *Leyla Şahin v Turkey* (n 183).

¹⁹⁰ *Dakir v Belgium* App no 4619/12 (ECtHR, 11 July 2017).

¹⁹¹ *Belcacemi and Oussar v Belgium* App no 37798/13 (ECtHR, 11 July 2017), para 44.

between her case and LGBTQI+ cases, the applicant is asserting that she has a right to religious freedom and private life. Moreover, that her niqab and hijab are not only part of her religious identity, but of her identification in general.

When examining the interference with Article 9, the Court determined that the ban complied with the requirement of legality despite being aware of the ban's drafting history, which showed that while the ban is framed in general and seemingly neutral terms, it is potentially based on exclusionary intentions.¹⁹² In fact, when the Court deliberated on the proportionality of the ban, it recognised that the debates regarding the adoption of the law contained "Islamophobic remarks", however it determined that "[i]t is *admittedly* not for the Court to rule on whether legislation is desirable in such matters".¹⁹³

The State argued that the ban followed two legitimate aims: the first, public safety and the second, the protection of rights and freedoms of others which it contended to contain the "ensuring [of] respect for the minimum set of values of an open democratic society".¹⁹⁴ Unlike its usual praxis, the Court offered a more in-depth analysis to this initial aspect of its assessment¹⁹⁵ and only accepted the State's argument regarding the principle of 'living together' as an expression of the legitimate aim of protection of the rights and freedoms of others.¹⁹⁶ This is perhaps one of the most criticised aspects of this ECtHR ruling.¹⁹⁷ When explaining the content of 'living together', France argued that covering one's face in public is incompatible with socialisation as the face "expresses the existence of the individual as a unique person, and reflects one's shared humanity with the interlocutor".¹⁹⁸ The Court

¹⁹² *S.A.S. v France* (n 159), para 148.

¹⁹³ *Ibid* para 149 (emphasis added).

¹⁹⁴ *Ibid* para 82.

¹⁹⁵ *Ibid* para 114.

¹⁹⁶ *Ibid* paras 121-122.

¹⁹⁷ Marshall (n 169) 384-386; Brems (n 169) 66-72; Nieminen (n 169) 72-79.

¹⁹⁸ *S.A.S. v France* (n 159) para 82.

accepted France's explanation of the ban within the meaning of this broad and abstract aim which it legitimised in its ruling.

In assessing whether this aim was necessary in a democratic society and proportionate, the ECtHR took note of the harmful effects of the ban on Muslim women who are similarly positioned to the applicant, including harm to their autonomy,¹⁹⁹ and on the Muslim community more broadly. More specifically, the Court recognised that individuals like the applicant may see the ban as “a threat to their identity”.²⁰⁰ The Court also stated that different human rights bodies expressed serious concerns regarding the ban's proportionality.²⁰¹

While the Court took note of these serious concerns and the implication of the ban, it ultimately decided to defer the proportionality assessment back to France by granting a wide margin of appreciation. It provided two minor justifications for this decision. First, it found “some significance that the ban is not expressly based” on religion but on the general idea of concealment of one's face in public,²⁰² and, second, that the criminal sanctions which are listed in the ban “are among the lightest”.²⁰³ However, the justification for granting a wide margin of appreciation ultimately hinged on the Court's framing of the case as “a choice of society” that is expressed through democratic processes and not through the Court's jurisprudence.²⁰⁴ This, the Court explained, is further supported by the lack of consensus among Council of Europe member states against issuing a ban on wearing full-face covering in public.²⁰⁵

¹⁹⁹ *Ibid* para 146.

²⁰⁰ *Ibid*.

²⁰¹ *Ibid* para 147.

²⁰² *Ibid* para 151.

²⁰³ *Ibid* para 152.

²⁰⁴ *Ibid* para 153.

²⁰⁵ *Ibid* para 156.

3.2.3 *Violation of Article 14 in Conjunction with Article 8 and Article 9*

By the same token, the Court established unanimously that there had been no violation of Article 14 on the prohibition on discrimination taken in conjunction with Article 8 and Article 9²⁰⁶ and that no separate issues arose under Article 10, separately nor in conjunction with Article 14.²⁰⁷ A partly-dissenting opinion was issued to the judgment by Judges Nussberger and Jäderblom, who argued that the judgment “sacrifices concrete individual rights guaranteed by the Convention to abstract principles”.²⁰⁸

3.3 Application of Individual Self-Determination

3.3.1 *Identifying the Subject in S.A.S. v France*

The applicant self-identifies as a French devout Muslim woman of Pakistani Sunni origins,²⁰⁹ who decided to wear the burqa and the niqab as an expression of her cultural, religious and personal identity.²¹⁰ Furthermore, she explained that “her faith is an essential part of her existence”.²¹¹ S.A.S. must be understood as embedded within a broader social, cultural, political, economic and legal panorama. Her positionality within such panorama is key to assessing the alleged harm to her right to individual self-determination.

Several important sources were at the Court’s disposal when assessing the applicant’s claims. Under a right to individual self-determination framework, these sources can assist the Court in constructing

²⁰⁶ *Ibid* paras 160-162.

²⁰⁷ *Ibid* para 163.

²⁰⁸ *Ibid*, Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom, 61.

²⁰⁹ *Ibid* para 76.

²¹⁰ *Ibid* para 10-11.

²¹¹ *Ibid* para 54.

the applicant's positionality, the panorama in which she is embedded. For example, it could have used the Opinion issued by the French National Consultative Commission on Human Rights (*Commission Nationale Consultative Des Droits De L'Homme* – CNCDH), a national institution entrusted with the protection and promotion of human rights, in order to construct this panorama. The CNCDH critiqued the ban during its drafting and affirmed that such legislation may “is very likely to be perceived and experienced as anti-Muslim”.²¹² Or the Report by the *ad hoc* French Parliamentary Commission, which preceded the drafting of the ban.²¹³ The Report is a reflection of parliamentarians' perceptions of Muslim women who wear the full-face veil specifically, Muslim people broadly, immigration, and French society and values as a whole. The report suggested to convince women of the Republican values, to protect them from being coerced to wear the full-face veil and to design ways to prohibit its use. It even went as far as proposing that the residence card could be refused “to individuals who present a radical religious practice which is incompatible with the values of the Republic, in particular with the principle of equality between men and women, this being considered as defect to their integration”.²¹⁴ Such suggestion cannot be interpreted as neutral, it targets Muslim women.

In addition, the Court could have used other international and regional sources²¹⁵ brought to its attention, including sources brought by third parties to the case,²¹⁶ and all of which indicate that

²¹² Original text : “la CNCDH pense qu’une loi prohibant le port du voile intégral, très probablement perçue et vécue comme anti-musulmane”. *Avis Sur le Port du Voile Intégral*, Commission National Consultative Des Droit De L’Homme (Adopté par l’Assemblée plénière du 21 Janvier 2010), para 12. Translation by author.

²¹³ *Rapport D’Informations fait en Application de l’Article 145 du Règlement Au Nom De La Mission D’Information Sur La Pratique du Port du Voile Intégral sur le Territoire National* N 2262 (26 Janvier 2010). Also, *S.A.S. v France* (n 159) paras 15-17.

²¹⁴ Original text : “Modifier l’article L.314-2 du CESEDA afin de refuser la délivrance d’une carte de résident aux personnes qui manifestent une pratique radicale de leur religion, incompatible avec les valeurs de la République, en particulier le principe d’égalité entre hommes et femmes, ceci étant considéré comme un défaut d’intégration”. *Ibid* (*Rapport D’Informations fait en Application de l’Article 145 du Règlement Au Nom De La Mission D’Information Sur La Pratique du Port du Voile Intégral sur le Territoire National*) 165. Translation by author.

²¹⁵ E.g., the Parliamentary Assembly of the Council of Europe Resolution and Recommendation as well as the report by the Commissioner for Human Rights of the Council of Europe which are all mentioned in the judgment. *S.A.S. v France* (n 159) para 35-37.

²¹⁶ *Ibid* para 93.

Muslim people in France²¹⁷ and in Europe broadly are faced with daily harassment, vandalism of mosques and cemeteries, hate crimes, and violence because they are Muslim.²¹⁸ These sources also addressed specifically the particular positionality of Muslim women²¹⁹ and French Muslim women²²⁰ like S.A.S. and explained that they experience intersectional discrimination²²¹ that is exacerbated by bans such as the one at stake in this case.²²² The European Commission Against Racism and Intolerance (ECRI) reports warned against a rhetoric against integration of Muslims into French society “because of the alleged cultural divide between the followers of this religion and the majority of the French population”.²²³ In its most recent report of relevance, issued in 2010, ECRI explained that xenophobia and discrimination “primarily concern persons who can be seen to belong to a visible minority on account of their skin colour, their physical appearance, their clothing or their surname. This problem particularly affects Black persons, persons of North African or Arab origins”.²²⁴

By constructing the panorama in which S.A.S. is embedded, her non-hegemonic position becomes apparent. Her visibility, that which in part has contributed to her non-hegemonic position but has been rendered invisible by the abstract and neutral framing of the ban, is now visible. Had the Court taken these sources into account as part of the contextual analysis, it would have been more difficult to argue that ‘living together’ is a legitimate aim as protecting the choice of a society. ‘Living together’ in light of these sources means living without subjects like S.A.S.

²¹⁷ *Report by Mr Alvaro Gil-Robels, Commissioner for Human Rights, On the Effective Respect for Human Rights in France Following his Visit From 5 to 21 September 2005* CommDH(2006)2 (Office of the Commissioner for Human Rights, Council of Europe, 15 February 2006), paras 303 and 305; *Third Report on France* CRI(2005)3 (European Commission Against Racism and Intolerance, ECRI, 25 June 2004), para 123.

²¹⁸ *Human Rights in Europe: No Ground for Complacency Viewpoints by Thomas Hammarberg* (Council of Europe, Commissioner on Human Rights, April 2011) 36; *Report by Mr Alvaro Gil-Robels, Commissioner for Human Rights, On the Effective Respect for Human Rights in France Following his Visit From 5 to 21 September 2005* (n 217) paras 309 and 316; *Fourth Report on France (Fourth Monitoring Cycle)* CRI(2010)16 (European Commission against Racism and Intolerance, ECRI 29 April 2010), para 71.

²¹⁹ *Human Rights in Europe: No Ground for Complacency, Viewpoints by Thomas Hammarberg* (n 218) 42.

²²⁰ *Third Report on France* (n 217) para 316; *Fourth Report on France (Fourth Monitoring Cycle)* (n 217) para 89.

²²¹ See Amnesty International’s submission to the case in *S.A.S. v France* (n 159), para 90.

²²² *Human Rights in Europe: No Ground for Complacency, Viewpoints by Thomas Hammarberg* (n 218) 40-41.

²²³ *Third Report on France* (n 217), para 124.

²²⁴ *Fourth Report on France* (n 218) para 133.

3.3.2 *Understanding the Alleged Harm in Relation to the Recognition of Subjects*

a. Harm to the Recognition of Identities

The harm to the applicant's identity consists both in her ability to express her identity in public as well as the traumatising and adverse effects of the ban as *de facto* if not *de jure*, criminalising her identity. The criminalisation of her ability to express her religious, spiritual, cultural and social identity²²⁵ in public spaces undermines her recognition as a full human legal subject. The harm is both the criminalisation of *expression* of her identity and the consequential criminalisation of her identity in general. This is supported by her argument to the Court in which she traced similarities between her case and that of LGBTQI+ persons which the Court and other IHRL bodies have determined incompatible with the right to privacy.²²⁶ The harm to her identity consisted in the undermining of the expression "an essential element of her existence".²²⁷ Thus, she is forced to either renounce a central aspect of her existence or to access any of her rights and services that are located in the public sphere. Lastly, while S.A.S.'s identity is multifaceted and personal, the criminalisation of the expression of *her* identity is a criminalisation also of a shared and collective identity.

b. Harm to the Recognition of Bodies

The ban prohibits S.A.S. from existing in the public sphere. That is, her body, if she wears the niqab or burqa, is an offence. Her decision of which parts she wishes to reveal or conceal is effectively taken away as the full-face veil is labelled as anti-French behaviour.²²⁸ In its ruling, the French

²²⁵ *S.A.S. v France* (n 159) paras 76; 79.

²²⁶ See (n 184).

²²⁷ *S.A.S. v France* (n 159) para 54.

²²⁸ *Ibid* para 25.

Constitutional Court affirmed that “the individuality of every subject of law (*sujet de droit*) in a democratic society is inconceivable without his or her face, a fundamental element therefore, being visible”.²²⁹ However, the drafting history of the ban appears to raise concerns not so much to the lack of visibility of Muslim women who wear the full-face veil, but perhaps to their ‘over’ visibility in public spaces. Much like the harm to the recognition of her identity, the core of the harm to her body is the erasure of her body from public spaces. Without the ability to exist in the public sphere, the applicant’s recognition as a full human legal subject is harmed to an extent in which it is doubtful she is able to access or participate in society, let alone a democratic one.

c. Harm to the Recognition of Relationships

While the ban is framed in order to sustain social interaction because the face “plays a significant role in human interaction (...) and reflects one’s shared humanity”,²³⁰ the very enactment of this ban eliminates women like S.A.S. from public spaces and bars them from engaging in social interaction. As guaranteeing full recognition of one’s subjecthood, the right to individual self-determination protects access and participation in society. Such participation is premised on the ability to forge relationships in private and in public. It is without a doubt that the ban excludes S.A.S. from engaging in any type of relationships in the public sphere, including essential services that exist primarily if not only in public, such as professional relationships in the workplace, medical assistance, education, or welfare. Lastly, her relationship with the French state, symbolically and materially, is deteriorated. The ban clearly states what being French is and uses the applicant as an example of that which “has no place within French territory.”²³¹ This creates a deep sense of alienation between the applicant and the country of which she is citizen.

²²⁹ Constitutional Court decision in as contained in the judgment. *Ibid* para B 21

²³⁰ *Ibid* para 82.

²³¹ *Ibid* para 25.

3.3.4 Assessing the Interference with the Right to Individual Self-Determination

a. In Accordance with the Law

While the ECtHR established in the original judgment that the ban was in accordance with the law as it fell within Section 1 and Section 2 of Law no. 2010-1192 Prohibiting the Concealment of one's Face,²³² the right to individual self-determination challenges this affirmation. While this requirement is usually satisfied when an interference has a legal basis which is compatible with the rule of law, clear and not arbitrary,²³³ the neutrality and generality of the law must be re-assessed as well in light of its drafting history. That is, while the ban is framed in a general and neutral way, its drafting history²³⁴ and the offences it introduced to the French Criminal Code²³⁵ undermine its generality and neutrality.²³⁶ The drafting of the ban and the introduction of these new offences have the main scope of banning women from wearing these clothing items in public spaces.²³⁷ This is also supported by the report issued by the *ad hoc* parliamentary commission that was established in order to study 'the wearing of the full-face veil on national territory', which I included as part of the contextualisation of the applicant's positionality section. The report labelled the full face veils as contrary to French values such as that of the principle of 'living together',²³⁸ the abstract principle which the ECtHR accepted as a legitimate aim in the original judgment. Nevertheless, the Commission itself explained

²³² *Ibid* para 112.

²³³ Among other authorities: *Amann v Switzerland* App no 27798/95 (ECtHR, 16 February 2000), para 56; *Perry v United Kingdom* App no 63737/00 (ECtHR, 17 July 2003), para 45; *Case of Liberty and Others v The United Kingdom* App no 58243/00 (ECtHR, 1 October 2008), para 59.

²³⁴ In their third-party intervention, Liberty (NGO) made a similar argument: "Liberty observed that, although the Law of 11 October 2010 was framed in neutral terms, its aim was to prohibit the wearing of the burqa and it applied to all public places". *S.A.S. v France* (n 159) para 99.

²³⁵ Two offences were introduced to the Criminal Code on regarding the wearing a full-face covering in public and one on the coercion of a person to wear a full-face covering in public. The latter included a specific ground for such coercion i.e., "on account of their gender". Therefore, while the Law 2010-1192 is framed in a neutral and general manner that does not specifically mention the full-face veils, the coercion offence clearly refers to the full-face veils. *Ibid* para 29.

²³⁶ A similar argument made by Open Society Justice Initiative who acted as a Third Party to this case: "even though the French and Belgian Law were neutral in their wording, their legislative history showed that the intent was to target specifically the niqab and the burqa". In: *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014), para 102.

²³⁷ *Ibid* para 31.

²³⁸ *Ibid* para 17.

that it is not unanimously supporting the legislation to ban the full-face veil in public in an absolute or general manner. While there is a strong indication to undermine the legality of the law in question, I accept that the findings are not conclusive and explore whether it pursues a legitimate aim within the meaning of the right individual self-determination.

b. Pursues a Legitimate Aim

The State argued that the ban followed the legitimate aim of ‘living together’ as contained within the protection of the right and freedoms of others, which included ‘living together’, equality between men and women, human dignity.²³⁹ While the Court dismissed the values of equality between men and women and the principle of human dignity, ‘living together’ was legitimised.²⁴⁰ The flexibility of this new ground was recognised also by the Court in the original judgment; such flexibility stems from its generality and abstract quality that, as Niemen argues, makes the assessment of “its necessity in relation to the full-face veil ban was an impossible task to begin with”.²⁴¹

While the State may rightly wish to protect the value of ‘living together’, the nexus between this value and the legitimate aim of protection of rights and freedoms of others is not self-evident. That is, while the State explained that the face is important for social interaction, it didn’t explain which rights and freedoms of others are harmed when Muslim women wear a full-face veil in public places. Limiting the applicant’s right to individual self-determination can be justified on the grounds of protection of rights and freedoms of others where such rights and freedoms are not abstract but concrete. This is because “the right of others to live in a space of socialisation”²⁴² is broad and abstract and the State

²³⁹ *Ibid* paras 117-120.

²⁴⁰ *Ibid* para 121.

²⁴¹ Niemenen (n 169) 72.

²⁴² *S.A.S. v France* (n 159) para 122.

failed to show that social interaction is impossible when Muslim women wear the full-face veil in public.²⁴³

In addition, there is much similarity between this argument and the argument regarding the principle of human dignity which was dismissed by the Court in the original judgment. Dignity was dismissed by the ECtHR because there is no evidence that the full-face veil is an expression of “contempt against those they encounter or otherwise to offend against the dignity of others” and while it may be “perceived as strange by many (...) it is the expression of a cultural identity which contributes to the pluralism that is inherent in a democracy”.²⁴⁴ The arguments under human dignity and ‘living together’ can be viewed as different sides of the same coin – thus while the Court established that the idea of the veil as a sign of contempt is unbased, it should have also recognised that there was no evidence to suggest that the full-face veil indeed makes social interaction difficult to the extent where it must be banned.

Instead, under the right to individual self-determination, the *fact* of living *together* and the *value* of ‘living together’ must be understood as including a plurality of human legal subjects. ‘Living *together*’ does imply a right to live without any type of discomfort or conflict, and surely does not imply a right to live in a homogenous society. However, discomfort does not equate to harm nor risk. In articulating ‘living together’ as a legitimate aim for the restriction of rights, France did not explain who is ‘living together’ if the applicant and others like herself are banned from the public sphere. Thus, it did not substantiate the obligation to explain the abstract aim in the specific case within the meaning of the right to individual self-determination.

²⁴³ *Ibid* para 120.

²⁴⁴ *Ibid*.

c. Necessary in a Democratic Society

Even if ‘living together’ were a legitimate aim, the State must still prove that there is a pressing social need, and that the interference is proportionate in order to achieve it. If ‘living together’ is pursued in order to alleviate sentiments of discomfort in relation to socialisation,²⁴⁵ it does not seem to be a pressing social need that justified, *prima facie*, the interference with the applicant’s right to individual self-determination. In the original judgment, the ECtHR recognised international and domestic human rights bodies’ critique to the ban, and the negative effects that the ban and the debates around its drafting and enactment have had on Muslims in France and Muslim French women specifically.²⁴⁶ It recognised that that the criminalisation itself, which is an integral aspect of the ban “is traumatising for women who have chosen to wear the full-face veil”.²⁴⁷ On this point, the ECtHR should have recognised that the criminalisation is traumatising *also* for women who did not choose to wear it. That is, the ban is potentially traumatising to all Muslim women, with or without the veil, whether they choose to wear it or didn’t choose so. Therefore, while the Court recognises the trauma that the ban produces, it should have further contextualised such trauma in relation to the particular positionality of Muslim woman in France as I presented above as NHHLSSs.

The original judgment grants a wide margin of appreciation to the State because the ECtHR deemed that at the heart of this case is “a choice of a society”, which I find even more dangerous that its acceptance of the ‘living together’ ground for limitations of rights. Both share an important rhetoric – it alludes to collective wishes, harmony, and collaboration. When applying critical intersectional feminist perspective that is attuned to IHRL’s acts of inclusion and exclusion, it is impossible to read this as anything but exclusionary rhetoric. The contextualisation of the applicant’s subjecthood

²⁴⁵ S.A.S. also explained that France ignored “the cultural practices of minorities which did not necessarily share this philosophy or the fact that there were forms of communication other than visual, and that in any event this bore no relation to the idea of imposing criminal sanctions to prevent people from veiling their faces in public”. *Ibid* para 77.

²⁴⁶ *Ibid* paras 145-152.

²⁴⁷ *Ibid* para 152.

demonstrated that she has a non-hegemonic position which precedes the enactment of the ban and was deteriorated once it entered into French law. When the ECtHR determined that the balancing should be deferred back to France, it failed to recognise that such deferral is an acceptance that the applicant and other NHHLs who are similarly positioned are *not* part of French society and are not fully recognised as human legal subjects. In particular, the State advanced the argument that suggests that the ban resulted from a “wide democratic consultation involving civil society”.²⁴⁸ However, as Brems points out, the Parliamentary Commission of Inquiry “had not planned to hear a single woman wearing a face veil”.²⁴⁹ Thus showing that the consultation did not include women like the applicant notwithstanding the effects the ban has on this specific category of human legal subjects.

What is crucially missing from the State’s position is an argument strong enough to justify the consequences that the ban has for S.A.S. and individuals who are similarly positioned. Alas, there is no argument that can justify such a disproportionate interference with the applicant’s right to individual self-determination. For example, the argument regarding the “light” nature of the offence introduced by the ban, which the Court accepted,²⁵⁰ is unacceptable through a right to individual self-determination framework. The guiding question should have not been whether the penalties posed by the ban are proportionate, but whether any banning of subjects from all public spaces can ever be proportionate to begin with. This is because the very core of the right to individual self-determination is the protection of the nexus between one’s recognition as a human subject *and* as a human legal subject as an end to itself and as a means to ensure access and participation in society. Banning individuals from existing in public spaces is a prime example of a violation of this right. Furthermore, applicant faces the possibility of receiving a 150-euro fine any time she leaves the private space of

²⁴⁸ *Ibid* para 83.

²⁴⁹ Brems (n 169) 61.

²⁵⁰ *S.A.S. v France* (n 159) para 152.

her home. The possibility of being fined is not a ‘one-off’, it is a risk one is faced with on a daily basis.

The Court’s decision that the lack of European consensus grants France a wide margin of appreciation is incompatible with the right to individual self-determination. Such conclusion does not align with a right to individual self-determination analysis which invites an application of the *pro persona* principle for several reasons. First, as Open Society Justice Initiative submitted to the Court, there is a consensus against this typology of bans.²⁵¹ In fact, only France and Belgium have legislated on this matter. Second, assuming that the Court views this conclusion as indicative of the lack of consensus, the decision to grant a wide margin of appreciation is still baffling. This is particularly so considering that the state is restricting an existing right by introducing a ban rather than relaxing an existing limitation. A right to individual self-determination requires an application of a *pro persona* principle in interpretation where possible, especially in contentious cases such as the one at hand. The limitation of rights must be done in order to protect concrete rights and freedoms of others. However, no limitation is allowed if it renders the right “theoretical or illusory”.²⁵² In order for the right to individual self-determination to be effective, an interference cannot exceed the level in which a human legal subject full recognition is undermined to the point where their access and participation in society is harmed. In this sense, the requirement that an interference be necessary in a democratic society implies that the Court must assess whether by placing such a ban the applicant is still able to fully participate in a democratic society. Thus, the absence of consensus cannot be interpreted as automatically granting a wide margin of appreciation. Thus, the ban is incompatible with the right to individual self-determination.

²⁵¹ *Ibid* para 105.

²⁵² *Artico v Italy* App no 6694/74 (ECtHR, 13 May 1980), para 33.

3.4 Conclusion

Similarly, to *Hämäläinen v Finland*, *S.A.S* presents an interference with the right to individual self-determination through the framing of ‘conflict of rights and interests’ as well as a narrative of ‘choice’ and ‘agency’ which *de facto* places the applicant in a situation in which she is deprived of agency and must pick between participation in society as a full legal subject or have her legal subjecthood criminalised because of the subject she *is*. In other words, like *Hämäläinen v Finland*, the case of *S.A.S v France* demonstrates the nexus between being recognised as a subject and a legal subject which is the essence of the right to individual self-determination. It also further shows how balancing exercises must follow a contextualised approach that is informed by the particular positionality of the human legal subject so to balance the integral imbalance that balancing exercises hold to the favour of majoritarian²⁵³ views and hegemonic subjects.

Conclusion:

In this final chapter I applied the emerging right to individual self-determination to the ECtHR judgments in *I.G. and Others v Slovakia*, *Hämäläinen v Finland*, and *S.A.S. v France*. The scope of the application was to examine whether a different reasoning and outcome can be achieved through the emerging right to individual self-determination and to illuminate the existing gaps in the original judgments. The application of the emerging right sought to disrupt what Romany calls the “frozen versions of social life and human association that exclude women’s experiences”²⁵⁴ and that I see as excluding all NHHLSs in different ways – to undertake “a deconstructive and reconstructive

²⁵³ This critique is also very much linked to that brought by Aileen Kavanagh in her debate with Jeremy Waldron on judicial review of legislation, in particular with regards to the meaning of participation in democracy. See: Aileen Kavanagh, ‘Participation and Judicial Review: A Reply to Jeremy Waldron’ (2003) 22 Law and Philosophy 451.

²⁵⁴ Celina Romany, ‘Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law’ (1993) 6 Harvard Human Rights Journal 87, 92.

critique”²⁵⁵ as Romany adds. This was possible because the application of the emerging right to individual self-determination requires an active reconstruction of context for these cases so to present each applicant as an embedded human legal subject, and to bring positionality to the fore.

This application had the objective of both imagining how IHRL could change through the emergence of the right to individual self-determination, and to illuminate existing gaps in the law and its application in cases regarding NHHLSs. In all three cases the reasoning and outcome of the application process resulted in a direction shift from the one given in the original judgment thanks to the emphasis on a contextualisation-based approach. Such approach requires the construction of the subject and their embeddedness in a broader social, cultural, political, economic, and legal panorama and the framing of the harm they allegedly have suffered within the relevant areas of recognition. Furthermore, it highlighted the crucial importance of an application of a critical lens when conflict of rights and interests arise in cases regarding NHHLSs.

Therefore, the harms of which the applicants in *I.G. and Others*, *Hämäläinen*, and *S.A.S.* complained of were framed as harms to their recognition as full human legal subjects. In *I.G. and Others*, I showed that the forced sterilisation being a negation of the applicants’ right to provide free, full, prior, and informed consent violated the applicants’ right to individual self-determination by not recognising them as full human legal subjects. I also explained that this ought to be framed as part of a broader structural harm to subjects who are similarly positioned to the applicants – Roma women. Thus, in the absence of a recognised, accepted and operationalised right to individual self-determination, I argued that the ECtHR refusal to examine the applicants’ right under Article 14 constitutes further harm to the applicants’ recognition as full human legal subjects.

²⁵⁵ *Ibid.*

In *Hämäläinen* the application of the emerging right to individual self-determination demonstrated how the different areas of recognition are harmed when legal gender recognition is conditioned upon the alteration of the applicant's existing legal recognition of her relationship. This is because the right to individual self-determination protects the right to be fully recognised as a human legal subject in order to guarantee access to participation in society. Where legal gender is a state requirement and does not allow for quick, simple and accessible routes for change, it severely undermines the individual's ability to be fully recognised as a human legal subject. More precisely, it deepens the gap between the notion of legal personality and that individual's subjecthood.

Lastly, in *S.A.S*, I showed how exclusion works through abstraction and why, by applying a right to individual self-determination framework, the abstract and neutral becomes exclusionary and visible. Thus, under this framework the concept of 'choice of a society' upon which the ECtHR originally deferred the balancing exercise back to France, does not comply with the obligation to not limit the right to individual self-determination to the extent where recognition is so compromised that participation in a democratic society is ineffective. In this case I showed that the ban on the full-face veil effectively removed the applicant from the public sphere (democratic society) in order to protect abstract exclusionary conceptions of 'living together' (i.e., living together without Muslims

Conclusion

[L]aws (...) tell their beneficiaries that they are not invisible, that they are seen and valued as equal members of that society, irrespective of their differences.¹

Judge Pavli, in *Fedotova and Others v Russia*

In this partly Dissenting Opinion issued by Judge Pavli and joined by Judge Motoc, the two ECtHR judges contested the majority's refusal to examine the allegations of non-discrimination in a case regarding the absence of an avenue for legal recognition of non-heterosexual relationships.² Judge Pavli's Dissenting Opinion opens with a praise of the majority's decision to find a violation of the positive obligations under Article 8 and thus lifting "a veil of invisibility for sexual minorities throughout Europe".³ In critiquing the Court's decision *not* to examine the allegations of non-discrimination, as quoted above, Judge Pavli used the concept of 'visibility' again, reaffirming law's power to make subjects visible.⁴ The Opinion further underscores that "national legal regimes that discriminate on impermissible grounds (...) tend to reinforce prejudice and social segregation, *causing harm that goes above and beyond the violation of particular individuals' Article 8 rights*".⁵ Judge Pavli's partial dissent echoes my reasons for writing this thesis, as well as its findings; His analysis demonstrates that privacy is an insufficient avenue for addressing complex claims of harm

¹ Partly Dissenting Opinion of Judge Pavli, Joined by Judge Motoc in ECtHR, *Fedotova and Others v Russia* App nos 40792/10; 30538/14; and 43439/14 (ECtHR, 17 January 2023), para 5.

² *Ibid* para 2.

³ *Ibid* para 1.

⁴ *Ibid* para 5.

⁵ *Ibid* (emphasis added).

brought forth by NHHLSs. It is thus imperative that we craft an alternative avenue for such claims in the shape of the emerging right to individual self-determination.

1. The Process of Articulating the Emerging Right to Individual Self-Determination and its Outcomes

The entry point of this thesis was uses that NHHLSs have made of the right to privacy. Many claims that NHHLSs have brought within privacy contributed to the expansion of its normative content so to include issues relating to identity, reproductive rights and intimate relationships. These developments have undoubtedly provided visibility and relief to many NHHLSs. In this thesis, I critically assessed the focus on the privacy framework for claims brought by NHHLSs. I showed that with the expansion of the right to privacy, an additional concept emerged – self-determination of individuals. This new framing entered the jurisprudence of IHRL with the ECtHR decision in *Pretty v United Kingdom* two decades ago and has since evolved in a fragmented way through different IHRL sources and actors.⁶ With the *Pretty* judgment self-determination of individuals not only entered IHRL jurisprudence but also created ties with the right to privacy.⁷ However, self-determination of individuals began to develop primarily in relation to NHHLSs within privacy and outside of privacy. There is a gap in the literature as the trajectories of this concept, its fragmented uses and developments, have not been studied and theorised as expressions of a unified concept of individual self-determination. This thesis' contribution is in filling this gap.

⁶ *Pretty v UK* App no 2346/02 (ECtHR, 29 April 2002).

⁷ *Ibid* para 61.

In order to address both the right to privacy and the concept of individual self-determination in relation to NHHLSs, I framed my research question as follows:

What are the limitations of the right to privacy in relation to NHHLSs and how can the new emerging right to individual self-determination be shaped as a responsive and responsible alternative avenue for their claims?

The answer to this twofold question, I argued, must begin with an examination of the structure in which the right to privacy and the fragmented uses of individual self-determination are located i.e., IHRL. I therefore framed my approach to IHRL as operating through acts of inclusion and exclusion of subjects, objects, actions, and spaces. In particular, I set out two acts as foundational layers of inclusion and exclusion in IHRL: (i) the making of legal subjects and (ii) the division of the legal space. I applied this analytical frame throughout my thesis which has allowed me to approach different key undertakings:

- (i) to explain the non-hegemonic position of NHHLS in Chapter 1.
- (ii) to assess the limitations of the right to privacy for NHHLSs as a particular expression of these acts of inclusion and exclusion in Chapter 2
- (iii) to think about the role of adjudication in setting and shifting boundaries of inclusion and exclusion in Chapter 2
- (iv) to problematise the fragmented developments of individual self-determination in Chapter 3, in particular with regards to its close ties with the right to privacy
- (v) to frame the content of the emerging right to individual self-determination in a manner which is responsive and responsible as it takes IHRL's acts of inclusion and exclusion into account

- (vi) and finally, to apply the emerging right to individual self-determination in order to assess these acts of inclusion and exclusion in practice through the re-imagination of three ECtHR judgments

1.1 The Right to Privacy and Non-Hegemonic Human Legal Subjects

In this thesis, I critiqued the right to privacy and its application and argued that (i) it is a precarious site of inclusion for NHHLSs and (ii) when they do come under its scope, the right to privacy is an insufficient instrument for fully accommodating and acknowledging the harm of which NHHLSs complain.

I argued that the right to privacy is precarious for these subjects because it is a particular expression of IHRLs acts of inclusion and exclusion. The cases of *S.A.S* and *Hämäläinen* exemplify this precarious nature. The right to privacy is premised on the division of spaces into a private/public binary which upholds a hierarchy of subjects. Pursing privacy litigation means to accept its spatial dimension which upholds a division of space into private and public. Consequently, subjects like S.A.S. in *S.A.S. v France*, i.e., Muslim women who wear a full-face veil, cannot exist in the public sphere.⁸ It also means that subjects like Ms. Hämäläinen in *Hämäläinen v Finland*, who is a transgender married religious woman and parent, are forced to choose between changing their legal gender recognition to *be visible* in both spheres as the person they are or to maintain the legal recognition and rights of their family unit.⁹ In other words, their subjecthood is artificially divided by IHRL's division of spaces. In both instances, the NHHLSs failed to convince the ECtHR that the harm of which they complained was sufficiently serious to limit the state's margin of appreciation. This is in part because the binary

⁸ *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014).

⁹ *Hämäläinen v Finland* App no 37359/09 (ECtHR, 16 July 2014).

of private/public erects a binary of private choice/collective or public interests which place NHHLSs at a serious disadvantage due their non-hegemonic positions. The harm of which they complain cannot be understood outside of their non-hegemonic positions. In the ECtHR context NHHLSs are essentially left at the grace of finding sufficient proof of European Consensus.

Bringing these claims and those of many other NHHLSs within the privacy framework means also to accept the concept of the private as a space of discretion that facilitates and protects personal choice and decision-making. It requires them to frame the harm that they have suffered as choice related. Choice is an appealing concept to many, representing an expression of personal liberty to do or not to do anything that is lawful within the private. However, choice is also a weak concept as Palacios-Zuloaga points out in her article on abortion rights in Latin America.¹⁰ An individual's personal choice to terminate their pregnancy can be seen as weaker than the right to life of the unborn. Furthermore, Palacios-Zuloaga rightly argues that the framework of privacy and choice does not adequately describe the suffering of being denied access to a safe abortion and shapes these issues as primarily individual rather than structural.¹¹

The right to privacy is an insufficient avenue and framework. Its insufficiency with regards to NHHLSs lies in its inability to capture the harm of which these subjects complain. This is not privacy's 'fault' but the erroneous perception that the right to privacy is the correct and only available avenue for NHHLSs in IHRL. Their claims, I argued, reflect the harmful effects of IHRL's acts of inclusion and exclusion. These acts place the NHHLS in a difficult position: between being formally recognised as a human legal subject and not fitting the 'human' of IHRL and the rights tailored to fit the hegemonic-heteronormative-cisgender-bodily-abled-adult-wealthy-Christian-Western-white-man. The claims that these subjects have thus far

¹⁰ Patricia Palacios Zuloaga, 'Pushing Past the Tipping Point: Can the Inter-American System Accommodate Abortion Rights?' (2020) 21 Human Rights Law Review 899.

¹¹ *Ibid* 905; and 922.

brought within the right to privacy framework, contributing to its normative expansion, regard NHHLSs' bodies, identities, and relationships. These three categories of claims are not just privacy related, these are claims about the gap between the human subject and the human legal subject which results from IHRL's acts of inclusion and exclusion. I argued that this can be seen in many cases in which alongside an allegation of a violation to their rights to privacy, NHHLSs also raise issues of non-discrimination and equality. However, their arguments regarding these aspects of their petitions are often dismissed or only partially examined, such as in the case of *Fedotova and Others v Russia* with which Partly Dissenting Opinion I opened these conclusions.¹²

Nevertheless, the critique to the right to privacy which I advanced in this thesis must not be construed as undermining the fact that NHHLSs have a right to privacy, and that this right was harmed in all the cases I examined. My intention is not to erode in any way the validity of right to privacy arguments for NHHLSs and by so doing, to undermine their ability to find visibility, relief and justice for their claims within this right. On the contrary, my argument is that privacy is not enough in order to fully understand the harms of which they complain in their totality. And, in this sense, to think about strategies beyond the right to privacy is the task of everyone who is interested in advancing NHHLSs access to justice and effective rights.

1.2 The Concept and Emerging Right to Individual Self-Determination in Relation to Non-Hegemonic Human Legal Subjects

The decision to engage with the concept of individual self-determination, which I argued is an emerging right in IHRL, did not have the objective of replacing the right to privacy per se. I

¹² *Fedotova and Others v Russia* App nos 40792/10; 30538/14; and 43439/14 (ECtHR, 17 January 2023), para 240.

explained that individual self-determination is an emerging right precisely because of the ways in which it is being incorporated by different IHRL actors and sources in Chapter 3. I framed the emerging right to individual self-determination as having a different scope to that of the right to privacy. The fragmented uses of individual self-determination are focused on highlighting the needs of NHHLSs relating to sexual orientation, gender identity, gender expression and sex characteristics, disabilities and reproductive rights and justice. Some of these uses stem directly from the jurisprudence on the right to privacy, whilst others develop it as relating to different rights – dignity, liberty, health, prohibition on torture, cruel, inhuman and degrading treatment or punishment, and the right to be recognised as a person before the law. I also explained that it is not only increasingly relevant in IHRL, but that it represents a possibility for NHHLSs because it is emerging as a new right.

For this new emerging right to become useful for NHHLSs it needed to be moved away from its ties with the right to privacy towards a broader concept. I focused my attention on shaping the emerging right to individual self-determination in relation to the right to be recognised as a person before the law to illuminate the effects that IHRL's acts of inclusion and exclusion have on these subjects. I defined the emerging right to individual self-determination as a right to be recognised as a full human legal subject, as the human subject that one *is*. This right illuminates the gap between the human subject and the human legal subject and has the scope of bridging this gap, which is essential to the recognition of NHHLSs and their ability to participate in a democratic society and IHRL.

1.3 Overview of the Chapters and Development of Conclusions

These conclusions are premised on an exploration of the particular and the general which began in **Chapter 1**, where I identified the analytical frame that has guided me throughout this thesis

- IHRL's modus operandi of inclusion and exclusion of subjects, objects, actions, and spaces. I therefore identified IHRL as a site of power which defines and divides reality into legal subjects, legal objects, lawful actions, and legal spaces. I demonstrated that IHRL's acts of inclusion and exclusion inform each other. The division of spaces into a private sphere of discretion and a public sphere of regulation upholds a hierarchy of subjects: the primary legal subject of international law and IHRL, i.e., the state and its primary human legal subject i.e., the hegemonic-heteronormative-cisgender-bodily-abled-adult-wealthy-Christian-Western-white-man. Consequently, I argued that when IHRL is understood through this frame, the non-hegemonic position of NHHLs became visible and integral to the structure and interpretation of this legal field.

The same analytical frame guided my analysis of the right to privacy in **Chapter 2**. In this chapter, I returned to my starting point – the right to privacy – and examined it as a particular expression of these acts of inclusion and exclusion. The scope of this chapter was to assess in which ways these inherent shortcomings limit the right to privacy's structure and interpretation when NHHLs seek to use it. My analysis highlighted three main themes: the right to spatial dimensions of the right, its ability to expand and contract and its primarily negative nature. I then moved to examine the claims that NHHLs make under this right and explained that these can be categorised as claims regarding one's body, identity and relationships. Finally, I examined the role of adjudicative bodies in interpreting the boundaries of inclusion and exclusion. By identifying three general attitudes towards boundaries, (i) inward-looking and status quo-based attitude, (ii) boundary-avoidance attitude and (iii) change-receptive and outward-looking attitude, I showed that while IHRL works through inclusion and exclusion, these categories, when viewed through the perspective of adjudication, are inherently dynamic. I concluded this chapter by arguing that the right to privacy is a precarious legal avenue for

NHHLSs precisely because it exemplifies IHRL's acts of inclusion and exclusion: the hierarchy of subjects and the division of space. However, I argued that privacy is not only precarious but also insufficient. No matter how far we will stretch it, it cannot, on its own, accommodate the claims that NHHLSs bring under its scope because harm to one's body, identity and relationships is ultimately not about choice, but about recognition of subjecthood. Therefore, I argued that the right to privacy should not limit our imagination to think that it is all we have. Instead, a move beyond privacy is called for.

After calling for the need to go beyond the right to privacy, I analysed the concept of individual self-determination in **Chapter 3**. I first set two starting points for the trajectory of the concept: a chronological one and a substantive one, namely the Cairo Programme of Action and the case of *Dianne Pretty v United Kingdom*, respectively. I examined subsequent developments and classified these in three main categories: (i) individual self-determination as relating to NHHLSs, (ii) individual self-determination within the framework of the right to privacy and (iii) individual self-determination beyond the right to privacy. I argued that these developments are indicative of the emergence of a right to individual self-determination in IHRL. I therefore applied these findings to the framework of Article 38(1) of the Statute of the International Court of Justice and explained that while the evidence gathered qualifies only within the category of subsidiary sources of IL, this is nonetheless sufficient to argue that the right is emerging, in particular when the importance of soft law in making IHRL is reaffirmed. I concluded that as the right to individual self-determination is in the process of emerging, now is the time to begin to think about how to best shape its role in IHRL in light of its inherent acts of inclusion and exclusion.

In **Chapter 4**, I defined the emerging right to individual self-determination through the concept of substantive recognition. The analytical frame I devised in Chapter 1 guided my decision to

define the emerging right to individual self-determination as a right that actively bridges the gaps between the human subject and the human legal subject: gaps which are particularly evident for NHHLSs due to their non-hegemonic position in a system that was tailored to the measures and needs of the hegemonic, narrow, yet universalised human legal subject of IHRL. Thus, by centring individual self-determination within substantive recognition, I underscored the nexus between recognition, access and participation in IHRL. These decisions, however, are not on their own a sufficient guarantee to protect this emerging right. It follows, to guarantee recognition as its core, an obligation to apply a contextualised-led approach to the setting of limitations to this right is essential. I therefore added two stages to the standard assessment of lawful interference with rights (legality, legitimate aim, necessity and proportionality): (i) identifying the human legal subject as an embedded subject and locating their positionality within a broader social, cultural, legal, political and economic panorama and (ii) understanding the harm of which they complain in relation to their positionality and the three protected areas of recognition (bodies, identity and relationships). These two additional steps to the assessment inform the standard test – thus, legality, legitimate aim, necessity and proportionality are understood in relation to the embedded subject and their harm. In this sense, any limitation of this right must show that it does not harm the core of the right – recognition. This is because when recognition is undermined, the ability to access rights and participate in a democratic society, which are part of the premises of IHRL, are compromised.

At the same time, I argued that while the right to individual self-determination is not yet a recognised and accepted right, and may never fully emerge as such, it is nonetheless important and relevant. It is, at minimum, an analytical tool that assists in illuminating the existing gaps in recognition of human legal subjects. I argued that now is the time to engage with this emerging right precisely because it is in the process of emerging. This is key to making sure

that when it does emerge that its scope is framed in a way that is centred around NHHLs' recognition and participation and addressed to their needs.

The right to privacy was my starting point as a means to re-think deeper structural and interpretative challenges in IHRL. I returned to privacy in **Chapter 5**, the concluding chapter of my thesis. In this chapter, I re-imagined three ECtHR judgments that contained a privacy feature through the application of the framework of the emerging right to individual self-determination. I therefore re-imagined the judgments in *I.G. and Others v Slovakia*, *Hämäläinen v Finland*, and *S.A.S. v France* to show in which way such application can change the reasoning and outcome for each of the applicants. The application chapter demonstrated the importance of a contextualisation-based approach to assessing limitations of the right to individual self-determination and how such method can assist in illuminating the entirety of each case. It showed the usefulness and necessity of contextualisation to countering any abstracted framing of balancing tests by the ECtHR. If the individual is not constructed as embedded, understanding their positionality within a relationship, such as that which is integral to assessing legitimate aims, necessity and proportionality, is undermined.

2. Further Engagement with the Conclusions of this Thesis and its Limitations

The core of the emerging right to individual self-determination which I presented in this thesis can be further engaged with in different ways. There is a potential of using it as a tool for critiquing IHRL and further illuminating its limitations. For example, a dimension that I did not include within the scope of this thesis – centred around asylum, nationality, and immigration – is undoubtedly relevant to constructing NHHLs positions in IHRL and assessing how the tension between state sovereignty and IHRL's human legal subjects locates

and dislocates NHHLSs which have the effect of undermining their recognition as full human legal subjects.

Another example of how it could be used as a tool for critiquing IHRL is by using the concept of substantive recognition that is the core of the emerging right to individual self-determination and assessing the right to non-discrimination against it. While the thesis does include issues regarding non-discrimination and equality claims, I did not engage with these rights in a substantive manner. Instead, I used them to illuminate my argument against privacy as being an insufficient avenue for NHHLSs. A careful articulation of the interaction between the emerging right to individual self-determination and the right to non-discrimination and equality is called for. Such analysis would sharpen both the definition of the emerging right to individual self-determination and perhaps clarify the role of non-discrimination. Such study may assist in devising a deeper structural intervention against IHRL's acts of inclusion and exclusion that locate NHHLSs in the non-hegemonic position to begin with.

Outside of the scope of this work was the use of qualitative methods. In shaping the emerging right to individual self-determination, further engagement with different grassroots and civil society actors and activists is necessary. In fact, when writing about the trajectories of individual self-determination in IHRL, I focused on a very specific reading of sources, focusing on a doctrinal approach that takes into consideration all that is 'Law' – treaties and judgments and all that is not-Law but within the general framework of IHRL i.e., soft law instruments. What is missing is a bottom-up approach to setting the meanings of IHRL and the ways in which it moves and develops. I am missing important voices. The voices of those who campaigned for any of the fragmented uses of individual self-determination – from activists and NGOs that promoted self-determination of gender in domestic law, to grassroots organisations demanding reproductive justice and rights through a concept of individual self-determination. Including the possibility of conducting interviews would allow me to further

define and refine the emerging right to individual self-determination and to critically reflect on my own assumptions regarding the best way it can be shaped to actively make space for NHHLSs in IHRL. This ultimately means that while this thesis appears to be the first attempt to organise the fragmented uses of individual self-determination in IHRL, further work needs to expand and include these additional sources.

In addition, I explained in the introduction that one of the main limitations of this research is the disproportionate inclusion of ECtHR jurisprudence on the right to privacy, which inevitably shapes the thesis and its outcomes in different ways. This stemmed from the focus on critiquing the right to privacy and devising the emerging right to individual self-determination as an alternative avenue. However, privacy was a starting point but not the final destination of this thesis. In this sense, further research can concentrate on further clarifying the emerging right to individual self-determination in IHRL. One way of doing so which would broaden its scope is to engage with the African System of Human Rights Protection and the Inter-American Human Rights System to assess how the emerging right to individual self-determination assists in complementing other right violation claims, for example claims regarding freedom of expression and the prohibition of torture, cruel, inhuman or degrading treatment or punishment. Similarly, to be more transformative and disruptive in its attempt to make space for NHHLSs in IHRL, the emerging right to individual self-determination needs to engage with economic, social and cultural rights such as the right to education, health and adequate standard of living. Lastly, this thesis identified a need to build shared strategies. This thesis is a first step toward articulating a unified concept and right to individual self-determination in IHRL. In finalising this thesis, I see an opportunity to move between specific and broader claims in IHRL not as a binary choice between one or the other, but the firm decision to uphold complexity and advocate for both. Simply put, the fragmented uses of individual self-determination are important. It is important to highlight each of the specific needs that come under individual

self-determination which advance the heterogenous group of NHHLSs and highlight the diversity of experiences of exclusion in IHRL. At the same time, great creativity and strength lays in sharing strategies and tracing similarities between the different claims. This is where NGOs, grassroots organisations, International Organisations, human rights advocates, scholar and litigants can actively shape that emerging right to individual self-determination as a unified rights and concept for NHHLSs whilst upholding the necessity of specific attention, articulation and work on fragmented expressions of individual self-determination.

3. Tensions

Finally, I return to Ahmed's metaphor of the door that opens and shuts at different moments, often abruptly, for "those who embody diversity, whose entry is understood as debt".¹³ I presented this metaphor in the Introduction to my thesis to situate the research as relating to the 'doors' of IHRL. I wanted to write about a new door- the emerging right to individual self-determination as a door that would be useful for NHHLSs unlike that of the right to privacy. However, crafting a new opening within IHRL means to engage and legitimatise its acts of inclusion and exclusion. Or better, as Kapur explains: to seek freedom in a fishbowl. To be part of a governance project that disciplines its subjects in order to assimilate, repress and oppress those who do not conform to its liberal, white, heteronormative order.¹⁴

How can the new door of the emerging right to individual self-determination be useful when it is situated in a structure whose very foundations require radical re-imagination? Thus, I return

¹³ Sara Ahmed, 'Slammed Doors' (Feministkilljoys, 17 March 2020) <<https://feministkilljoys.com/2020/03/17/slammed-doors/>> last accessed 9 April 2023.

¹⁴ Ratna Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Elgar 2018) 46.

to the tensions that arise from doing intersectional feminist critical legal work within IHRL by returning again to the words of Engle

While sometimes it seems we are suppressing our doubts about the inability of the tools to work, we often end up expressing them in other ways. The doubts ooze out in our decisions to try more specialized tools (such as the Women's Convention or CEDAW) and sometimes to try different tools altogether (such as education). Similarly, sometimes we think we are expressing doubts and we actually suppress them, for example, by trashing rights rhetoric and then returning to it.¹⁵

I often found myself between accepting and protecting the fishbowl and rejecting it because it will never be fully effective and reliable for NHLSs. There is virtue in rejecting the fishbowl and working outside of IHRL, or with IHRL and outside of it. However, I remained inside the tensions and devised an answer within it. The continuous questioning of the decision to engage or not to engage with IHRL is key to doing intersectional feminist critical legal work. It keeps us on our feet and allows for dynamic re-consideration and re-imagination of IHRL from a position of power – the power to examine it as a social construction. In this thesis I began to craft a door within IHRL like many other intersectional feminist critical legal scholars. We continuously observe these doors and fix what we are able to fix. However, the structure remains vulnerable and uncertain. At the same time, not engaging with these acts of reconstruction at all means that voices which were absent from the making of IHRL remain absent. While the doors of IHRL will remain precarious, abandoning them means that they might shut completely.

¹⁵ Karen Engle, 'International Human Rights and Feminism: When Discourses Meet' (1992) 13 *Michigan Journal of International Law* 517, 610.

Bibliography

Books, Book Chapters and Articles

Abrusci, Elena, *Judicial Convergence and Fragmentation in International Human Rights Law: The Regional Systems and the United Nations Human Rights Committee* (Cambridge University Press 2022).

Ahmed, Sarah, *Complaint!* (Duke University Press 2021).

Alexy, Robert, 'On the Structure of Legal Principles', (2000) 13 *Ratio Juris*.

Alexy, Robert, 'Balancing, Constitutional Review, and Representation', (2005) 3 *International Journal of Constitutional Law*.

Anderson, Perry, *The H-Word: The Peripeteia of Hegemony* (Verso 2017).

Anghie, Antony, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27 *Third World Quarterly*.

Anghie, Antony, 'Rethinking Sovereignty in International Law' (2009) 5 *Annual Review of Law and Social Sciences*.

Arendt, Hannah, *The Origins of Totalitarianism* (Penguin Books, first published 1951, first published in Penguin Classics 2017).

Arstein-Kerslake, Anna and Flynn, Eilínór, 'The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: A Roadmap for Equality Before the Law' (2016) 20 *The International Journal of Human Rights*.

Arstein-Kerslake, Anna and Flynn, Eilínór, 'The Right to Legal Agency: Domination, Disability and the Protections of Article 12 of the Convention on the Rights of Persons with Disabilities' (2017) 13 *International Journal of Law in Context*.

Baars, Grietje, 'Queer Cases Unmake Gendered Law, Or, Fucking Law's Gendering Function' (2019) 45 *The Australian Feminist Law Journal*.

Bassetti, Matteo E, 'Human Rights Bodies' Adjudication of Trans People's Rights: Shifting the Narrative from the Right to Private Life to Cruel and Inhuman or Degrading Treatment' (2020) 12 *European Journal of Legal Studies* 291.

Bell, Duncan, 'John Stuart Mill on Colonies' (2010) 38 *Political Theory*.

Bengtson, Sarah, Gonzalez-Salzberg, Damian and Hodson, Loveday, 'Christine Goodwin v the United Kingdom' in Hodson, Loveday and Lavers, Troy (eds), *Feminist Judgments in International Law* (Hart Publishing 2019).

Bhatia, Rajani, Sasser, Jade S, Ojeda, Diana, Hendrixson, Anne, Nadimpally, Sarojini and Foley, Ellen E, 'A Feminist Exploration of 'Populationism': Engaging Contemporary Forms of Population Control' (2020) 27 *Gender, Place and Culture*.

Bilchitz, David, 'Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals' (2009) 25 *South African Journal of Human Rights*.

Blanco, Elena and Grear, Anna, 'Personhood, Jurisdiction and Injustice: Law, Colonialities and the Global Order', (2019) 10 *Journal of Human Rights and the Environment*.

Boyle, Alan E, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 *International and Comparative Law Quarterly*.

Boyle, Alan E, 'The Choice of a Treaty: Hard Law versus Soft Law' in Chesterman, Simon, Malone David M and Villapando, Santiago (eds), *The Oxford Handbook of United Nations Treaties* (Oxford University Press 2019).

Brems, Eva (ed), *Diversity and European Human Rights: Rewriting Judgments of the ECtHR* (Cambridge University Press 2012).

Brems, Eva, 'Introduction' in Brems, Eva (ed), *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (Cambridge University Press 2012).

Brems, Eva, 'SAS v France: A Reality Check' (2016) 25 *Nottingham Law Journal*.

Brems, Eva, 'Conclusion- Conflicting Views on Conflicting Rights' in Smet, Stijn and Brems, Eva (eds), *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (Oxford University Press 2017).

Brems, Eva, 'Positive Subsidiarity and its Implications for the Margin of Appreciation Doctrine' (2019) 37 *Netherlands Quarterly of Human Rights*.

Brems, Eva, Cannoot, Pieter and Moonen, Toon, 'Introduction' in Brems, Eva, Cannoot, Pieter and Moonen, Toon (eds), *Protecting Trans Rights in the Age of Gender Self-Determination* (Intersentia 2020).

Bryant, Taimie L, 'Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans' (2008) 39 *Rutgers Law Journal*.

Burchill, Richard, 'Chapter 9: Self-Determination', in Conte, Alex and Burchill, Richard, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (Taylor and Francis, 2nd edition 2009).

Çali, Başak, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions' (2007) 29 *Human Rights Quarterly*.

Cannoot, Pieter, 'The Pathologisation of Trans* Persons in the ECtHR's Case Law on Legal Gender Recognition' (2019) 37 *Netherlands Quarterly of Human Rights*.

Cannoot, Pieter, 'The Limits to Gender Self-Determination in a Stereotyped Legal System', in Brems, Eva, Cannoot, Pieter and Moonen, Toon (eds), *Protecting Trans Rights in the Age of Gender Self-Determination* (Intersentia 2020).

Cannoot, Pieter and Decoster, Mattias, 'The Abolition of Sex/Gender Registration in the Age of Gender Self-Determination: An Interdisciplinary, Queer, Feminist and Human Rights Analysis' (2020) 1 *International Journal of Gender, Sexuality and Law*.

Celik, Elif, 'The Role of CRPD in Rethinking the Subject of Human Rights' (2017) 21 *The International Journal of Human Rights*.

Charlesworth, Hilary, 'The Public/Private Distinction and the Right to Development in International Law' (1992) 12 *Australian Year Book of International Law*.

Charlesworth, Hilary, 'Women's International Human Rights?' in Cook, Rebecca J. (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994).

Charlesworth, Hilary and Chinkin, Christine, *The Boundaries of International Law: A Feminist Analysis* (2nd edition, Manchester University Press 2016).

Chenwi, Lilian, Bulto, Soboka Takele (eds), *Extraterritorial Human Rights Obligations from an African Perspective* (Cambridge University Press 2018).

Chinkin, Christine, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *The International and Comparative Law Quarterly*.

Chinkin, Christine, 'Sources' in Moeckli, Daniel, Shah, Sangeeta and Sivakumaran, Sandesh (eds), *International Human Rights Law* (3rd edition, Oxford University Press 2018).

Chinkin, Christine, Heathcote, Gina, Jones, Emily and Jones, Henry, 'Bozkurt Case, aka the Lotus Case (France v Turkey): Ships that Go Bump in the Night', in Hodson, Loveday and Lavers, Troy (eds) *Feminist Judgments in International Law* (Hart Publishing 2019).

Cho, Sumi, Crenshaw, Kimberlé Williams and McCall, Leslie 'Toward a Field of Intersectionality Studies: Theory, Applications and Praxis' (2013) 38 *Signs*.

Cook, Rebecca J, 'Human Rights and Reproductive Self-Determination' (1995) 44 *American University Law Review*.

Crane, Barbara B and Issacs, Stephan L, 'The Cairo Programme of Action: A New Framework for International Cooperation on Population and Development Issues' (1995) 36 *Harvard International Law Journal*.

Crawford, James, *Brownlie's Principles of International Law* (9th edition, Oxford University Press 2012).

Crenshaw, Kimberlé, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1 *The University of Chicago Legal Forum*.

Crenshaw, Kimberlé, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43 *Stanford Law Review*.

Davies, Margaret, 'Taking the Inside Out' in Naffine, Ngaire and Owens, Rosemary J (eds), *Sexing the Subject of Law* (Sweet and Maxwell 1997).

Davies, Margaret and Naffine, Ngaire, *Are Persons Property? Legal Debates About Property and Personality* (Ashgate 2001).

DeJong, Jocelyn, 'The Role and Limitations of the Cairo International Conference on Population and Development' (2000) 51 *Social Sciences and Medicine*.

Diggelmann, Oliver, and Cleis, Maria Nicole, 'How the Right to Privacy Became a Human Right' (2004) 14 *Human Rights Law Review*.

Douglas, Heather, Bartlett, Francesca, Luker, Trish and Hunter, Rosemary (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing 2014).

Douzinas, Costas, 'The End(s) of Human Rights' (2002) 26 *Melbourne University Law Review*.

Ducor, Philippe, 'The Legal Status of Human Materials' (1996) 44 *Drake Law Review*.

Dworkin, Roland, 'The Model of Rules', (1967) 35 *The University of Chicago Law Review*.

Dworkin, Roland, 'Hard Cases' (1975) 88 *Harvard Law Review*.

Engle, Karen, 'International Human Rights and Feminist: When Discourses Meet' (1992) 13 *Michigan Journal of International Law*.

Engle, Karen, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22 *The European Journal of International Law*.

Enright, Máiréad, McCandless, Julie and O'Donoghue, Aoife (eds), *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Hart Publishing 2017).

Favre, David, 'Equitable Self-Ownership for Animals' (2000) 50 *Duke Law Journal*.

Finnis, John, *Collected Essays: Volume II, Intention and Identity* (Oxford University Press 2011).

Fleming, Nathaniel, 'S.A.S. v. France: A Margin of Appreciation Gone Too Far' (2020) 52 *Connecticut Law Review*.

Gaeta, Paola, Viñuales, Jorge E. and Zappalà, Salvatore (eds), *Cassese's International Law* (3rd edition, Oxford University Press 2020).

Gibney, Mark, Türkelli, Gamze Erdem, Krajewski, Markus and Vandenhoe, Wouter (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022).

Gray, Garry C, 'The Responsibilisation Strategy of Health and Safety: Neo-Liberalism and the Reconfiguration of Individual Responsibility for Risk' (2009) 49 *British Journal of Criminology*.

Gray, John Chipman, *The Nature and Sources of the Law* (The Macmillan Company, 1924).

Grear, Anna, 'Challenging Corporate 'Humanity': Legal Disembodiment, Embodiment and Human Rights' (2007) 7 *Human Rights Law Review*.

Grear, Anna, 'Deconstructing Anthropos: A Critical Legal Reflection on 'Anthropocentric' Law and Anthropocene 'Humanity'' (2015) 26 *Law and Critique*.

Grear, Anna, 'Framing the Project of International Human Rights Law Reflections on the Dysfunctional 'Family' of the Universal Declaration' in Gearty, Conor and Douzinas, Costas (eds), *The Cambridge Companion to Human Rights Law* (Cambridge University Press 2012).

Grear, Anna, 'Sexing the Matrix': Embodiment, Disembodiment and the Law- Towards the Re-Gendering of Legal Rationality' in Jones, Jackie, Grear, Anna, Fenton, Rachel Anne and Stevenson, Kim (eds), *Gender, Sexualities and Law* (Routledge 2017).

Habibi, Don, 'The Moral Dimensions of J S Mill's Colonialism' (2002) 30 *Journal of Social Philosophy*.

Halewood, Peter, 'Law's Bodies: Disembodiment and the Structure of Liberal Property Rights' (1996) 81 *Iowa Law Review*.

Harris, Angela P, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 *Stanford Law Review*.

Hart, HLA, *The Concept of Law* (Joseph Raz and Penelope A. Bulloch, Second Edition, University of Oxford Press 1994).

Heathcote, Gina, 'On Feminist Legal Methodologies: Split, Plural and Speaking Subjects' (2018) 8 *Feminist@law*.

Hunter, Rosemary, 'Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism' in Davies, Margaret and Munro, Vanessa E. (eds) *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2013).

Hunter, Rosemary, McGlynn, Clare and Rackley, Erika (eds), *Feminist Judgments from Theory to Practice* (Hart Publishing 2010).

Jahn, Beate, 'Barbarian Thoughts: Imperialism in the Philosophy of John Stuart Mill' (2005) 31 *Review of International Studies*.

Jones, Emily, 'Posthuman International Law and the Rights of Nature' (2021) 12 *Journal of Human Rights and the Environment*.

Jones, Emily, *Feminist Theory and International Law: Posthuman Perspectives* (Routledge 2023).

Kanter, Arlene S, 'The Law: What's Disability Studies got to do with it or an Introduction to Disability Legal Studies' (2011) 42 *Columbia Human Rights Law Review*.

Kapur, Ratna, 'Law and the Sexual Subaltern: A Comparative Perspective' (2000) 48 *Cleveland State Law Review*.

Kapur, Ratna, 'Human Rights in the 21st Century: Take a Walk on the Dark Side' (2006) 28 *Sydney Law Review*.

Kapur, Ratna, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Elgar 2018).

Kavanagh, Aileen, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 *Law and Philosophy*.

Kelsen, Hans, *General Theory of Law and State* (Russel & Russel 1961).

King, Hugh, 'The Extraterritorial Human Rights Obligations of States' (2009) 9 *Human Rights Law Review*.

Knop, Karen, 'Why Rethinking the Sovereign State is Important for Women's International Human Rights Law' in Cook, Rebecca J, *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994).

Koskeniemi, Martti, *From Apology to Utopia: The Structure of International Legal Argument* (reissued edition, Cambridge University Press 2005).

Kouvo, Sari and Pearson, Zoe, 'Introduction' in Kouvo, Sari and Pearson, Zoe, (eds) *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance* (Hart Publishing 2011).

Kurki, Visa A.J., *A Theory of Legal Personhood* (Oxford University Press 2019).

Laclau, Ernesto, *New Reflections on the Revolution of Our Time* (Verso 1990).

Lostal, Marina, 'De-Objectifying Animals: Could they Qualify as Victims before the International Criminal Court?' (2021) 19 *Journal of International Criminal Justice*.

MacKinnon, Catharine A, *Are Women Human? And Other International Dialogues* (Harvard University Press 2006).

Marín, Ruth Rubio, and Möschel, Mathias, 'Anti-Discrimination Exceptionalism: Racist Violence before the ECtHR and the Holocaust Prism', (2016) 26 *The European Journal of International Law*.

Marshall, Jill, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights* (Brill 2009).

Marshall, Jill, *S.A.S. v France: Burqa bans and the Control or Empowerment of Identities*' (2015) 15 *Human Rights Law Review*.

Matsuda, Mari J, 'Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique to Rawls' Theory of Justice' (1986) 16 *New Mexico Law Review*.

McIntosh, Alison C and Finkle, Jason L, 'The Cairo Conference on Population and Development: A New Paradigm?' (1995) 21 *Population and Development Review*.

Mill, John Stuart, *On Liberty* (The Floating Press 1909, re-printed 2009).

Murray, Rachel, *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford University press 2020).

Mutcherson, Kimberly M (ed), *Feminist Judgments: Reproductive Justice Rewritten* (Cambridge University Press 2020).

Mutua, Makau, 'What is TWAIL?' (2000) 94 *Proceedings of the American Society of International Law*.

Mutua, Makau, 'Standard Setting in Human Rights: Critique and Prognosis' (2007) 29 Human Rights Quarterly.

Naffine, Ngaire, 'Who are Law's Persons? From Cheshire Cats to Responsible Subjects' (2003) 66 The Modern Law Review.

Naffine, Ngaire and Owens, Rosemary J, 'Sexing Law' in Naffine, Ngaire and Owens, Rosemary J (eds), *Sexing the Subject of Law* (Sweet and Maxwell 1997).

Nedelsky, Jennifer, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press 2012).

Negishi, Yota, 'The *Pro Homine* Principle's Role in Regulating the Relationship between Conventionality Control and Constitutionality Control' (2017) 28 The European Journal of International Law.

Nieminen, Kati, 'Eroding the Protection Against Discrimination: The Procedural and De-Contextualised Approach to *S.A.S v France*' (2019) 19 International Journal of Discrimination and the Law.

Nijman, Jane Elisabeth, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (Asser Press 2004).

Nikolaidis, Charilaos, 'Unravelling the Knot of Equality and Privacy in the European Court of Human Rights and the US Supreme Court: From *Isonomia* to *Isotimia*' (2018) 18 Human Rights Law Review.

Nowak, Manfred, *U.N. Convention on Civil and Political Rights: CCPR Commentary* (2nd edition, N.P. Engel 2005).

O'Flaherty, Michael, 'Sexual Orientation and Gender Identity' in Moeckli, Daniel, Shah, Sangeeta and Sivakumaran, Sandesh (eds), *International Human Rights Law* (Oxford University Press 2nd edition 2018).

O'Hara, Claerwen, 'Consensus, Difference and Sexuality: Que(e)rying the European Court of Human Rights' Concept of 'European Consensus'' (2021) 32 Law and Critique.

Olsen, Frances, 'Constitutional Law: Feminist Critiques of the Public/Private Distinction' (1993) 10 Constitutional Commentary.

Orford, Anne, *International Law and Its Others* (Cambridge University Press 2006).

Orford, Anne, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press 2009).

Otto, Dianne, 'Rethinking Universals: Opening Transformative Possibilities in International Human Rights Law' (1997) 18 Australian Year Book of International Law.

Otto, Dianne, 'Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law', in Orford, Anne (ed), *International Law and Its Others* (Cambridge University Press 2006).

Otto, Dianne, 'Celebrating Complexity' (2012) 106 Proceedings of the Annual Meeting American Society of International Law.

Otto, Dianne, 'Gender and Sexual Diversity: A Question of Humanity?' (2016) 17 *Melbourne Journal of International Law*.

Otto, Dianne, 'Beyond Legal Justice: Some Personal Reflections on Peoples' Tribunals, Listening and Responsibility' (2017) 5 *London Review of International Law*.

Otto, Dianne, 'Feminist Judging in Action: Reflecting on the *Feminist Judgments in International Law Project*' (2020) 28 *Feminist Legal Studies*.

Park, Ki-Gab, 'The Right to Self-Determination and Peremptory Norms' in Tladi. Dire (ed), *Peremptory Norms of General International Law (Jus Cogens)* (Brill, 2021).

Parlett, Kate, *The Individual in the International Legal System- Continuity and Change in International Law* (Cambridge University Press 2013).

Pellet, Alain and Muller, Daniel, 'Competence of the Court, Article 38' in Zimmerman, Andreas, Tams, Christian J, Oellers-Frahm, Karin and Tomuschat, Christian (eds) *The Statute of the International Court of Justice: A Commentary* (3rd edition, Oxford University Press 2019).

Quinn, Gerard and Rekas-Rosalbo, Abigail, 'Civil Death: Rethinking the Foundations of Legal Personhood for Persons with a Disability' (2016) 56 *Irish Jurist*.

Rancière, Jacques, 'Who is the Subject of the Rights of Men?' (2004) 103 *The South Atlantic Quarterly*.

Raz, Joseph, 'Legal Principles and the Limits of Law', (1972) 81 *The Yale Law Journal*.

Romany, Celina, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' (1993) 6 *Harvard Human Rights Journal*.

Romany, Celina, 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' in Cook, Rebecca J (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994).

Rose, Nikolas, 'Government and Control' (2000) 40 *British Journal of Criminology*.

Saul, Matthew, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' (2011) 11 *Human Rights Law Review*.

Sellers, Mortimer N S, 'International Legal Personality' (2005) 11 *IUS GENTIUM*.

Senaratne, Kalana, 'Internal Self-Determination in International Law: A Critical Third World Perspective' (2013) 3 *Asian Journal of International Law*.

Shany, Yuval, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2006) 16 *The European Journal of International Law*.

Shaw, Malcolm N., *International Law* (6th edition, Cambridge University 2008).

Shelton, Dinah, 'Introduction: Law, Non-Law and the Problem of 'Soft Law'' in Shelton, Dinah (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press 2003).

Shelton, Dinah, 'Normative Hierarchy in International Law' (2006) 100 *The American Journal of International Law*.

Singer, Elyse Ona, 'From Reproductive Rights to Responsibilisation: Fashioning Liberal Subjects in Mexico City's New Public Sector Abortion Program' (2016) 31 *Medical Anthropology Quarterly*.

Sivakumaran, Sandesh, 'The Influence of Teachings of Publicists on the Development of International Law' (2017) 66 *International and Comparative Law Quarterly*.

Smith, Bryant, 'Legal Personality' (1928) 37 *The Yale Law School Journal*.

Sosa, Lorena P. A., 'Inter-American Case Law on Femicide: Obscuring Intersections?' (2017) 35 *Netherlands Quarterly of Human Rights*.

Spade, Dean, 'Compliance is Gendered: Struggling for Gender Self-Determination in a Hostile World' in Currah, Paisley, Juang, Richard M and Minter, Shannon Price (eds), *Transgender Rights* (University of Minnesota Press 2006).

Spivak, Gayatri Chakravorty, 'Can the Subaltern Speak?' in Morris, Rosalind C (ed), *Can the Subaltern Speak? Reflections on the History of an Idea* (Columbia University Press 2010).

Stanchi, Kathryn M, Berger, Linda L and Crawford, Bridget J (eds), *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (Cambridge University Press 2016).

Syed, Sofie G, 'Liberté, Égalité, Vie Privée: The Implications of France's Anti-Veil Laws for Privacy and Autonomy' (2017) 40 *Harvard Journal of Law & Gender*.

Taylor, Paul M, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge University Press 2020).

Thirlway, Hugh, *The Sources of International Law* (2nd edition, Oxford University Press 2019).

Tudor, Steven, 'Some Implications for Legal Personhood of Extending Legal Rights to Non-Human Animals' (2010) 35 *Australian Journal of Legal Philosophy*.

Tunick, Mark, 'John Stuart Mill and Unassimilated Subjects' (2005) 53 *Political Studies*.

Tzouvala, Ntina, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020).

Viljoen, Frans and Abebe, Adem Kassie, 'Amicus Curiae Participation Before Regional Human Rights Bodies in Africa' (2014) 58 *Journal of African Law*.

Warren, Samuel D, and Brandeis, Louis D, 'The Right to Privacy' (1890) 4 *Harvard Law Review*

Wicks, Elizabeth, *The State and the Body: Legal Regulation of Bodily Autonomy* (Hart Publishing 2016).

Williams, David, 'John Stuart Mill and the Practice of Colonial Rule in India' (2020) 17 *Journal of International Political Theory*.

Wise, Steven M, 'The Legal Thinghood of Nonhuman Animals' (1996) 23 Boston College Environmental Affairs Law Review.

Yutaka, Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002).

Zuloaga Palacios, Patricia, 'Pushing Past the Tipping Point: Can the Inter-American System Accommodate Abortion Rights?' (2020) 21 Human Rights Law Review.

Zuniga, José M., and Sidibé, Imane, 'Primum non nocere and the Right to Health', in Zuniga, José M., Marks, Stephen P. and Gostin, Lawrence O. (eds) *Advancing the Human Right to Health* (Oxford University Press 2013).

Reports, Amicus Briefs and Additional Documents

Amicus Curiae Brief of Amnesty International in the Supreme Court of Korea on Legal Gender Recognition (Case No 2020SEU616) Amnesty International.

Annual Report 2012 by the Ombudsman for Equality, Office of the Ombudsman for Equality, Publications On Equality 2013:13.

Annual Report 2013 by the Ombudsman for Equality, Office of the Ombudsman for Equality, Publications On Equality 2014:3.

Avis Sur le Port du Voile Intégral, Commission National Consultative Des Droit De L'Homme (Adopté par l'Assemblée plénière du 21 Janvier 2010).

'Body and Soul – Forced Sterilisation and Other Assaults on Roma Reproductive Freedom in Slovakia', The Centre for Reproductive Rights and the Centre for Civil and Human Rights/Poradňa (2003).

Lakshmi v Government of Nepal: CRR Memo to Supreme Court of Nepal, Centre for Reproductive Rights.

Rapport D'Informations fait en Application de l'Article 145 du Règlement Au Nom De La Mission D'Information Sur La Pratique du Port du Voile Intégral sur le Territoire National N 2262 (26 Janvier 2010).

Websites and Blogs

Sara Ahmed, 'Slammed Doors' (Feministkilljoys ,17 March 2020) <<https://feministkilljoys.com/2020/03/17/slammed-doors/>> last accessed 9 April 2023.

Human Rights Watch, 'World Report 2022 – Israel and Palestine' <<https://www.hrw.org/world-report/2022/country-chapters/israel-and-palestine>> accessed on 8 April 2023.