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THE EMERGING CRIME OF PERSECUTION BASED ON SEXUAL ORIENTATION

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Cover Page Footnote

Anthony J. Colangelo, Robert G. Storey Distinguished Faculty Fellow and Professor of Law, Southern Methodist University, Dedman School of Law, Senior Associate, Nautilus Institute for Security and Sustainability. I owe a deep debt of gratitude to Jordan Burger for his outstanding research and substantive assistance. I would also like to thank Dale Carpenter, Nancy Coombs, Evan Criddle, Melissa Durkee, Chimène Keitner, David Luban, Leila Sadat, and Goran Sluiter for very helpful feedback on an early draft. Finally, I would like to thank Ryan Demarest, Francesca Rollo, Orly Salim, and Fernando Salizar Martinez for excellent research assistance. Special thanks go to Carrie Rief.

THE EMERGING CRIME OF PERSECUTION BASED ON SEXUAL ORIENTATION

*Anthony J. Colangelo**

ABSTRACT—This Article argues that persecution based on sexual orientation constitutes a crime against humanity under international law. Unlike other scholarship that has focused on the definition of crimes against humanity in the 1998 Rome Statute for the International Criminal Court—which does not explicitly enumerate “sexual orientation” as a protected classification—this Article looks to customary international law made up by the practices of states.

Diligent research has revealed that between 1998 and 2022, at least 107 states enacted laws or revised existing laws decriminalizing sexual orientation and/or categorizing sexual orientation as a protected classification from discrimination. This is in addition to the sizable number of states that already did so before 1998. Similarly, since 1998, a plethora of United Nations (UN) and regional resolutions, as well as non-governmental organizations (NGOs) as a subsidiary basis for customary law formation, solidified sexual orientation as a protected classification. In short, the legal landscape has changed dramatically in the intervening years since the Rome Statute went into effect, and now argues more powerfully for the inclusion of sexual orientation as a protected classification from persecution under international law.

Finally, because persecution is a crime against humanity, all states have jurisdiction to prosecute the perpetrators or hold them civilly accountable. This Article hopes to provide the hard, empirical data and the sound legal reasoning on which such arguments can be made.

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INTRODUCTION

Imagine State A enacts a law providing that all homosexual acts are hereby illegal and imposes a mandatory death penalty on any person who engages in such acts. The law is carried out in a widespread and systematic fashion by state agents and street thugs. Under current international criminal law (ICL), the conduct of the perpetrators appears perfectly legal.

This Article sets out to change that. The reason for this present state of affairs is that the two most watershed – indeed, revered – developments of ICL — the 1945 London Charter under which the Nazis were prosecuted at Nuremberg,¹ and the more recent 1998 Rome Statute for the International Criminal Court (ICC)²—both omit “sexual orientation” as a specific classification of persons subject to persecution under the definition of crimes against humanity.

These omissions have not gone unnoticed in the literature, but efforts to enlarge the category of persons subject to persecution under international law have focused mainly on trying to wrestle sexual orientation as a protected classification—along with political, racial, national, ethnic, cultural, religious, and gender—into the language of the Rome Statute as it presently exists.³ This is a relatively weak argument: A straightforward textual exegesis of the statute simply does not include the words “sexual orientation” when it plainly could have. Its context is restrictive because it is a criminal code, and its drafting history is a full-blown exercise of studied ambiguity surrounding the word “gender,” clearly indicating that inclusion of sexual orientation would have been anathema to a significant block of delegates.

But the Rome Statute was meant only to *codify* international law, not freeze it.⁴ On the other hand, there has been a robust development in the field

¹ Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement) art. 8, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

² Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 105 [hereinafter Rome Statute].

³ See, e.g., Nevenka Duric et al., *Legal Protections of Sexual Minorities in International Criminal Law*, 6 RUSSIAN L. J. 28, 38 (2018); Charles Barrera Moore, *Embracing Ambiguity and Adopting Propriety: Using Comparative Law to Explore Avenues for Protecting the LGBT Population Under Article 7 of the Rome Statute of the International Criminal Court*, 101 MINN. L. REV. 1287, 1289 (2017); Josh Scheinert, *Is Criminalization Criminal?: Antisodomy Laws and the Crime Against Humanity of Persecution*, 24 TUL. J. L. & SEXUALITY, 99, 103 (2015).

⁴ See, e.g., Rep. of the Preparatory Comm. on the Establishment of an Int’l Crim. Ct., Vol. I, ¶ 54, U.N. Doc. A/51/22 (1996) (“Several delegations held the view that the Statute *should codify customary international law* and not extend to the progressive development of international law.”) (emphasis added); see also Lisa Davis, *Reimagining Justice for Gender-Based Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes Against Women and LGBTIQ Persons*, 24 W. & MARY J. WOMEN & L. 513,

of LGBTQ+ rights since 1998 occurring in the field of customary international law. Unlike treaties, this form of international law is evolutionary and grows from the ground up. It is comprised of state practice and “*opinio juris*,” or the intent or belief that the practice gives rise to a legal obligation or right.⁵ Importantly, customary international law is an empirical phenomenon that surveys the practices of states to identify existing and evolving norms.⁶

In other words, custom is distinct from treaties like the Rome Statute. Treaties are positive law and bind only state parties; custom arises from state practice and *opinio juris*, or an accompanying sense of legal obligation, and binds all states. So, the establishment of a customary crime of persecution based on sexual orientation would stand on its own, irrespective of the cramped, anachronistic jurisdiction of the ICC. And of equal importance, this means that the law against persecution based on sexual orientation applies the world over, irrespective of limited membership in the ICC. Finally, crimes against humanity are subject to “universal jurisdiction,” which means any state in the world can prosecute the perpetrators or hold them civilly liable.⁷ In short, national courts may act as decentralized enforcers of an international law that covers the globe.

In turn, this Article uses the development of LGBTQ+ rights in the field of customary international law to demonstrate that the definition of persecution has enlarged since the drafting of the Rome Statute to encompass sexual orientation as a protected classification. It draws from not only ICL but also the field of international human rights law (IHRL) to show that international law has grown at a relatively fast pace for a field that tends to be reactionary and incremental. Marshaling IHRL is a natural move, since this body of law grew in large part out of ICL.⁸ It is time for IHRL to return the favor in this longstanding symbiotic relationship to advance the rights of a class of human beings too long discriminated against and persecuted.

516 (2018); Moore, *supra* note 3, at 1289; Judge Sang-Hyun Sung, President of the Int’l Crim. Ct., From Punishment to Prevention: Reflections on the Future of Int’l Crim. Just., Address for the Wallace Wurth Memorial Lecture, U.N.S.W., Sydney, Austrl., 4–20 (2012) (commenting on the impact of codifying customary international law as it existed at the time of the codification of the Rome Statute).

⁵ RESTATEMENT (FOURTH) OF FOREIGN RELATIONS § 401 cmt. a (Am. L. Inst. 2018) (“[C]ustomary international law . . . results from a general and consistent practice of states followed out of a sense of international legal right or obligation.”).

⁶ See Int’l Law Comm’n, Rep. on the Work of Its Seventieth Session, U.N. Doc. A/73/10, at 119–122, ¶ 65 (2018) [hereinafter Int’l Law Comm’n Rep. Seventieth Session].

⁷ See *infra* Conclusion.

⁸ See, e.g., Scheinert, *supra* note 3, at 103–06; Alycia T. Feindel, Symposium, *Reconciling Sexual Orientation: Creating A Definition of Genocide That Includes Sexual Orientation*, 13 MICH. ST. J. INT’L L 197, 204 (2005).

The Article proceeds as follows. It reviews the grim history of the omission of the crime of persecution as to sexual orientation at Nuremberg and the studied omission of the crime in the Rome Statute. Next, it surveys developments in the field of customary international law leading to the inclusion of sexual orientation as a protected classification for purposes of persecution under modern international law. This Part of the article is largely empirical, surveying state practice, UN General Assembly Resolutions, Regional Resolutions and NGO instruments, all of which may contribute to the formation of customary international law.⁹

Indeed, diligent research has revealed that no less than 107 states have revised their laws to decriminalize sexual orientation and/or protect sexual orientation between 1998 and 2022 in addition to the sizable number of states that already had either never criminalized homosexuality, decriminalized homosexuality, or classified sexual orientation as a protected classification prior to the establishment of the ICC.¹⁰ The Article surveys and lays out these laws by year. In addition, UN bodies have passed a plethora of resolutions strongly providing that sexual orientation is a protected classification. Regional bodies have been active as well. And NGOs support these conclusions as a subsidiary basis for international lawmaking.

⁹ See *infra* Part III

¹⁰ For example, 16 countries (which are not otherwise included in the main text of this article) have never criminalized homosexual activity: (1) Vietnam, (2) Benin, (3) North Korea, (4) Laos, (5) Indonesia, (6) Cambodia, (7) Rwanda, (8) Niger, (9) Mali, (10) Madagascar, (11) Equatorial Guinea, (12) Djibouti, (13) Côte d'Ivoire, (14) Central Africa Republic, (15) Democratic Republic of the Congo, (16) Burkina Faso. See *State-Sponsored Homophobia: Global Legislation Overview Update*, INT'L LESBIAN, GAY, BISEXUAL, TRANS & INTERSEX ASS'N WORLD, 325–28 (2020), https://ilga.org/wp-content/uploads/2023/11/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2020.pdf [hereinafter ILGA]. An additional 75 jurisdictions had decriminalized homosexual activity prior to 1998: (1) New Zealand, (2) Australia, (3) United Kingdom, (4) Ukraine, (5) Turkey, (6) Switzerland, (7) Sweden, (8) Spain, (9) Slovenia, (10) Slovakia, (11) Serbia, (12) Russia, (13) Romania, (14) Portugal, (15) Poland, (16) Norway, (17) North Macedonia, (18) Netherlands, (19) Montenegro, (20) Monaco, (21) Moldova, (22) Malta, (23) Luxembourg, (24) Lithuania, (25) Liechtenstein, (26) Latvia, (27) Italy, (28) Ireland, (29) Iceland, (30) Hungary, (31) Greece, (32) Germany, (33) France, (34) Finland, (35) Estonia, (36) Denmark, (37) Czech Republic, (38) Croatia, (39) Bulgaria, (40) Belgium, (41) Belarus, (42) Austria, (43) Andorra, (44) Albania, (45) Thailand, (46) Philippines, (47) Palestine, (48) Mongolia, (49) Jordan, (50) Japan, (51) East Timor, (52) Hong Kong, (53) China, (54) Bahrain, (55) Venezuela, (56) Uruguay, (57) Suriname, (58) Peru, (59) Paraguay, (60) Mexico, (61) Haiti, (62) Honduras, (63) Guatemala, (64) El Salvador, (65) Ecuador, (66) Dominican Republic, (67) Cuba, (68) Costa Rica, (69) Colombia, (70) Brazil, (71) Bolivia, (72) Bahamas, (73) Argentina, (74) Guinea-Bissau, (75) China. *Id.* at 325–29. Of the 75 jurisdictions that decriminalized homosexuality prior to 1998, 12 have not otherwise formally offered protections to individuals on the basis of sexual orientation, and thus have not been included in the main text: (1) Turkey, (2) Russia, (3) Palestine, (4) Jordan, (5) Japan, (6) China, (7) Bahrain, (8) Paraguay, (9) Guatemala, (10) Bahamas, (11) Guinea-Bissau, (12) Belarus. *Id.* In addition, the Netherlands—while having enacted formal protections to homosexuals beyond decriminalization—has not been included in the main text because its protections were enacted before 1998. See *id.* at 210, 232, 259.

Some sources go straight to the matter of decriminalizing the criminalization of individuals based on their sexual orientation and criminalizing various forms of persecution. However, the laws, judicial opinions, and practices are wide-ranging and prohibit discrimination in virtually all areas of life. In relation to those prohibitions, this Article uses a syllogism which holds that the lesser prohibition includes the greater prohibition. For example, a prohibition on discrimination in employment practices or self-expression (the lesser prohibition) necessarily includes a prohibition on persecution (the greater prohibition). Finally, the Article concludes that LGBTQ+ individuals are a protected class for purposes of the crime of persecution under extant international law, and all states have a right, if not an obligation, to punish the perpetrators of such crimes under the doctrine of universal jurisdiction through either criminal or civil suit.

The hope is that states, lawyers and activists look beyond the otiose Rome Statute definition to modern international law as it exists today. The present work provides both the legal argumentation and the raw data to do so.

I. NUREMBERG

Although it is likely well known to most readers that the Nazi party persecuted homosexuals, the extent of that persecution may not be. Most were worked to death in concentration camps.¹¹ To be sure, “[t]he Nazis considered homosexuals to be at the bottom of the prisoner hierarchy, and the homosexuals were often singled out for special tortures and dangerous work.”¹² Indeed, because of their sexual orientation, one survivor explained: “We who wore the pink triangle were prioritized for medical experiments, and these generally ended in death.”¹³

The story of persecution against sexual orientation during the Nazi reign is instructive for two reasons. First, despite the severity of the persecution, the Nuremberg Tribunal did not prosecute the Nazis for crimes against humanity based on sexual orientation. In fact, the Allies left the principal Nazi anti-homosexuality law in full force and effect; thus, all those imprisoned by the Nazis for their sexual orientation remained in jail or were listed as sex-offenders, sexual deviants, and perverts long after the War

¹¹ Feindel, *supra* note 8, at 204; ERIC HEINZE, SEXUAL ORIENTATION: A HUMAN RIGHT 4–20 (1993).

¹² Feindel, *supra* note 8, at 204 (internal citation and quotation marks omitted).

¹³ HEINZ HEGER, THE MEN WITH THE PINK TRIANGLE: THE TRUE, LIFE-AND-DEATH STORY OF HOMOSEXUALS IN THE NAZI DEATH CAMPS, 66–67 (1994).

ended and the Nuremberg sentences were handed down.¹⁴ Second, of the four major signatories to the Nuremberg Charter—the United States,¹⁵ the United Kingdom,¹⁶ France,¹⁷ and the U.S.S.R.¹⁸—only one had decriminalised homosexuality before WWII: France, with the enactment of the French Penal Code of 1791 and the Napoleonic Code.¹⁹ In other words, it is worth a brief history laying out the persecution of homosexuals by the Nazi regime to demonstrate that it was comparable to persecution against other groups protected by the London Charter and the Nuremberg judgment. On this last point, it is not a stretch to say that a similar phenomenon happened with the Rome Statute: Because states parties had anti-homosexuality laws on the books, they rejected inclusion of persecution on that basis in negotiating the international instrument. The question is whether international law has evolved enough to override those objections today.

The basis for the Nazis' persecution scheme was an expansion of anti-sodomy, or anti-homosexual, laws first established in the 1800s in pre-Nazi Germany.²⁰ Specifically, the Third Reich's Criminal Code Paragraph 175,²¹ namely:

- (1) A man over the age of eighteen who performs sexual acts on a man under the age of eighteen or has them carried out by a man under the age of eighteen shall be punished with imprisonment for up to five years or a fine.
- (2) The court may waive punishment under this provision if:
 1. the perpetrator was not yet twenty-one years old at the time of the crime, or
 2. taking into account the behavior of the person against whom the act is directed, the injustice of the act is small.²²

¹⁴ *Id.*; *Gay People*, HOLOCAUST MEM'L DAY TRUST, <https://www.hmd.org.uk/learn-about-the-holocaust-and-genocides/nazi-persecution/gay-people/>.

¹⁵ Nuremberg Charter, *supra* note 1, at 280 ("Now therefore the Government[s] of the United Kingdom and Northern Ireland, . . . United States, the [Provisional] Government of the French Republic, and the Union of Soviet Socialist Republics (hereinafter 'Signatories')").

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See HEINZE, *supra* note 11, at 86, n. 32.

²⁰ It is generally recognized that the Nazi Party took control of Germany fully around 1925–1929, with the more militant factions of the Party expanding their grip in the mid-1930s, leading to the commencement of WWII on September 1, 1939.

²¹ Strafgesetzbuch für das Deutsche Reich vom 15. Mai 1871 [StGB] [Criminal Code for the German Reich of the 15th of May 1871], as amended 1935, § 175, <https://lexetius.com/StGB/175,2> (unofficial translation).

²² *Id.*

The Criminal Code for the Reich was then amended, expanding Paragraph 175 in 1935 as such:

a male who commits lewd and lascivious acts with another male or permits himself to be so abused for lewd and lascivious acts, shall be punished by imprisonment. In a case of a participant under 21 years of age at the time of the commission of the act, the court may, in especially slight cases, refrain from punishment.²³

The Reich's motivation for the expanded law—outside of Hitler's own desires to rid Germany of those who threatened the Aryan ideals he pursued²⁴—was one of political necessity: Ernst Röhm, Hitler's leader of the infamous "Brown Shirt Division," who was purged from the Party during a power struggle, was a homosexual.²⁵ The 1935 amendments were enacted on the one-year anniversary of his execution.²⁶

Although the pre-1935 Paragraph 175 included a statutory cap on the maximum sentence imposed, the 1935 amended Paragraph 175 did not. This was an intentional move by the Third Reich to allow the Party to more permanently remove "undesirables" from society. As Geoffrey Giles notes: "[Paragraph 175 (1935)] permitted convictions for simple masturbation and indeed even the slightest of homosexual advances."²⁷ Thus, individuals arrested and prosecuted by the Third Reich's criminal courts were often imprisoned for life—particularly due to the fact that these laws were not repealed after the conclusion of WWII²⁸—if they were not sentenced to death by a Reich Criminal Tribunal.²⁹

The Reich's disdain for due process and the fundamentals of justice was further apparent in its efforts to keep the law secret, preventing widespread public knowledge of the 1935 amendments, both because it allowed the law to be wielded in an arbitrary manner and "the Ministry of Justice felt that a

²³ *Id.*

²⁴ The irony of this must be noted: Hitler himself was not even remotely representative of the "Aryan" master-race he hoped to create; instead, he was a short, brown-haired, blue-eyed man with numerous health defects, including neurosyphilis. See, e.g., *Nazi Persecution: 1933–1945*, HOLOCAUST MEM'L DAY TRUST, <https://www.hmd.org.uk/learn-about-the-holocaust-and-genocides/nazi-persecution/>; *Gay People*, *supra* note 14.

²⁵ See Geoffrey J. Giles, *Why Bother About Homosexuals?: Homophobia and Sexual Politics in Nazi Germany*, U.S. HOLOCAUST MEM'L MUSEUM, 6, 8, 12 (2001), <https://www.ushmm.org/m/pdfs/20050726-giles.pdf>.

²⁶ *Id.*

²⁷ Giles, *supra* note 25, at 8 (citing *Die Strafrechtsnovellen v. 28. Juni 1935: Gesetz zur Änderung des Strafgesetzbuches (RGBl. I S.389); Gesetz zur Änderung von Vorschriften des Strafverfahrens und des Gerichtsverfassungsgesetzes (RGBl. I S.844)*, und die amtlichen Begründungen zu diesen Gesetzen, Amtliche Sonderveröffentlichungen der Deutschen Justiz, Nr. 10 (Berlin: R. v. Decker, 1935), p. 9.).

²⁸ See generally Giles, *supra* note 25 at 8, 12–19.

²⁹ *Id.*

clear explanation in the press of the kinds of sexual acts now covered by the law would have the deplorable effect of encouraging young men to experiment.”³⁰ Homosexuals imprisoned by the Reich were routinely beaten, tortured, and harassed by camp guards and other prisoners.³¹

As noted, the majority of the Allies also had anti-homosexuality laws in place.³² Even more troubling is the fact that the Allies left Paragraph 175 in full force and effect—thus, all those imprisoned by the Nazis for their sexual orientation remained imprisoned long after the War was over, and the Nuremberg sentences were handed down.³³

Nuremberg is often held high as a shining example of international justice and even the wellspring of international human rights.³⁴ According to most accounts, its reach has been grand: forming and advancing both international ICL and IHRL into global fields for the pursuit of international justice. Yet, it is important to recognize a legacy that is not so grand: its treatment of homosexual. Unfortunately, that legacy also stretched forward into the Rome Statute for the ICC.

II. THE ROME STATUTE

The Rome Statute for the ICC is a treaty-based international legal instrument. The drafting history makes pellucidly clear that the purpose of the statute was to codify existing international law at the time of the drafting of the statute, not to preclude future developments. According to the Preparatory Commission, it was not the ICC statute’s “function to define new crimes . . . [or] to authoritatively codify crimes under general international law.”³⁵ As such, the International Law Commission limited the statute “to those crimes under general international law which the Commission believes should be within the jurisdiction of the Court *at this stage*, whether by reason of their magnitude, continuing reality of their occurrence or their inevitable international consequence.”³⁶

Importantly, the Delegations of the Preparatory Commission believed that a “procedural instrument enumerating rather than defining the crimes would not meet the requirements of the principle of legality . . . and that the

³⁰ *Id.* at 8.

³¹ *See supra* notes 25-30.

³² *Id.*

³³ *Id.*; *see also Gay People*, *supra* note 14.

³⁴ Leila Nadya Sadat, *The Nuremberg Trial, Seventy Years Later*, 15 WASH. U. GLOB. STUD. L. REV. 575, 580, 583-84 (2016); Scheinert, *supra* note 3, at 105-110.

³⁵ Int’l Law Comm., Rep. on the Work of its Forty-Sixth Session, U.N. Doc A/49/10, at 38, art. 20, comment. 4 (1994) [hereinafter Int’l Law Comm’n Rep. Forty-Sixth Session].

³⁶ *Id.*, at art. 21, comment. 17 (emphasis added).

constituent elements of each crime should be specified to avoid any ambiguity and to ensure full respect for the rights of the accused.”³⁷ In order for the criminal law to work fairly, it must be sufficiently clear that actors know the law in advance so they can plan their conduct. This principle, generally referred to as legality, is a pillar of any sophisticated legal system.³⁸

Article 7 provides in pertinent part:

1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

...

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

...

3. For the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.³⁹

As far as one longstanding plain-meaning exegesis goes, the statute does not explicitly say “sexual orientation.” And, *expressio unius est exclusio alterius*, had the drafters wanted to include sexual orientation, they certainly could have.⁴⁰ Indeed, one runs into Article 7(3)’s definition of

³⁷ Int’l Law Comm’n Rep. Forty-Sixth Session, *supra* note 35, at 54, art. 38, ¶ 2.

³⁸ Anthony J. Colangelo, *Spatial Legality*, 107 Nw. U. L. Rev. 69, 71 (2015) (“Indeed, the principle plunges to the root legitimacy of law: if people cannot predict how law will treat their behavior, law in turn loses legitimacy and effectiveness as a tool for shaping behavior.”) (citing KENNETH S. GALLANT, *THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE LAW* 20 (2009)).

³⁹ Rome Statute, *supra* note 2, at art. 7.

⁴⁰ *See* *Gibbons v. Ogden*, 22 U.S. 1, 195 (1824) (“The enumeration presupposes something not enumerated.”). *But c.f.* *Bostock v. Clayton County*, 590 U.S. 644 (2020) (holding that a strict and exclusive textualist interpretation of “sex” includes homosexuals as a protected class for purposes of employment discrimination). Textualism does not end the interpretative process for the ICC statute, however. The Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, (entered into force Jan. 27, 1980), which has entered into customary international law, *see Vienna Convention on the Law of Treaties*, U.S. DEP’T OF STATE, <https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm>, does not limit its interpretive instructions solely to textualism but takes into account context and the object and purpose of the words, *id.* at art. 31(1), which are restrictive given the ICC’s criminal law nature, *see supra* notes 35-37; Valerie Oosterveld, *The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 HARV. HUM. RIGHTS J. 55, 64 (2005), as well as “[a] special meaning . . . if it is established that the parties so intended.” *Id.* at art. 31(4). There is simply too much in the way of the unique structure of the article and drafting battle regarding the definitions of sex and gender—and the fact that the parties absolutely knew of the term

“gender,” the only potentially available receptacle of sexual orientation. According to William Schabas, Article 7(3) “was added at the Rome Conference so as to respond to concerns that the word ‘gender’ might appear to endorse homosexuality.”⁴¹ Other scholars agree.⁴²

Yet, an in-depth look at the drafting history suggests Article 7(3)’s language is somewhat more ambiguous. This combination of a clear lack of inclusion of sexual orientation and a highly ambiguous drafting history makes for a relatively weak argument that sexual orientation is a protected classification within the statute as compared to other, more straightforward arguments. International law has simply and empirically outgrown the 1998 drafting to now embrace sexual orientation as a protected classification today.

As to the drafting history, debates about the meaning of “gender” initially centered around another Article in the statute, Article 21, which includes a broad “non-discrimination paragraph . . . governing applicable law.”⁴³ Article 21(3) contains a no adverse distinction clause providing that:

The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.⁴⁴

This clause—and in particular the term “gender”—was the subject of rigorous debate during the final week of the Rome Conference. While Article 21(3) was approved by a consensus of the Preparatory Committee, some states objected to the inclusion of the term “gender.” These delegations “argued that the term ‘gender’ could imply rights *more expansive than those currently recognized in many states*, with the main concern being that the

“sexual orientation” and rejected it—*see infra*. notes 47-48, 53-54, 59, 63—to forego analysis into what the parties meant by those terms.

⁴¹ WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 209 (2d. ed. 2016).

⁴² *See e.g.*, Rana Lehr-Lehnardt, *One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court*, 16 *BYU J. PUB. L.* 317, 340 (2002) (“Due to the restraining definition of gender in Article 7(3), gender means male and female, not homosexual”); Brenda Cossman *et al.*, *Gender, Sexuality, and Power: Is Feminist Theory Enough?*, 12 *COLUM J. GENDER & L.* 587, 598 (2003) (“Debates in Rome resulted in the [the Rome Statute] adopting a limiting definition to ensure that persecution on the basis of sexual orientation would not be covered”).

⁴³ Cate Steains, *Gender Issues*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE—ISSUES, NEGOTIATIONS, RESULTS* 357, 371 (Roy S. Lee ed., 1999).

⁴⁴ Rome Statute, *supra* note 2, at art. 21.

term might sanction rights based on sexual orientation.”⁴⁵ Thus, one delegation expressed concern with the use of the term gender as follows:

[H]is delegation was concerned about the use of the word “gender” in paragraph 1 (h) under “Crimes against humanity”. Did that provision imply that a conviction by a national court for homosexual acts might be regarded as persecution and thus fall within the jurisdiction of the Court as a crime against humanity? He asked for clarification in that regard.⁴⁶

Out of these concerns, some states proposed chopping off the adverse distinction clause altogether and limiting the paragraph to the requirement that “application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights.”⁴⁷ Others felt that the clause should remain but that any reference to “gender” be omitted out of concerns that it “could be read to expand to include sexual orientation as a protected group.”⁴⁸ Thus, the definition of the term “gender” needed to be hashed out with sufficient detail to assuage the concerns of those who feared that it would expand to homosexuality.

The Chair of the Working group on Applicable Law initially proposed that the Rome Statute adopt the definition of “gender” contained in the Beijing Declaration of the Fourth World Conference on Women in 1995.⁴⁹ The 1995 World Conference “eschewed the word ‘sex’ and instead referred to ‘gender.’”⁵⁰ The President of the Fourth World Conference issued a statement that: “(1) the word ‘gender’ has been commonly used and understood in its ordinary, generally accepted usage in other UN forums and conferences; (2) there was no indication that any new meaning or connotation of the term, different from accepted prior usage, was intended”⁵¹ At the Rome Conference, supporters of retaining “gender” argued that the “final sentence [of the definition] should at least reflect the Beijing approach and read: ‘The term does not imply any new meaning or connotation of the term different from accepted prior usage.’”⁵² However,

⁴⁵ Oosterveld, *supra* note 44, at 63; *see also* George E. Edwards, *International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy*, 26 YALE J. INT’L L. 323, 347 (2001).

⁴⁶ U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, at 9, ¶ 61, U.N. Doc. A/CONF.183/C.1/SR.25 (July 8, 1998).

⁴⁷ Steains, *supra* note 47, at 372.

⁴⁸ Moore, *supra* note 3, at 1300.

⁴⁹ Oosterveld, *supra* note 40, at 63.

⁵⁰ *Id.*

⁵¹ The Fourth World Conference on Women, *Report of the Fourth World Conference on Women, Addendum*, U.N. Doc. A/CONF.177/20/Add.1, annex IV, (October 27, 1995).

⁵² Oosterveld, *supra* note 40, at 64–65.

the Beijing approach was ultimately rejected as essentially a non-definition, too vague to meet the requirement of certainty in criminal law.⁵³ As a result, “the negotiations . . . shifted from deleting reference to gender to defining the term narrowly.”⁵⁴

The debate then moved to Article 7(3), because that is where “gender” first appeared in the statute and thus where it was decided that it should be defined.⁵⁵ More particularly, it was decided whether “gender” should be limited to biological sex or also include some reference to sociological gender roles. States initially opposed to including “gender” argued that the definition should be limited to the two sexes.⁵⁶ These delegations proposed “a definition that referred to ‘men, woman, and children’ or ‘the two sexes, male and female.’”⁵⁷ Other delegations wished to retain reference to “gender” but advocated for a definition that recognized “gender” as a social construct. They highlighted that the UN had previously indicated that “gender” is broader than sex and argued that “inclusion of the term ‘gender’ in the Statute must represent an accurate reflection of the current state of international law, and therefore needed to capture sociological aspects rather than mere biological differences.”⁵⁸

Despite this disagreement, it was ultimately accepted that the definition should include some reference to a sociological dimension of gender. However, “some delegations remained concerned . . . that the reference should exclude sexual orientation.”⁵⁹ Informally proposed definitions that sought to address these concerns were rejected.⁶⁰ In the end, “in the context

⁵³ *Id.* at 64.

⁵⁴ Steains, *supra* note 43, at 373.

⁵⁵ U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Committee of the Whole: Summary Record of the 38th Meeting*, U.N. Doc. A/CONF.183/C.1/SR.38, ¶ 4 (November 20, 1998) (“Mr. Saland (Sweden), Chairman of the Working Group on Applicable Law, introducing the Group’s second report of the Working Group [sic], said that after intensive consultations on article 20, paragraph 3, it had been decided to *propose the inclusion of a definition of the word ‘gender’ in the article in which it appeared for the first time*, namely the proposed article 5 ter on crimes against humanity. The proposed definition would become paragraph 3 of article 5 ter, and, whenever the word ‘gender’ appeared subsequently in the Statute, it would be accompanied by a footnote referring to the definition in article 5 ter”) (emphasis added); *see also* U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Working Group on Applicable Law: Addendum*, U.N. Doc. A/CONF.183/C.1/WGAL/L.2/Add.1, at n. 2 (July 14, 1998).

⁵⁶ Oosterveld, *supra* note 40, at 64.

⁵⁷ *Id.*

⁵⁸ Steains, *supra* note 43, at 373.

⁵⁹ *Id.* at 374.

⁶⁰ For example, the following were rejected: “male and females, and their roles in society” (2) “males and females, and their societal relationships” (3) “males and females in the context of society and the traditional family unit” (4) “males and females in the context of their society.” *Id.* at 374, n. 52.

of society” was agreed to by parties on both sides, as each thought this language provided “sufficient flexibility as well as precision.”⁶¹ Still, those who favored a limited reading of “gender” wanted further clarification that it did not include sexual orientation. Hence, the inclusion of the language that “the term gender does not indicate any meaning different from above.”⁶² The final sentence was acceptable to both camps because each thought it emphasized what they viewed to be the pertinent aspect of the definition: “it gave comfort to those opposed to ‘gender’ because they saw it as reaffirming ‘the two sexes, male and female,’ while those supportive felt that it was harmless because it reaffirmed the valuable sociological reference to ‘context of society.’”⁶³

In sum, the final definition of “gender” reflects the compromises made by both sides: “The reference to the ‘two sexes, male and female’ was a concession [to the conservatives] . . . while the reference to gender ‘within the context of society’ was a concession to women’s groups, who wanted to include as fluid a concept, and as many iterations, of the term gender as possible.”⁶⁴

In light of all this studied ambiguity, advocates for the inclusion of sexual orientation as a protected classification face somewhat of an uphill battle, or at least a relatively more difficult one as compared to the straightforward empirical argument that sexual orientation is a protected classification under international law today. The text of the statute simply does not say “sexual orientation.” If it had, a block of states would have immediately rejected it. Thus, advocates for the inclusion of sexual orientation must rely on a bizarre linguistic compromise; they must rely on the definition of a word—“gender”—to mean sexual orientation, when that word does not explicitly do so, and buttress it with “within the context of society”—an ambiguous and vague phrase that may well suggest multiple meanings. Given that sexual orientation was anathema to an entire block of states, “gender” is a thin reed to bear such weight. As Michael Bohlander states:

“It appears highly doubtful against this background that the judges should have been empowered to substitute their own policy choice for the intentional

⁶¹ *Id.* at 374.

⁶² Oosterveld, *supra* note 40, at 65.

⁶³ *Id.*

⁶⁴ Brian Kritz, *The Global Transgender Population and the International Criminal Court*, 17 YALE HUM. RTS. & DEV. L. J. 1, 36 (2014).

omission of choice by the States Parties merely because a progressive attitude to the development of law is deemed appropriate.”⁶⁵

Finally, the curious phrase “or other grounds that are universally recognized as impermissible under international law,”⁶⁶ falls prey to the same textual exegesis that the listing of the protected classes does. The drafters set out to include only extant crimes under international law at the time of the statute’s writing. If international law saw sexual orientation as a universally protected classification, surely it would have been explicit in its view. And, as the drafting history of the term “gender” plainly demonstrates, sexual orientation as a protected classification was emphatically not “universally recognized.”⁶⁷

III. PERSECUTION BASED ON SEXUAL ORIENTATION AS A CRIME AGAINST HUMANITY

As noted, customary international law is an empirical phenomenon formed by the practice of states accompanied by *opinio juris*.⁶⁸ But where do we look for such practice? A preeminent and powerful source is the laws and judicial opinions of states⁶⁹—precisely where this Article looks. Indeed, the recent International Law Commission Report (the “ILC Report”) on identifying customary international law specifically explains, “State practice consists of conduct of the State, whether in the exercise of its legislative, judicial or other functions.”⁷⁰ The empirical work below surveys this source material in great and comprehensive detail. While “there is no precise formula to indicate how widespread a practice must be” to be law forming,⁷¹ “[w]hat is certain is that general [lawmaking] practice does not require the unanimous practice of all states or other international subjects.”⁷² Finally, it is also important to recognize that “human rights are different” when it comes to international law formation: “not only are they generally rooted

⁶⁵ Michael Bohlander, *Criminalising LGBT Persons Under National Criminal Law and Article 7(1)(h) and (3) of the ICC Statute*, 5 GLOB. POL’Y 401, 410 (2014).

⁶⁶ Rome Statute, *supra* note 2, at art. 7(1)(h).

⁶⁷ Moore, *supra* note 3, at 1305-06 (“This language is the only reference to a ‘universally recognized’ set of rights or groups in the entire treaty, whereas other parts of the Rome Statute acknowledge that there are ‘internationally recognized human rights’ and ‘internationally recognized norms and standards.’ This provision could have stated that these groups must be ‘internationally recognized’ rather than ‘universally recognized,’ and the language utilized suggests that there is a higher threshold for proving that a group is ‘universally recognized.’”).

⁶⁸ *See supra* note 5.

⁶⁹ Int’l Law Comm’n Rep. Seventieth Session, *supra* note 6, at 120, conclusion 5, conclusion 6(2).

⁷⁰ *Id.*

⁷¹ PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 76 (Oxford 2013).

⁷² *Id.*

within states rather than in interstate engagements, but they need not on their surface involve any international consequences whatsoever.”⁷³

Even so, the “practice of international organizations also contributes to the formation, or expression, of rules of international law.”⁷⁴ To be sure, “[a] resolution adopted by an international organization or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary law, or contribute to its development.”⁷⁵ The Report elaborates:

the word “resolution” refers to resolutions, decisions and other acts adopted by international organizations or at intergovernmental conferences, whatever their designation and whether or not they are legally binding. Special attention should be paid in the present context to resolutions of the General Assembly, a plenary organ of the United Nations with virtually universal participation, that may offer important evidence of the collective opinion of its Members.⁷⁶

Similarly, the study below canvasses UN resolutions and other instruments providing for the protection of LGBTQ+ rights.⁷⁷ Finally, even reports of NGOs have a subsidiary law-making function,⁷⁸ as shown below.

What follows surveys in great detail all these sources of customary international law. Some of the raw materials go straight to the matter of decriminalizing the criminalization of individuals based on their sexual orientation and criminalizing various forms of persecution. However, the instruments and practices are wide-ranging and prohibit discrimination in virtually all areas of life. In relation to those prohibitions, I use a syllogism which holds that the lesser prohibition includes the greater prohibition. For example, a prohibition on discrimination in employment practices or self-expression (the lesser prohibition) necessarily includes a prohibition on persecution (the greater prohibition).

Lastly, a brief note on methodology: the reader will notice multiple entries for different states. This is because those states have enacted multiple laws relevant to the question of persecution of sexual orientation as a crime against humanity. For example, one law may decriminalize homosexual acts, while another may classify sexual orientation as a protected classification, and another still may criminalize persecution against individuals based on their sexual orientation.

⁷³ *Id.* at 75, 58-59.

⁷⁴ Int’l Law Comm’n Rep. Seventieth Session, *supra* note 6, at 119, conclusion 4(2).

⁷⁵ *Id.* at 121, conclusion 12(2).

⁷⁶ *Id.* at 147, ¶ 66, conclusion 12, comment. 2.

⁷⁷ *See infra* Part III(a)(iii).

⁷⁸ *See infra* Part III(b).

A. State Practice

Almost immediately in the Rome Statute's wake, efforts to protect LGBTQ+ rights took hold and accelerated at windspeed for an otherwise often lumbering and reactive field of law. Of essential importance is the practice of states—the quintessential hard law upon which custom is built. This Part classifies state law into two main categories demonstrating that sexual orientation is a protected classification under international law: the decriminalization of laws criminalizing sexual orientation and prohibiting discrimination against individuals based on their sexual orientation. As the study shows, between 1998 and 2022, no less than 107 states have revised their laws in this manner.

But before getting there, I discuss a case litigated in U.S. courts involving persecution on grounds of sexual orientation. The objectives in doing so are twofold. First, the case *Sexual Minorities of Uganda v. Lively* illustrates the strong tilt toward classifying sexual orientation as a protected classification that has grown since the Rome Statute went into effect. Second, it highlights the paucity of sources the court relied upon, effectively drawing upon nothing more than the judge's say-so. Again, it is the aim of this Article to provide litigants, courts, and policymakers with a robust set of sources with which to marshal arguments that sexual orientation is a protected classification for purposes of the crime against humanity of persecution.

I. *Sexual Minorities of Uganda v. Lively*

State court decisions are formative of customary international law—not as binding decisions on other states' courts, but as evidence of state practice and *opinio juris*.⁷⁹ Thus, the 2013 U.S. case *Sexual Minorities of Uganda*⁸⁰ provides data as to how the United States views persecution of sexual minorities under international law.⁸¹ Lively was a minister who preached a

⁷⁹ See, e.g., Anthony J. Colangelo, *Procedural Jus Cogens*, 60 COLUM. J. TRANSNAT'L L. 377, 381 (2022) (citing Statute of the International Court of Justice art. 38, Oct. 24, 1945), 398, n. 108; Anthony D'Amato, *Trashing Customary International Law*, 81 AM. J. INT'L L. 101 (1987).

⁸⁰ *Sexual Minorities Uganda v. Lively (Lively I)*, 960 F. Supp. 2d 304, 309 (D. Mass. 2013). As noted in note 81, *infra.*, the *Lively* matter consists of several individual decisions. When the matter is discussed generally, all three cases will collectively be referred to as *Lively*.

⁸¹ Int'l Law Comm'n Rep. Seventieth Session, *supra* note 6, at 134, ¶ 66, conclusion 6, comment. 6 (“Decisions of national courts as all levels may count as State practice.”). Subsequent proceedings found that the claims could not overcome the so-called presumption against the extraterritorial application of U.S. law. See *Sexual Minorities Uganda v. Lively (Lively II)*, 254 F. Supp. 3d 262, 264 (D. Mass. 2017) (granting Lively's Motion for Summary Judgment), *aff'd in part, appeal dismissed in part*; 899 F. 3d 24, 36 (1st. Cir. 2018) (*Lively III*) (affirming the court's decision denying the Motion for Summary Judgment, but rejecting Lively's appeal on the basis that the appellate court lacked jurisdiction following the Summary Judgment, and on the basis that the court's language—which Lively disagreed with, given it labeled him an international criminal—was not in error). However, the holding from *Lively I*, and the

severe anti-homosexual message, made repeated trips to Uganda, acted in coordination with like-minded officials, proposed anti-gay legislation and fomented an overall pervasive and powerful anti-gay message in the country.⁸² As a result of this campaign, gay activist events were raided and a number of gay activists were harassed and abused at the hands of the police and private citizens and were forced to either leave Uganda or go into hiding.⁸³

Plaintiffs, an umbrella group calling itself Sexual Minorities of Uganda, brought claims under the Alien Tort Statute, which allows an alien plaintiff to sue for tort in violation of the law of nations,⁸⁴ or what we now refer to as international law.⁸⁵ The principal claim alleged that Lively aided and abetted the persecution of the LGBTQ+ community in Uganda and that this persecution amounted to a crime against humanity.⁸⁶ The court found the answer to whether this claim survived “straightforward and clear. Widespread, systematic persecution of LGBTQ+ people constitutes a crime against humanity that unquestionably violates international norms.”⁸⁷ By surveying international legal materials, the court observed that many of them have savings clauses—clauses indicating that the list of crimes was not exhaustive—or receptacles of other potential crimes, such as the Rome

court’s subsequent findings (reported as dicta)—*i.e.*, that the defendants committed the crime against humanity of persecution based on sexual orientation—remained in place.

⁸² *Lively I*, 960 F. Supp. 2d at 313–14; *see also Lively II*, 254 F. Supp. 3d at 265.

⁸³ *See Lively I*, 960 F. Supp. 2d. at 314, 319. Specifically, in addition to the raids—ordered by Simon Lokodo, the (then) Minister of Ethics and Integrity—several newspapers had published photos, names, and other identifying information for several LGBTI individuals and activists, including their allies, with headlines including “Hang Them.” *Lively I*, 960 F. Supp. 2d. at 314 (internal citations omitted).

⁸⁴ *Id.* at 310 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)).

⁸⁵ *Id.* at 315 (citing *Sosa*, 542 U.S. at 724); *see also United States v. Yousef*, 327 F.3d 56, 103–04 n.38 (2d Cir.), *cert. denied sub nom.*; *Ismoli v. United States*, 540 U.S. 993 (2003) (addressing the history of the use and custom of the phrases “law of nations” and “international law.” Specifically, the phrases are “often used interchangeably,” despite not being “entirely synonymous”) (quoting RESTATEMENT (THIRD) ON THE FOREIGN RELATIONS LAWS OF THE U.S. § 41 (Am. L. Inst. 1986) (“the law of nations later [was] referred to as international law”).

⁸⁶ *Lively I*, 960 F. Supp. 2d. at 315–19. In its discussion on the aiding and abetting issue, the court noted that (A) “[a]iding and abetting in the commission of a crime against humanity is one of the limited group of international violations for which the [Alien Tort Statute] furnishes jurisdiction,” *Lively I*, 960 F. Supp. 2d. at 316, and (B) that “[a]iding and abetting has subsequently recognized as an established basis for liability in international law instruments including the Rome Statute and the statutes creating the ICTY,” *Lively I*, 960 F. Supp. 2d. at 319 (citing *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 270–75 (2d Cir. 2007) (Katzmann, J. concurring)).

⁸⁷ *Lively I*, 960 F. Supp. 2d. at 316. Additionally, the court further found that “[t]he history and current existence of discrimination against LGBTI people is precisely what qualifies them as a distinct targeted group eligible for protection under international law.” *Lively I*, 960 F. Supp. 2d. at 318 (emphasis added). “The fact that a group continues to be vulnerable to widespread, systematic persecution in some parts of the world simply cannot shield one who commits a crime against humanity from liability.” *Lively I*, 960 F. Supp. 2d. at 318.

Statute’s “other grounds that are universally recognized as impermissible under international law” of the type found inadequate above,⁸⁸ and that:

Customary international law does not in general limit the type of group that may be targeted for persecution. As the International Criminal Tribunal for the Former Yugoslavia (ICTY) has observed, ‘There are no definitive grounds in customary international law on which persecution must be based and a variety of different grounds have been listed in international instruments.’⁸⁹

The court could have been far more specific by citing the plethora of state laws and instruments provided for in the present work. Again, the primary purpose of this Article is to arm courts adjudicating just these types of claims with the types of materials used to prove the existence of customary international law.

After the court’s initial decision came down, the U.S. Supreme Court decided *Kiobel v. Royal Dutch Petroleum*, which applied a canon of construction called the presumption against extraterritoriality to the Alien Tort Statute.⁹⁰ The court in *Lively II* found that, in light of *Kiobel*, because the Alien Tort Statute did not affirmatively indicate extraterritorial application, and the principal activity occurred outside the U.S. territory, the statute did not grant jurisdiction to entertain plaintiffs’ claims.⁹¹ Importantly, however, the court’s holding that the international crime of persecution applied to sexual orientation remained intact and stands as a position of the United States.⁹² To be sure, the court went out of its way to emphasize:

Anyone reading this memorandum should make no mistake. The question before the court is not whether Defendant’s actions in aiding and abetting efforts to demonize, intimidate, and injure LGBTI people in Uganda constitute violations of international law. *They do*. The much narrower and more technical question posed by Defendant’s motion is whether the limited actions taken by Defendant on American soil in pursuit of his odious campaign are sufficient to give this court jurisdiction over Plaintiff’s claims. Since they are not sufficient, summary judgment is appropriate for this, *and only this*, reason.⁹³

⁸⁸ *Id.* at 318.

⁸⁹ *Id.* (quoting *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Judgment, ¶ 710 (Int’l Crim. Trib. for the Former Yugoslavia) May 7, 1997).

⁹⁰ See *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 124 (2013) (“We therefore conclude that the presumption against extraterritoriality applies to claims under [the Alien Tort Statute, 28 U.S.C. § 1350 (2006)], and nothing in that statute rebuts that presumption.”).

⁹¹ *Lively II*, 254 F. Supp. 3d at 270–72.

⁹² *Id.*

⁹³ *Id.* at 264 (emphasis added). As discussed, *supra* notes 90–91, the United States Court of Appeals for the First Circuit affirmed the court’s decision in *Lively II*, on the basis that *Kiobel* firmly applied the presumption against extraterritoriality to claims involving the Alien Tort Statute, thereby removing the court’s jurisdiction over the issues in the case. See *Lively III*, 899 F.3d at 45–46. The appellate court *did*

In short, *Lively* illustrates both an unequivocal position that persecution based on sexual orientation is a crime against humanity and a veritable dearth of sources supporting that position—a problem the next Section fixes.

2. *Changes in State Law*

What follows is a comprehensive account of domestic laws that have changed to either decriminalize the criminalization of sexual orientation or prohibit discrimination based on sexual orientation by year. The data shows nothing less than a tectonic shift in how the international community views sexual orientation and a powerful argument that persecution based on sexual orientation now constitutes a crime against humanity.⁹⁴

1998

Cyprus (decriminalization): Prior to 1998, under the Criminal Code of Cyprus, it was a felony for a person to “ha[ve] carnal knowledge of any person against the order of nature; or (b) [to permit] a male person to have carnal knowledge of him against the order of nature” However, in 1993, *Modinos v. Cyprus*, the European Court of Human Rights found “that the existence of the prohibition [against homosexual acts] continuously and directly affects the applicant’s private life.”⁹⁵ The Court further found that Cyprus did not have an adequate justification for the law. Accordingly, the Court held that the Cyprus Law violated Article 8 of the European Convention on Human Rights.⁹⁶ In response to the Court’s ruling in the *Modinos* case, Cyprus passed legislation legalizing homosexual conduct in 1998.⁹⁷

Ecuador (protected classification): Article 11(2) of the Constitution states:

not, however, reverse the district court’s findings—from either *Lively I* or *Lively II*—that *Lively* had committed crimes against humanity. See *Lively III*, 899 F.3d at 45–46. It should further be noted that *no* subsequent appellate history—*i.e.*, a petition for writ of cert. to the Supreme Court of the United States—can be identified, based on a Lexis+ *Shepard’s* Report conducted May 8, 2022.

⁹⁴ Throughout this section, every effort has been made to cite directly to primary sources (e.g., the legislative bodies or courts) of each state. However, due to various reasons—including inability to locate primary documents, which have not been digitised; and inability to fully or properly translate the various languages involved—we have chosen, as many other scholars on the issues included in this Article, to use reliable, well-known, established secondary sources who have translated or summarised the changes discussed in this section (e.g., the U.N. and its various bodies).

⁹⁵ *Modinos v. Cyprus*, App. No. 15070/89, ¶ 24 (April 22, 1993), <https://hudoc.echr.coe.int/?i=001-57834>.

⁹⁶ *Id.* ¶ 26.

⁹⁷ NAYIA KAMENOU ET AL., *DEMOCRACY & HUM. RIGHTS: THE LGBTI MOVEMENT IN CYPRUS: ACTIVISM, LAW, AND CHANGE ACROSS THE DIVIDE* 4 (2019).

No one shall be discriminated against for reasons of ethnic belonging, place of birth, age, sex, gender identity, cultural identity, civil status, language, religion, ideology, political affiliation, legal record, socio-economic condition, migratory status, *sexual orientation*, health status, HIV carrier, disability, physical difference or any other distinguishing feature, whether personal or collective, temporary or permanent, which might be aimed at or result in the diminishment or annulment of recognition, enjoyment or exercise of rights. *All forms of discrimination are punishable by law.*⁹⁸

Kazakhstan (decriminalization): Kazakhstan passed legislation in 1997—which became effective in 1998—that decriminalized homosexual activity.⁹⁹

Kyrgyzstan (decriminalization): Kyrgyzstan decriminalized same sex acts in 1998, following its separation from the USSR.¹⁰⁰ Prior to 1998, the act of sodomy was a crime in the country.¹⁰¹

South Africa (decriminalization): The Constitutional Court, in a wide-ranging opinion citing foreign and international legal materials, held that “the offence of sodomy . . . [is] unconstitutional because it breaches the rights of equality, dignity, and privacy.”¹⁰²

1. It is declared that the common-law offense of sodomy is inconsistent with the Constitution of the Republic of South Africa 1996.

2. It is declared that the common-law offense of commission of an unnatural sexual act is inconsistent with the Constitution of the Republic of South Africa 1996 to the extent that it criminalizes acts committed by a man or between men which, if committed by a woman or between women or between a man and a woman, would not constitute an offence.

⁹⁸ CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR 2008 [CONSTITUTION] Oct. 20, 2008, title II, ch. 1, art. 11(2), *translated in Political Database of the Americas: Republic of Ecuador* GEO. U. EDMUND A. WALSH SCH. FOREIGN SERV.: CTR. LATIN AM. STUD. (last updated Jan. 31, 2011), <https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>.

⁹⁹ Adil Nurmakov, *Kazakhstan: Sexual Rights and the Internet in Kazakhstan*, in GLOBAL INFORMATION SOCIETY WATCH 2015: SEXUAL RIGHTS AND THE INTERNET 164 (Alan Finlay ed., 2015); “That’s When I Realized I Was Nobody”: A Climate of Fear for LGBT People in Kazakhstan, HUM. RTS. WATCH 1 (2015).

¹⁰⁰ Nika Yuryeva, et al., *Alternative Report on the Implementation of the Provisions of ICCPR Related to LGBT People in Kyrgyzstan: Submitted for consideration at the 110th Session of the U.N. Human Rights Committee*, KRYGYZ INDIGO & LABRYS 2 (2014), https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/KGZ/INT_CCPR_CSS_KGZ_16586_E.pdf (noting that as of 1998, the Kyrgyzstan Criminal Code no longer contains the offense of sodomy).

¹⁰¹ *Id.*

¹⁰² *Nat'l Coal. for Gay and Lesbian Equality v. Minister of Justice* 1998 (23) BCLR 1517 (CC) at 32 (S. Afr.).

3. It is declared that section 20A of the Sexual Offences Act, 1957 is inconsistent with the Constitution and invalid.

4. It is declared that the inclusion of sodomy as an item in Schedule 1 of the Criminal Procedure Act, 1977 is inconsistent with the Constitution and invalid.

5. It is declared that the inclusion of sodomy as an item in the Schedule to the Security Officers Act, 1987 is inconsistent with the Constitution and invalid.¹⁰³

South Africa (protected classification):

No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, and birth.¹⁰⁴

Tajikistan (decriminalization): “Tajikistan officially decriminalized same-sex conduct in 1998.”¹⁰⁵

1999

Bolivia (decriminalization and protected classification): Constitution is amended at Article 14(II) to read:

The State prohibits and punishes all forms of discrimination based on sex, color, age, *sexual orientation*, gender identity, origin, culture, nationality, citizenship, language, religious belief, ideology, political affiliation or philosophy, civil status, economic or social condition, type of occupation, level of education, disability, pregnancy, and any other discrimination that attempts to or results in the annulment of or harm to the equal recognition, enjoyment or exercise of the rights of all people.¹⁰⁶

South Africa (protected classification): South Africa enacted a law prohibiting discrimination based on sexual orientation in housing.

In advertising a dwelling for purposes of leasing it. or in negotiating a lease with a prospective tenant. or during the term of a lease, a landlord may not unfairly

¹⁰³ *Id.* at 2-3.

¹⁰⁴ Employment Equity Act of 1998 § 6(1) (S. Afr.).

¹⁰⁵ HEARTLAND ALLIANCE FOR HUMAN NEEDS & HUMAN RIGHTS, EQUAL OPPORTUNITIES, HUMAN RIGHTS VIOLATIONS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER (LGBT) PEOPLE IN TAJIKISTAN: A SHADOW REPORT – SUBMITTED FOR CONSIDERATION AT THE 108TH SESSION OF THE U.N. HUMAN RIGHTS COMMITTEE 4, (2013) (citing LUCAS PAOLI ITABORAHY & JINGSHU ZHU, INTERNATIONAL LESBIAN GAY BISEXUAL TRANS AND INTERSEX ASSOC., STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS: CRIMINALIZATION, PROTECTION AND RECOGNITION OF SAME-SEX LOVE 20 (8 ed., 2013)).

¹⁰⁶ CONSTITUCIÓN POLÍTICA DEL ESTADO FEBRERO 2009 [CONSTITUTION] Feb. 7, 2009, art. 14(II) (Bol.).

discriminate against such prospective tenant or tenants, or the members of such tenant's household or the bonajde visitors of such tenant, on one or more grounds. including race, gender, sex, pregnancy. marital status, sexual orientation. ethnic or social origin, colour, age. disability. religion. conscience. belief. culture, language and birth.¹⁰⁷

Chile (decriminalization): Article 10 of Law 19617 replaced Article 365 of the Penal Code of November 12, 1874, and decriminalized consensual same-sex sexual acts between consenting adults. Prior to the replacement, an inmate convicted of sodomy faced the penalty of minor imprisonment in minimum to medium degree.¹⁰⁸

“[Article] 10. Article 365 is replaced by the following:

Article 365. Anyone who has carnal access to a minor of eighteen years of the same sex, regardless of the circumstances of the crimes of rape or statutory rape, will be punished with minor imprisonment in its minimum to medium degrees.”¹⁰⁹

2000

Azerbaijan (decriminalization): “A law forbidding same-sex sexual relations (between men) was abolished in 2000.”¹¹⁰

Dominican Republic (protection): “Article 2 of the General Law on Youth (Law No. 49) (2000), prohibits discrimination on the basis of sexual orientation . . . [but] this protection is formally applicable only to youth between 15 and 35 years of age.”¹¹¹

Georgia (decriminalization): “Georgian legislation has improved significantly since it joined the Council of Europe in 1999. In 2000, Georgia adopted a new Criminal Code that [. . .] no longer contain[ed] an article incriminating male homosexuality.”¹¹²

¹⁰⁷ Rental Housing Act 50 of 1999 §4(1) (S. Afr.).

¹⁰⁸ CÓDIGO PENAL [CÓD. PEN.] [PENAL CODE] art. 365, Noviembre 12, 1874 (Chile).

¹⁰⁹ Law No. 19617 art. 365, Julio 12, 1999, DIARIO OFICIAL [D.O.] (Chile) (Fernando Martinez trans.).

¹¹⁰ *Study on Homophobia, Transphobia, and Discrimination on Grounds of Sexual Orientation and Gender Identity: Legal Report: Azerbaijan*, DANISH INST. FOR HUM. RTS. ¶ 23.

¹¹¹ ILGA *supra* note 10, at 201; *see* Ley General de Juventud (Ley 49-2000) [General Law on Youth], art. 2, art. 3 (Dom. Rep.).

¹¹² *The Status of Lesbian, Gay, Bisexual and Transgender Rights in Georgia: Submission to the Human Rights Council for the 10th Session of Universal Periodic Review*, INT'L LESBIAN & GAY ASS'N-EUR., ET AL. 1.

Lithuania (protected classification): Discrimination on the basis of sexual orientation as an aggravating circumstance:

*A person who carries out the actions aimed at hindering, on grounds of sex, sexual orientation, race, nationality, language, descent, social status, religion, convictions or views, a group of persons or a person belonging thereto to participate on a par with other persons in political, economic, social, cultural, labour or other activities or at restricting the rights and freedoms of such a group of persons or of the person belonging thereto shall be punished by community service or by a fine or by restriction of liberty or by arrest or by imprisonment for a term of up to three years.*¹¹³

UK territories in the Caribbean (decriminalization): The legislative body of Anguilla specifically decriminalized homosexuality, or homosexual conduct, to wit:

Notwithstanding any statutory or common law provision in force in the Territory to the contrary, a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of eighteen years.¹¹⁴

South Africa (protected classification): South Africa enacted a law prohibiting discrimination on the grounds of “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth” in labor.¹¹⁵

2001

France (protected classification): France amended its labor code to protect against discrimination based on sexual orientation:

No person may be excluded from a recruitment procedure or from access to an internship or a training period in a company, no employee may be sanctioned, dismissed or be the subject of a discriminatory, direct measure or indirect, in particular in terms of remuneration, training, reclassification, assignment, qualification, classification, professional promotion, transfer or renewal of contract due to their origin, gender, morals, their *sexual orientation*, their age, their family situation, their membership or non-membership, real or supposed,

¹¹³ Law on the Approval and Entry into Force of the Crim. Code No. VIII-1968 *as amended* by No. XII-1649, art. 169 (Lith.), *translated in* https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/a84fa232877611e5bca4ce385a9b7048?jfwid=j4ag1gp8#part_71c544a86448432a9d2f8a036054875f (emphasis added) [hereinafter LoAEFoCC]. Additionally, Article 60 of the LoAEFoCC provides the commission of a criminal offense, such as assault, by one individual against another *solely* because of the victim’s sexual orientation constitutes an aggravated offence. LoAEFoCC at art. 60.

¹¹⁴ See Caribbean Territories (Criminal Law) Order 2000 § 3(1) (Anguilla).

¹¹⁵ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 § 1(xxii) (S. Afr.).

of an ethnic group, nation or race, their political opinions, their trade union or mutualist activities, religious beliefs, physical appearance¹¹⁶

Ireland (protected classification): Ireland enacted the Equal Status Act, expressly including sexual orientation as a protected class.¹¹⁷

New Zealand (protected classification): Aggravating Circumstance:

[T]hat the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and (i) the hostility is because of the common characteristic; and (ii) the offender believed that the victim has that characteristic.¹¹⁸

South Korea (protected classification):

The term ‘discriminatory act of violating the equal right’ means any of the following acts, without reasonable grounds, on the grounds of sex, religion, disability, age, social status, region of origin (referring to a place of birth, place of registration, principal area of residence before coming of age, etc.), state of origin, ethnic origin, physical condition such as features, marital status such as single, separated, divorced, widowed, remarried, married de facto, or pregnancy or childbirth, types or forms of family, race, skin color, ideology or political opinion, record of crime whose effect of punishment has been extinguished, sexual orientation, academic career, medical history, etc.¹¹⁹

¹¹⁶ Loi 2001-1066 du 16 novembre 2001 relative à la lutte contre les discriminations [Law 2001-1066 of November 16, 2001 Relating to the Fight Against Discrimination], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Nov. 17, 2001, p. 18311 (unofficial translation) (emphasis added).

¹¹⁷ Equal Status Act 2000 (Act No. 8/2000) §§ 3(2)(d), 5(1) (Ir.), <https://www.irishstatutebook.ie/eli/2000/act/8/enacted/en/html> (“As between any two persons, the discriminatory grounds (and the descriptions of those grounds for the purposes of this Act) are . . . that they are of different sexual orientation . . . A person shall not discriminate in disposing of goods to the public generally or a section of the public or in providing a service, whether the disposal or provision is for consideration or otherwise and whether the service provided can be availed of only by a section of the public.”).

¹¹⁸ Sentencing Act 2002 s 9(1)(h) (N.Z.) (establishing sexual orientation as a protected classification for the purpose of the aggravating factors in violent crimes, or other offenses committed against an individual on the basis of their sexual orientation).

¹¹⁹ Gukgaingwonwihonhoe [National Human Rights Commission of Korea Act] art. 2(3) (S. Kor.), translated in Korea Legislation Research Institute’s online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=60182&lang=ENG.

2002

New Zealand (protected classification): The New Zealand Parliament extended “[d]ivision of property” protections, applicable in divorce cases involving heterosexual couples, to same-sex *de facto* partnerships.¹²⁰

2003

Armenia (decriminalization): “Homosexual actions were decriminalized in 2003 when the Criminal Code was amended and the provision on homosexuality was repudiated.”¹²¹

Belgium (protected classification): “It is possible for same-sex couples to marry (since 2003)”¹²²

Belgium (protected classification): In 2003, the Belgian Government amended existing employment law and created a Centre for Equal Opportunities.¹²³

Prohibits direct and indirect discrimination based on sexual orientation (inter alia) with respect to the conditions for access to gainful, unpaid, or self-employment, including the selection and appointment criteria, irrespective of the branch of activity, on all levels of the occupational hierarchy, including promotion opportunities, as well as employment and working conditions, including dismissal and pay, in both the private and the public sector.¹²⁴

Belgium (protected classification): “The Anti-Discrimination Act introduces three types of criminal provisions: ‘Incitement to hatred, discrimination and violence’. This recognises crimes committed out of hatred or contempt for persons on the basis of sexual orientation as aggravating circumstances. It also prohibits discriminatory conduct by civil and public servants.”¹²⁵

¹²⁰ Megan Cook, *Marriage and Partnering: Loosening rules, expanding choices: partnering from the late 1960s*, TE ARA: ENCYCLOPEDIA N.Z. (May 1, 2017), <http://www.TeAra.govt.nz/en/marriage-and-partnering/page-4>.

¹²¹ *Response to Information Requests (RIRs)*, IMMIGR. AND REFUGEE BD. OF CAN. 1 (Jan. 19, 2006).

¹²² *The Social Situation Concerning Homophobia and Discrimination on the Grounds of Sexual Orientation in Belgium*, DANISH INST. FOR HUM. RTS. 6 (March 2009) [hereinafter DAN. IHR BELGIUM].

¹²³ *Belgium: Discrimination Based on Sexual Orientation in the Field of Employment*, EQUAL RTS. TRUST I (2008).

¹²⁴ *Id.*

¹²⁵ DAN. IHR BELGIUM, *supra*, note 122, § 10.

Bosnia and Herzegovina (protected classification): Bosnia and Herzegovina enacted a law providing that “[d]iscrimination based on sex and sexual orientation is hereby prohibited.”¹²⁶

Ecuador (protected classification):

All children and adolescents are equal before the law and shall not be discriminated against on the basis of birth, nationality, age, sex, ethnic and shall not be discriminated against because of their birth, nationality, age, sex, ethnicity; color, social origin, language, religion, affiliation, political religion, affiliation, political opinion, economic situation, sexual orientation, health status, disability or cultural diversity, or any other condition of their or cultural diversity or any other condition of their own or of their parents, representatives or relatives.¹²⁷

Italy (protected classification): Italy protects against discrimination on the basis of sexual orientation in employment at the national level.¹²⁸

Hungary (protected classification):

Article 8: All dispositions as a result of which a person or a group is treated or would be treated less favourably than another person or group in a comparable situation because of his/her sex,

- b) racial origin,
- c) colour,
- d) nationality,
- e) origin of national or ethnic minority,
- f) mother tongue,
- g) disability,
- h) state of health,
- i) religious or ideological conviction,
- j) political or other opinion,

¹²⁶ Law on Gender Equality in Bosnia and Herzegovina art. 2, *translated and published by* OFF. HIGH ORG., <https://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/008%20-%20human%20rights%20ombudsman%20of%20bosnia%20and%20herzegovina/bh%20law%20on%20gender%20equality%20in%20bosnia%20and%20herzegovina%2016-03.pdf>.

¹²⁷ Código de la Niñez y Adolescencia [Code of Childhood and Adolescence], Ley No. 2002-100, REGISTRO OFICIAL [OFFICIAL GAZETTE] 737 (July 3, 2003) (Ecuador).

¹²⁸ ILGA *supra* note 10, at 213; *see* Decreto legislativo 9 lugilo 2003, n.215, G.U. 13 agosto 2003, n.187 (It.).

- k) family status,
 - l) motherhood (pregnancy) or fatherhood,
 - m) sexual orientation,
 - n) sexual identity,
 - o) age,
 - p) social origin,
 - q) financial status,
 - r) part-time nature or definite term of the employment relationship or other relationship aimed at work,
 - s) membership in an organisation representing employees' interests,
 - t) any other status, characteristic feature or attribute (hereinafter collectively: characteristics)
- are considered direct discrimination.¹²⁹

Lithuania (protected classification): Lithuania enacted a law prohibiting discrimination based on sexual orientation:

The purpose of this Law is to ensure the implementation of human rights laid down in the Constitution of the Republic of Lithuania, and to prohibit any direct or indirect discrimination based upon age, *sexual orientation*, disability, racial or ethnic origin, religion or beliefs.¹³⁰

Malta (protected classification):

[D]iscrimination means discrimination based on sex or because of family responsibilities, sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity, gender expression or sex characteristics and includes the treatment of a person in a less favourable manner than another person is, has been or would be treated on these grounds and 'discriminate' shall be construed accordingly.¹³¹

¹²⁹ 2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról [Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities], art. 8 (Hung.), *translated in Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities*, OFF. HIGH COMM'R HUM. RTS. 4 (2003), <https://www2.ohchr.org/english/bodies/cescr/docs/e.c.12.hun.3-annex3.pdf>.

¹³⁰ Law on Equal Treatment No. IX-1826, art. 1(1) (Lith.).

¹³¹ Equality for Men and Women Act I of 2003, *as amended by* Legal Notice 427 of 2007; and Acts IV of 2009, IX of 2012, XVIII of 2014, and VII and XI of 2015 (Malta).

United States (decriminalization): The U.S. Supreme Court ruled that criminalizing consensual sexual conduct between adults violated the right to liberty under the Due Process Clause of the Fourteenth Amendment:

Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. [. . .] When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and private spheres.¹³²

2004

Austria (protected classification): “The prohibition of discrimination at work on grounds of religion, beliefs, age, sexual orientation and ethnicity followed in 2004.”¹³³

Bulgaria (protected classification):

(1) (Amended SG No. 70/2004 - effective 1.01.2005) Any direct or indirect discrimination on grounds of gender, race, nationality, ethnicity, human genome, citizenship, origin, religion or belief, education, convictions, political affiliation, personal or social status, disability, age, sexual orientation, marital status, property status, or on any other grounds established by law or by an

¹³² *Lawrence v. Texas*, 539 U.S. 558, 575 (2003). *Bowers v. Hardwick*, 478 U.S. 186 (1986), was the first monumental action before the Supreme Court of the United States dealing with the issue of “sodomy” and homosexual conduct. The Court, led by then-Chief Justice Warren E. Burger, held that the Constitution *did not* provide a right to, or protection of, homosexual activities.

¹³³ Alois Stöger, *Equal Opportunities: Equal Treatment Legislation in Austria*, SOZIAL MINISTERIUM AUSTRIA [FED. MINISTRY LAB., SOC. AFFS. & CONSUMER PROT.] 3, <https://broschuerenservice.sozialministerium.at/Home/Download?publicationId=46>.

international treaty to which the Republic of Bulgaria is a party, shall be banned.¹³⁴

Canada (protected classification): This enactment expands the definition of ‘identifiable group’ relating to the area of hate propaganda in the Criminal Code to include any section of the public distinguished by sexual orientation.¹³⁵

Cape Verde (decriminalization): “Neighboring Mozambique removed anti-gay laws in 2015, while Sao Tome and Cape Verde have also abolished laws criminalizing gay relationships.”¹³⁶

Cyprus (protected classification): Cyprus enacted The Combating of Racism and Other Discrimination Law which lists sexual orientation as a protected class.¹³⁷

Estonia (protected classification):

Everyone has the right of recourse to the Chancellor of Justice for the conduct a conciliation procedure [sic] if he or she finds that a natural person or a legal person in private law has discriminated against him or her on the basis of:

- 1) sex;
- 2) race;
- 3) nationality (ethnic origin),
- 4) colour;
- 5) language;
- 6) origin;
- 7) religion or religious beliefs;
- 8) political or other opinion;
- 9) property or social status;
- 10) age;
- 11) disability;

¹³⁴ Law on Protection Against Discrimination, SG No. 86/30.09.2003 (Bulg.).

¹³⁵ An Act to Amend the Criminal Code (Hate Propaganda), S.C. 2004, c 250 (Can.).

¹³⁶ *U.N. Welcomes Angola’s Repeal of Anti-Gay Law, and Ban on Discrimination Based on Sexual Orientation*, U.N. NEWS (Jan. 25, 2019).

¹³⁷ The Combating of Racism and Other Discrimination Law, L.42(I)/2004, *translated by* OFF. L. COMM’R (Cyprus).

12) sexual orientation, or

13) other discrimination attributes specified by law.¹³⁸

Poland (protected classification):

Art. 94. Duties of the employer. The employer is obliged in particular to: . . . act against discrimination in employment, in particular in respect of sex, age, disability, race, religion, nationality, political belief, trade union membership, ethnic origin, creed, sexual orientation, as well as on grounds of employment for a definite or indefinite period of time, or in full or part-time . . .¹³⁹

Portugal (protected classification): Article 13(2) of the Constitution states:

No one shall be privileged, favoured, prejudiced, deprived of any right or exempted from any duty for reasons of ancestry, sex, race, language, place of origin, religion, political or ideological beliefs, education, economic situation, social circumstances *or sexual orientation*.¹⁴⁰

San Marino (protected classification): “All shall be equal before the law, without any distinction based on sex or personal, economic, social, political and religious status.”¹⁴¹

Slovakia (protected classification):

If you are employed, discrimination is banned on grounds of:

- sex, marital status and family status, sexual orientation, race, colour, language, age, ill health or disability, genetic characteristics, belief, religion, political or other opinion, trade-union activity, national or social origin, nationality or ethnic origin, property, birth or other status, or because you have reported a crime or other antisocial activity.¹⁴²

Thailand (protected classification): “The Ministry of Labour’s Regulation on Thai Labour Standards and Social Responsibility of Thai

¹³⁸ Chancellor of Justice Act, RT I 1999 29, 406 *as amended by* RT I 2003, 23, 142, ch. 4, § 19(2) (Est.).

¹³⁹ Labour Code of 26 June 1974 div. 4, ch. 1, art. 94(2b) (Pol.).

¹⁴⁰ CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [C.R.P.] art. 13, no. 2, English translation available at https://www.constituteproject.org/constitution/Portugal_2005 (emphasis added).

¹⁴¹ DICHIARAZIONE DEI DIRITTI DEI CITTADINI E DEI PRINCIPI FONDAMENTALI DELL’ORDINAMENTO SAMMARINESE [DECLARATION ON THE CITIZENS’ RIGHTS AND FUNDAMENTAL PRINCIPLES OF SAN MARINO CONSTITUTIONAL ORDER] [CONSTITUTION] Feb. 26, 2002, art. 4 (San Marino).; *see also* ILGA, *supra*, note 10, at 189.

¹⁴² *Equal Treatment*, SLOVENSKO.SK (last updated September 27, 2021), https://www.slovensko.sk/en/life-situation/life-situation/_equal-treatment/#:~:text=In%20Slovakia%2C%20discrimination%20is%20prohibited,promotion%2C%20training%20and%20working%20conditions.

Businesses B.E. 2547 (2004) prohibits discrimination against workers on numerous grounds, including “personal sexual attitude”. However, it has been noted that it is unclear whether the Regulation “has even been applied in practice.”¹⁴³

Uruguay (protected classification): Enacted a law prohibiting discrimination based on sexual orientation, which reads:

For the purposes of this law, discrimination shall be understood as any distinction, exclusion, restriction, preference or exercise of violence physical and moral, based on race, skin color, religion, national or ethnic origin, disability, cosmetic appearance, gender, *sexual orientation* and identity, which has as its object or result nullify or impair the recognition, enjoyment or exercise, in conditions equality, human rights and fundamental freedoms in the political, economic, social, cultural or any other sphere of public life.

Furthermore, “Article 2 of the Law to Combat Racism, Xenophobia and Discrimination (Law No. 17817) includes ‘sexual orientation’ among the prohibited grounds of discrimination. As per Article 2, this law applies to all human rights and to all spheres of public life.” The Article continues with:

Article 2. The effect of the current law is to be understood as covering discrimination of all distinctions, exclusions, restrictions, preference or use of physical or moral violence, based on motives of race, skin color, religion, national or ethnic origin, disability, aesthetic appearance, gender, sexual orientation or identity, of which the objective or result cancels or undermines the recognition, enjoyment or exercise, in conditions of equality, of human rights and fundamental liberties in the political, economic, social, cultural spheres or other areas of public life.¹⁴⁴

2005

Andorra (protected classification): “Article 338 of the Penal Code (2005) criminalises acts of discrimination based on sexual orientation with regard to goods and services and employment, among others.”¹⁴⁵

Denmark (protected classification): Denmark includes discrimination on the basis of sexual orientation as an aggravating circumstance to a criminal offense.¹⁴⁶

¹⁴³ ILGA *supra* note 10, at 226.

¹⁴⁴ Declaration of National Interest: Fight Against Racism, Xenophobia, and All Other Forms of Discrimination, Law No. 17817, art. 2 (2004) (Uru.) (Fernando Martinez trans.).

¹⁴⁵ ILGA, *supra* note 10, at 207.

¹⁴⁶ Criminal Code, Order No. 909 of September 27, 2005, *as amended by* Act Nos. 1389 and 1400 of December 21, 2005, ch. 10, § 6 (Den.).

Fiji (decriminalization and protected classification): The High Court of Fiji at Suva, Appellate Jurisdiction ruled that Fijian law criminalizing homosexual conduct violated the Constitution.¹⁴⁷ In particular, the law violated the rights to privacy and equal protection of the law.¹⁴⁸ Moreover, the Court explained that this ruling was informed by “International Human Rights Law” as set forth in the “International Covenant of Civil and Political Rights,”¹⁴⁹ expressing clear *opinio juris*. Indeed, the Court explained:

Article 43(2) of the Constitution requires me to have regard to public international law as an interpretative aid for the rights set out in Chapter 4.¹⁵⁰

...

In my view the Court should adopt a broad and purposive construction of privacy that is consistent with the recognition in international law that the right to privacy extends beyond the negative conception of privacy as freedom from unwarranted State intrusion into one’s private life to include the positive right to establish and nurture human relationships free of criminal or indeed community sanction.¹⁵¹

Greece (protection): “[T]he Act Against Discrimination prohibit[s] discrimination based on sexual orientation in employment.”¹⁵²

Marshall Islands (decriminalization): Marshall Islands Repealed its criminal prohibition of same sex acts in 2005.¹⁵³

2006

Belgium (protected classification): “It is possible for same sex couples . . . to adopt children (since 2006).”¹⁵⁴

Georgia (protected classification): “Discrimination of any kind is forbidden during the labor relations, such as: discrimination by race, color of a skin, language, ethnic and social belong, origin, property, class, working

¹⁴⁷ *McCoskar v The State* [2005] FJHC 500; HAA0085 & 86.2005 (26 August 2005) (Fiji High Court).

¹⁴⁸ *Id.* at 6-7.

¹⁴⁹ *Id.* at 7-10.

¹⁵⁰ *Id.* at 7.

¹⁵¹ *Id.* at 11.

¹⁵² ILGA, *supra* note 10, at 231.

¹⁵³ *Submission to the UN Universal Periodic Review regarding the protection of the rights of LGBTI persons in the Republic of the Marshall Islands*, KALEIDOSCOPE AUSTRAL. (2014).

¹⁵⁴ DAN. IHR BELGIUM, *supra*, note 122, at 6.

place, age, sex, sexual orientation, limited abilities, religion or membership of other unifications, family status, political and other beliefs.”¹⁵⁵

Germany (protected classification): Germany enacted an *Act Implementing European Directives Putting Into Effect the Principle of Equal Treatment* prohibiting discrimination based on sexual orientation.¹⁵⁶

Latvia (protected classification):

(1) Everyone has an equal right to work, to fair, safe and healthy working conditions, as well as to fair remuneration.

(2) The rights provided for in Paragraph one of this Section shall be ensured without any direct or indirect discrimination - irrespective of a person’s race, skin colour, gender, age, disability, religious, political or other conviction, ethnic or social origin, property or marital status, sexual orientation or other circumstances.¹⁵⁷

Luxembourg (protected classification):

The discrimination grounds prohibited are religion, conviction or belief, disability, age, sexual orientation, real or assumed belonging to an ethnic group. Criminal law also prohibits discrimination if it is based on gender, sexual orientation, health issues or disability, nationality, real or assumed ethnic background or origin, political or philosophical belief, and union membership. The discrimination can be direct (being treated less advantageously) or indirect (a neutral practice having a negative effect only on the persons discriminated against).¹⁵⁸

The law of 28 November 2006 transposed into Luxembourg law, two EU directives (Directive 2000/43/EC and 2000/78/EC). This law amended Luxembourg’s Labour Code and introduced into book II of the Code, a new title (V) relating to equal treatment in employment and occupation. The law of 13 May 2008 modified the rules on gender equality by transposing Directive 2000/78/EC, establishing a general framework for equal treatment in employment.¹⁵⁹

Saint Lucia (protected classification):

An employer shall not dismiss an employee or institute disciplinary action based on:

¹⁵⁵ Labour Code of Georgia art. 2(3)/2006.

¹⁵⁶ See generally General Act on Equal Treatment, Aug. 14, 2006, FED. L. G. I [BGBl] 1897.

¹⁵⁷ Labour Law LATVIJAS VESTNESIS 105, 06.07.2001, ch. 1, § 7 (Lat.).

¹⁵⁸ *Luxembourg: Anti-Discrimination Laws*, L&E GLOBAL (Jan. 5, 2021).

¹⁵⁹ *Id.*

- a. an employee's race, sex, religion, colour, ethnic origin, national extraction, indigenous origin, social origin, political opinion or affiliation, trade union affiliation or activity, disability, sexual orientation, serious family responsibility or marital status; [. . .]
- b. the perception that the employee has or is carrying the HIV/AIDS unless the employee is engaged in work established as putting other persons at risk of contracting the HIV/AIDS or unless the inherent requirements of the job permit the removal of that employee to other duties.¹⁶⁰

South Africa (protected classification): "A civil union may only be registered by prospective civil union partners who would, apart from the fact that they are of the same sex, Not be prohibited by law from concluding a marriage under the Marriage Act or Customary Marriages Act."¹⁶¹

2007

Australia (protected classification):

- (1) A private health insurer must not:
 - (a) take or fail to take any action; or
 - (b) in making a decision, have regard or fail to have regard to any matter; that would result in the insurer improperly discriminating between people who are or wish to be insured under a complying health insurance policy of the insurer.
- (2) **Improper discrimination** is discrimination that relates to:
 - (a) the suffering by a person from a chronic disease, illness or other medical condition or from a disease, illness or medical condition of a particular kind; or
 - (b) the gender, race, sexual orientation or religious belief of a person.¹⁶²

Belgium (protected classification):

The Anti-Discrimination Act of 2007 also covers discrimination on the basis of 'current and future state of health', a ground that is relevant for the protection of persons with HIV or AIDS. This is (indirectly) also relevant for LGB persons, mainly for gay men, as discrimination of homosexuals regularly seems

¹⁶⁰ Labour Act § 131, REVISED LS. ST. LUCIA (2021) (emphasis added).

¹⁶¹ Civil Union Act 17 of 2006 § 6(1) (S. Afr.).

¹⁶² *Private Health Insurance Act 2007* (Cth) pt 3-2, div 55-5 (Austl.), <https://www.legislation.gov.au/Details/C2020C00026>.

to be connected with fears and prejudices regarding HIV/AIDS and other sexually transmitted diseases.¹⁶³

Costa Rica (protected classification): The Constitutional Chamber held in 2007 that:

Through its jurisprudential line, this Chamber has recognized as a fundamental legal principle contained in the Political Constitution of Costa Rica respect for the dignity of every human being and, consequently, the absolute prohibition of carrying out any type of discrimination against that dignity. To discriminate, in general terms, is to differentiate to the detriment of the rights and dignity of a human being or group of them; in this case of homosexuals. Based on the foregoing, it can be validly affirmed that *discrimination based on sexual orientation is contrary to the concept of dignity duly enshrined in the Political Constitution and in the International Treaties on Human Rights signed by our country.*¹⁶⁴

As with other states, the Costa Rican courts and constitution are informed by international law,¹⁶⁵ demonstrating that this is not only Costa Rica's view of its own Constitution, but also its view of international law, explicitly demonstrating *opinio juris*.

Mozambique (protected classification): Labour Law No. 23/2007 prohibits discrimination in the workplace, listing sexual orientation as a protected class:

This law shall be interpreted and applied in accordance with, among other principles, the principle of the right to work, of employment stability and job stability, of change in circumstances and of non-discrimination on grounds of sexual orientation, race or HIV/AIDS.¹⁶⁶

1. Employers have an obligation to respect the personal rights of employees, in particular, the employees' right to keep their personal lives private.
2. The right to privacy relates to access to and dissemination of matters relating to the private and personal lives of employees, such as their family lives, personal relationships, sex lives, state of health and their political and religious convictions.¹⁶⁷

¹⁶³ See DAN. IHR BELGIUM, *supra* note 122, § 21, p. 7-8.

¹⁶⁴ Sala Constitucional de la Corte Suprema de Costa Rica [Constitutional Chamber of the Supreme Court of Costa Rica] [CCSCCR] Res. No. 2007-018660, 21 December 2007, File No. 07-013203-0007-CO.

¹⁶⁵ *See id.*

¹⁶⁶ Labour Law, Law 23/2007, art. 4(1), 1 August 2007 (Mozam.), https://web.archive.org/web/20150529221817/http://www.tipmoz.com/library/resources/tipmoz_media/labour_law_23-2007_1533E71.pdf.

¹⁶⁷ *Id.* at art. 5(2).

3. All employees, whether nationals or foreigners, without distinction based on sex, sexual orientation, race, colour, religion, political or ideological convictions, family background or ethnic origin, have the right to receive a wage and to enjoy equal benefits for equal work.¹⁶⁸

Nepal (protected classification):

It is an appropriate time to think about decriminalizing and de-stigmatizing the same sex marriage by amending the definition of unnatural coition.¹⁶⁹

[T]he fundamental rights stipulated in Part III are the rights similarly vested in third gender people as human beings. The homosexuals and third gender people are also human beings as other men and women are, and they are the citizen of this country as well.¹⁷⁰

The right to privacy is a fundamental right of an individual. The issue of sexual activity falls under the definition of privacy. No one has the right to question how do two adults perform the sexual intercourse and whether this intercourse is natural or unnatural. In the way the right to privacy is secured to two heterosexual individuals in sexual intercourse, it is equally secured to the people of third gender who have different gender identity and sexual orientation. In such a situation, therefore, gender identity and sexual orientation of the third gender and homosexuals cannot be ignored by treated the sexual intercourse among them as unnatural.¹⁷¹

. . . it looks necessary to keep a clear provision in the new Constitution to be made by the Constituent Assembly, guaranteeing non-discrimination on the ground of 'gender identity' and the 'sexual orientation' besides 'sex' in line with the Bill of Rights of the Constitution of South Africa.¹⁷²

Looking at the issue of same sex marriage, we hold that it is an inherent right of an adult to have marital relation with another adult with her/his free consent and according to her/his will. The same sex marriage should be viewed from the view point of interest and rights of the concerned people as well as that of the society, family, and all others. . . . The Government of Nepal has hereby been directed to form a committee as mentioned below in order to undertake the study on over all issues in this regard.¹⁷³

United Kingdom (protected classification): The Equality Act (Sexual Orientation) Regulations 2007 established sexual orientation as a protected

¹⁶⁸ *Id.* at art. 108(3).

¹⁶⁹ *Sunil Babu Pant and Others v. Nepal Gov't*, Writ No. 917, NJA J. 2008, at 262, 276 (2007) (Nepal).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 280.

¹⁷² *Id.* at 285.

¹⁷³ *Id.* at 285-286.

classification under the law, barring discrimination on the basis of sexual orientation in education, public authorities, advertising, adoption, etc.

3. (1) For the purposes of these Regulations, a person (“A”) discriminates against another (“B”) if, on grounds of the sexual orientation of B or any other person except A, A treats B less favourably than he treats or would treat others (in cases where there is no material difference in the relevant circumstances).

(2) In paragraph (1) a reference to a person’s sexual orientation includes a reference to a sexual orientation which he is thought to have.

(3) For the purposes of these Regulations, a person (“A”) discriminates against another (“B”) if A applies to B a provision, criterion or practice—

(a) which he applies or would apply equally to persons not of B’s sexual orientation,

(b) which puts persons of B’s sexual orientation at a disadvantage compared to some or all others (where there is no material difference in the relevant circumstances),

(c) which puts B at a disadvantage compared to some or all persons who are not of his sexual orientation (where there is no material difference in the relevant circumstances), and

(d) which A cannot reasonably justify by reference to matters other than B’s sexual orientation.¹⁷⁴

2008

Cape Verde (protected classification): “Cape Verde (2008) . . . have laws related to prohibition of discrimination in employment based on sexual orientation.”¹⁷⁵

“See article 45(2) and article 406(3) of the Novo Cedigo Laboral Cabo-Verdiano”¹⁷⁶

Iceland (protected classification): “Learning and teaching objectives and the manner of compulsory schools must be such as to prevent discrimination on the basis of ethnicity, gender, sexual orientation, place of residence, social background, religion, health, handicap, or general situation.”¹⁷⁷

¹⁷⁴ The Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263, art. 3, ¶¶ 1-3 (UK), <https://www.legislation.gov.uk/uksi/2007/1263/contents/made>.

¹⁷⁵ MITHILESH N. BHATT, QUEER CRIMES & CRIMINAL JUSTICE 205 (2022).

¹⁷⁶ *Id.*

¹⁷⁷ Compulsory School Act 2008 No 91 12 June, sec. VII, art. 24 (Ice.).

Kosovo (protected classification): Article 24(2) of the Constitution states:

No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, *sexual orientation*, birth, disability or other personal status.¹⁷⁸

Macau (protected classification):

No employee or applicant for employment shall be unduly privileged, or discriminated against or deprived of any right or exempted from any duty on ground of, inter alia, national or social origin, descent, race, colour, gender, sexual orientation, age, marital status, language, religion, political or ideological beliefs, membership of associations, education or economic background.¹⁷⁹

Mauritius (protected classification): Mauritius enacted the Equal Opportunities Act, prohibiting discrimination based on sexual orientation, which is a protected class under the Act: “‘status’ means age, caste, colour, creed, ethnic origin, impairment, marital status, place of origin, political opinion, race, sex or sexual orientation.”¹⁸⁰

Nicaragua (decriminalization): Article 36(5) of the 2008 Penal Code (Law No. 641) repeals Article 205 of the 1974 Penal Code that criminalized sodomy.¹⁸¹ Article 36(5) specifically establishes aggravated penalties motivated by the victim’s sexual orientation:

5. Discrimination. When the crime is committed with racial motives, or other class of discrimination in regard to ideology or political opinion, religion or beliefs of the victim; ethnicity, race or nationality; sex or sexual orientation; or illness or disability.¹⁸²

¹⁷⁸ KUSHTETUTËS SË REPUBLIKËS SË KOSOVËS [CONSTITUTION OF THE REPUBLIC OF KOSOVO] rev. 2016, art. 24, § 2. (Kos.).

¹⁷⁹ Labour Relations Law, Law No. 7/2008, art. 6, § 2 (Mac.).

¹⁸⁰ Equal Opportunities Act 2008, Act No. 42/2008, pt. 1, clause 2 (Mauritius).

¹⁸¹ Ley No. 641, 5 May 2008, Código Penal [Penal Code] tit. I, ch. IV, art. 5, LA GACETA [L.G.] 5 May 2008 (Nicar.). “Concubitus between people of the same sex or against nature constitutes sodomy and those who practice it in a scandalous way or outrage public modesty or morality, will suffer a prison sentence of one to three years; but if one of those who practice it, even in private, has disciplinary or command power over the other, as ascendant, guardian, teacher, boss, guardian or in any other concept that implies influence of authority or moral direction, prison They will be for him, from two to four years, the same as when he practices it with a child under fifteen or uses force or intimidation.” Art. 205. Nicaragua Penal Code 1974.

¹⁸² [Penal Code] [L.G.] Original Spanish: “5. Discriminación. Cuando se comete el delito por motivos raciales, u otra clase de discriminación referida a la ideología u opción política, religión o creencias de la

Norway (protected classification):

Section 77. Aggravating circumstances. In connection with sentencing, aggravating factors to be given particular consideration are that the offence . . . was motivated by a person's religion or life stance, skin colour, national or ethnic origin, homosexual orientation, disability or other circumstances relating to groups with a particular need for protection.¹⁸³

Panama (decriminalization): Article 1 of Presidential Executive Decree No. 332 of July 31, 2008 repealed Section 12 of Executive Order No. 149 of May 20, 1949, which criminalized sodomy.

Whereas Decree 149 of May 20, 1949, in which the measures provided in Articles 1 and 3 of the Preliminary Title of Volume 1 and Articles 146 and 147 of Chapter 5, Title 1, Volume III of the Health Code, in suppressing prostitution and provides measures pertaining to social hygiene and public morality, penalizes sodomy, which is what homosexuality was known as prior to 1973.

...

Article 1. Repealing of Article 12 from Decree 149 of May 20, 1949.¹⁸⁴

2009

Bolivia (protected classification): "Article 40 *bis* of the Penal Code aggravates the penalties by up to half of the original penalty (a 50% increase) for all crimes motivated by any of the discriminatory grounds listed in Article 281 *sexies*, including 'sexual orientation.'"¹⁸⁵ Specifically, it provides:

Raised by a third at minimum and by half the maximum, all penalties specified in the Special Part of this Code and other complementary penal laws, when they have been committed with racist and/or discriminatory motives described in Articles 281(5) and 281(6) of this same Code. In no case shall the penalty exceed the maximum established by the Constitution [of Bolivia].¹⁸⁶

"Article 281 *sexies* of the Criminal Code . . . as amended by the *aforementioned Act* [in 2010] criminalizes any act of discrimination based

víctima; etnia, raza o nación a la que pertenezca; sexo u orientación sexual; o enfermedad o discapacidad que padezca."

¹⁸³ THE PENAL CODE [PENAL CODE], ch. 14, § 77 (Nor.).

¹⁸⁴ July 31, 2008. Original Spanish "Que el Decreto 149 de 20 de mayo de 1949, por el cual se desarrollan las disposiciones contenidas en los artículos 1 y 3 del Título Preliminar del Libro I y los artículos 146 y 147 del Capítulo 5, Título I, Libro III del Código Sanitario, en represión de la prostitución y se dictan medidas sobre higiene social y moralidad pública, penaliza la sodomía, que es como se conocía a la homosexualidad antes del año de 1973 . . . Artículo 1. Derogar el artículo 12 del Decreto 149 de 20 de mayo de 1949."

¹⁸⁵ ILGA *supra* note 10, at 241.

¹⁸⁶ CÓDIGO PENAL [C. PENAL] [PENAL CODE], 2010, art. 40 *bis* (Bol.).

on sexual orientation and aggravates the penalty if it is committed by public servants or by private individuals providing public services.”¹⁸⁷ Bolivia thus “ban[s] sexual orientation discrimination in broad terms and therefore apply to employment.”¹⁸⁸ Specifically, this provision provides:

Any person who arbitrarily or illegally obstructs, restrains, undermines, impedes or annuls the exercise of individual and collective rights, with motives of sex, age, gender, sexual orientation or gender identity, cultural identity, family affiliation, nationality, citizenship, language, religious creed, ideology, political or philosophical opinion, civil status, socioeconomic condition, illness, type of occupation, education, different capacities or physical disability, intellectual or sensory, being pregnant, regional backroad, physical appearance and dress, shall be sanctioned by term of imprisonment from one (1) to five (5) years.

II. The term of imprisonment shall be aggravated by a third at minimum and by half at maximum when:

- a) The act is committed by a public servant or official.
- b) The act is committed by an intermediary carrying out a public service.
- c) The act is committed with violence.¹⁸⁹

“Article 281 *septies* of the Penal Code (2010) criminalizes any act of dissemination or incitement to hatred based on sexual orientation. Sexual orientation is included by references to Article 281 *sexies*.”¹⁹⁰ It states:

Any person who for whatever medium disperses ideas based on the superiority or inferiority of race, or that promotes and/or justifies racism or any form of discrimination, with the motives described in Articles 281(d) and 281(6), or incite violence, or persecution, of persons or groups of persons, based on racist or discriminatory motives, shall be sanctioned with a term of imprisonment from one (1) to five (5) years.

I. The sanction shall be aggravated by a third at minimum and half at maximum when committed by a public servant or authority.

II. When the act is committed by an employee via social media, or on their own property, no claims of immunity or jurisdiction may be made.¹⁹¹

Croatia (protected classification):

¹⁸⁷ ILGA *supra* note 10, at 195 (emphasis added).

¹⁸⁸ *Id.* at 220.

¹⁸⁹ CÓDIGO PENAL [C. PENAL] [PENAL CODE], 2010, art. 281 *sexies* (Bol.).

¹⁹⁰ ILGA *supra* note 10, at 253.

¹⁹¹ CÓDIGO PENAL [C. PENAL] [PENAL CODE], 2010, art. 281 *septies* (Bol.).

This Act provides for the protection and promotion of equality as the highest value of the constitutional order of the Republic of Croatia, creates prerequisites for the realisation of equal opportunities and regulates protection against discrimination on the grounds of race or ethnic affiliation or colour, gender, language, religion, political or other belief, national or social origin, property, trade union membership, education, social status, marital or family status, age, health condition, disability, genetic heritage, native identity, expression or sexual orientation.¹⁹²

Czech Republic (protected classification):

Direct discrimination shall mean an act, including omission, where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on grounds of race, ethnic origin, nationality, sex, sexual orientation, age, disability, religion, belief or opinions and, in legal relationships governed by the directly applicable regulation of the European Union on freedom of movement for workers, also on grounds of nationality.¹⁹³

East Timor (protected classification): Aggravating Circumstances includes: “The crime is motivated by racism, or any other discriminatory sentiment on grounds of gender, ideology, religion or beliefs, ethnicity, nationality, sex, sexual orientation, illness or physical, disability of the victim.”¹⁹⁴

Estonia (protected classification):

Discrimination of persons on grounds of religion or other beliefs, age, disability or sexual orientation is prohibited upon: 1) establishment of conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, as well as upon promotion; 2) entry into employment contracts or contracts for the provision of services, appointment or election to office, establishment of working conditions, giving instructions, remuneration, termination or cancellation of employment contracts or contracts for the provision of services, release from office; 3) access to vocational guidance, vocational training, advanced vocational training and retraining, practical work experience[.]¹⁹⁵

United States (protected classification):

Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B) or paragraph (3), willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person,

¹⁹² The Anti-Discrimination Act art. I, 2014 (Reg. No. 71-05-03/1-08-2) (Croat.).

¹⁹³ Anti-Discrimination Act title I, § 2(3) (Czech).

¹⁹⁴ Penal Code of the Democratic Republic of Timor Leste art. 52 (Decree Law No. 19/2009).

¹⁹⁵ Equal Treatment Act §2 (2008) (Est.).

because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person-

(i) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

(ii) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if

(I) death results from the offense; or

(II) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.¹⁹⁶

2010

Argentina (recognition): Law 26.618 amends the Civil Code to recognize same-sex civil unions. Article 2 of Law 26.618 replaces Article 172 of the Civil Code with the following:

Article 172: The full and free consent expressed personally by both spouses before the competent authority to celebrate it is essential for the existence of marriage.

Marriage shall have the same requirements and effects, regardless of whether the spouses are of the same or different sex.

The act that lacks any of these requirements will not produce civil effects even if the parties had acted in good faith, except as provided in the following article.¹⁹⁷

Albania (protected classification): Albania enacted a law, On Protection from Discrimination, outlawing discrimination, explicitly including discrimination based on sexual orientation.¹⁹⁸

Botswana (protected classification):

Notwithstanding anything contained in a contract of employment, an employer shall not terminate the contract of employment on the ground of-

(a) the employee's membership of a registered trade union or participation in any activities connected with a registered trade union outside working hours or, with that consent of the employer, within working hours;

(b) the employee seeking office as or acting or having acted in the capacity of an employees' representative;

¹⁹⁶ 18 U.S.C. § 249.

¹⁹⁷ Matrimonio Civil [Civil Marriage] No. 26.618 art. 2 (Arg.) (unofficial translation).

¹⁹⁸ Law on Protection from Discrimination No. 10/221/2010 art. 1 (Alb.).

(c) the employee making, in good faith, a complaint or participating in proceedings against the employer involving the alleged violation of any law;

(d) the employee's race, tribe, place of origin, social origin, marital status, gender, sexual orientation, colour, creed, health status or disability[.]¹⁹⁹

Montenegro (protected classification):

Any form of discrimination, on any ground, shall be prohibited.

Discrimination is any unjustified, legal or actual, direct or indirect distinction or unequal treatment, or failure to treat a person or a group of persons in comparison to other persons, as well as exclusion, restriction or preferential treatment of a person in comparison to other persons, based on race, colour of skin, national affiliation, social or ethnic origin, affiliation to the minority nation or minority national community, language, religion or belief, political or other opinion, gender, gender identity, sexual orientation, health conditions, disability, age, material status, marital or family status, membership in a group or assumed membership in a group, political party or other organisation as well as other personal characteristics.²⁰⁰

Serbia (protected classification):

[T]he terms “discrimination” and “discriminatory treatment” shall be used to designate any unwarranted discrimination or unequal treatment, that is to say, omission (exclusion, limitation or preferential treatment) in relation to individuals or groups, as well as members of their families or persons close to them, be it overt or covert, on the grounds of race, skin colour, ancestors, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, membership in political, trade union and other organisations and other real or presumed personal characteristics (hereinafter referred to as: personal characteristics)[.]²⁰¹

2011

Spain (protected classification): Article 6(1) of Law on General Public Health and Amendment 78 of the Organic Law reinforce the prohibition of discrimination in health and education respectively.²⁰²

¹⁹⁹ Employment Act No. 10/2010 Cap. 47:01 § 23 (Bots.).

²⁰⁰ The Law on Prohibition of Discrimination OFFICIAL GAZETTE OF MONTENEGRO No. 46/2010 art. 2, *translated in* REFWORLD: GLOB. L. & POL'Y DATABASE, <https://www.refworld.org/legal/legislation/natlegbod/2010/en/123796>.

²⁰¹ The Law on the Prohibition of Discrimination in the Republic of Serbia OFFICIAL GAZETTE OF THE REPUBLIC OF SERBIA No. 22/2009 art. 2.

²⁰² General de Salud Pública [General Public Health] Ley No. 33/2011 art. 6 (Spain), *translated in* GLOBAL REGULATION, <https://www.global-regulation.com/translation/spain/618933/law-33-2011>

Article 6. Right of Equality.

1. All persons have the right to ensure that public health action is carried out on an equal footing without discrimination on grounds of birth, racial or ethnic origin, sex, religion, conviction or opinion, age, disability, sexual orientation or identity, disease or any other personal or social condition or circumstance.

Seventy-eight. Article 124 is worded as follows:

Article 124. Rules for organization, operation and coexistence.

...

2. The rules for the coexistence and conduct of the centres shall be enforced, and shall specify the duties of the pupils and students and the corrective measures applicable in the event of non-compliance, taking into account their situation and personal conditions.

The corrective measures will have an educational and recuperative character, they must guarantee respect for the rights of the rest of the students and students and will seek to improve the relations of all the members of the community educational.

Corrective measures must be proportionate to the faults committed. Those conduct that infringe on the personal dignity of other members of the educational community, who have as their origin or consequence discrimination or harassment based on gender, sexual orientation or identity, or racial, ethnic origin, religious, belief or disability, or that they are carried out against the students most vulnerable for their personal, social or educational characteristics will have the qualification of very serious lack and will be associated as a corrective measure the expulsion, temporary or definitive, from the center.²⁰³

Colombia (protected classification): “Article 134A of the Criminal Code (2000) as amended by Article 2 of the Law No. 1,482 (2011) criminalizes acts of discrimination based on sexual orientation.” “Article 134B of the Penal Code, as amended by Law No. 1482 (2011) criminalizes any incitement to acts of harassment aimed at causing physical or moral harm for reasons of sexual orientation.”

Article 134A. *Racist or Discriminatory Acts*. Anyone who arbitrarily prevents, obstructs or restricts the full exercise of the rights of persons on grounds of race, nationality, sex or sexual orientation, shall liable to imprisonment for twelve

%252c-on-4-october%252c-general-public-health.html; Para la Mejora de la Calidad Educativa [For Improving Educational Quality] Organic Law No. 8/2013 art. 124 (Spain), *translated in* GLOBAL REGULATION, <https://www.global-regulation.com/translation/spain/1466369/organic-law-8-2013%252c-of-9-december%252c-for-improving-educational-quality.html>.

²⁰³ *Id.* at arts. 6(1), 124.

(12) to thirty-six (36) months and a fine of ten (10) to fifteen (15) times the statutory minimum monthly wage.

Article 134B. *Harassment on the basis of race, religion, ideology, political ideology, or national, ethnic or cultural origin.* Any person who promotes or instigates acts, behaviour or conduct constituting harassment, aimed at causing physical or moral harm to a person, group of persons, community or people, on account of their race, ethnicity, religion, nationality, political or philosophical ideology, sex or sexual orientation, shall be imprisoned for twelve (12) to thirty-six (36) months and fined ten (10) to fifteen (15) times the statutory monthly minimum wage in force, unless the conduct constitutes an offence punishable by a greater penalty.²⁰⁴

Articles 134C(3) and 134C(4) “aggravate the penalty if such acts are committed by public servants or while providing public services.” Article 134C(6) also includes the motive of denying or restricting labor rights as an aggravating factor:

Article 134C. *Circumstances of Punitive Aggravation.* The penalties provided for in the preceding articles shall be increased by one-third up to one-half when:

1. The conduct is displayed in a public space, public establishment or place open to the public.
2. The conduct is displayed through the use of mass media.
3. The conduct is displayed by a public servant.
4. The conduct is exhibited for or in connection with the provision of a public service.
5. The conduct is directed against a child, an adolescent or a senior citizen.
6. The conduct is aimed at denying or restricting workers’ rights.²⁰⁵

Croatia (protected classification): “A hate crime shall mean a criminal offence committed on account of a person’s race, colour, religion, national or ethnic origin, disability, gender, sexual orientation or gender identity. Unless a more severe punishment is explicitly prescribed by this Code, such conduct shall be taken as an aggravating circumstance.”²⁰⁶

²⁰⁴ Situation and Treatment of Sexual and Gender Minorities, Including Treatment by Authorities and Society; State Protection and Support Services Available DIARIO OFICIAL 48270 Law No. 1482/2011 arts. 134A, 134B (Colom.) (unofficial translation).

²⁰⁵ *Id.* at art. 134C.

²⁰⁶ KAZNENI ZAKON [CRIMINAL CODE] NN 125/2011 Reg. 71-05-03/1-11-2 art. 87(20) (Croat.).

Dominican Republic (protection): “Article 2 of the Law on HIV/AIDS protects people living with HIV from discrimination on the basis of sexual orientation.”²⁰⁷

Finland (protected classification):

A person who makes available to the public or otherwise spreads among the public or keeps available for the public information, an expression of opinion or another message where a certain group is threatened, defamed or insulted on the basis of its race, skin colour, birth status, national or ethnic origin, religion or belief, sexual orientation or disability or a comparable basis, shall be sentenced for *ethnic agitation* to a fine or to imprisonment for at most two years.²⁰⁸

Finland also includes discrimination on the basis of sexual orientation as an aggravating circumstance to a criminal offense.²⁰⁹

Sweden (protected classification): The constitution of Sweden provides: “The public institutions shall promote the opportunity for all to attain participation and equality in society . . . The public institutions shall combat discrimination of persons on grounds of gender, colour, national or ethnic origin, linguistic or religious affiliation, functional disability, sexual orientation, age or other circumstance affecting the individual.”²¹⁰

Switzerland (protected classification):

Since registered partnerships became a possibility, limited employment protections have been adopted in the Code of Obligations (1911). These are limited to areas of spousal benefits, employee compensation and other forms of remuneration which employers must extend to employees regardless of sexual orientation.

It has been widely understood that sexual orientation has been read into numerous laws because of the protections afforded to that status in the country’s Constitution (1999), where the words “way of life” at Article 8 have been interpreted to include diverse SOGI identities. However, in April 2019, the Federal Court held in a case involving a former unit commander in the Swiss Armed Forces that the Law on Equality (1995) did not apply to discrimination

²⁰⁷ Ley General de Juventud [General Law on Youth] Law No. 49/2000 art. 2 (Dom. Rep.) (unofficial translation).

²⁰⁸ THE CRIMINAL CODE OF FINLAND ch. 11, § 10.

²⁰⁹ *Id.* at ch. 6, § 5.

²¹⁰ REGERINGSFORMEN [RF] [CONSTITUTION] 1:2 (SWED.).

on the basis of sexual orientation (see the section on broad protection against discrimination above).²¹¹

2012

Argentina (protected classification): “Article 80(4) of the Penal Code (as amended by Law No. 26.791 in 2012) establishes aggravated penalties only for homicides motivated by hate towards a person’s sexual orientation.”²¹²

”Article 80. Lifelong reclusion or life imprisonment will be imposed, and the provisions of article 52 may be applied to anyone who kills:

...

4. For pleasure, greed, racial, religious, gender hatred or sexual orientation, gender identity or its expression.”²¹³

In the same manner, Article 92 enhances the punishment for causing injury under the same circumstances:

“Article 89. A prison sentence of one month to one year will be imposed on anyone who causes another, to the body or health, damage that is not provided for in another provision of this code.

...

Article 92. If any of the circumstances listed in Article 80 occur, the penalty will be: in the case of Article 89, from six months to two years.”²¹⁴

Chile (protected classification):

For the purposes of this law, arbitrary discrimination is understood to be any distinction, exclusion or restriction that lacks reasonable justification, carried out by agents of the State or individuals, and that causes deprivation, disturbance or threat in the legitimate exercise of the fundamental rights established in the Political Constitution of the Republic or in the international treaties on human rights ratified by Chile and that are in force, particularly when they are based on reasons such as race or ethnicity, nationality, socioeconomic situation, language, ideology or political opinion, religion or belief, union membership or participation in trade organizations or lack thereof, sex, maternity, breastfeeding, breastfeeding, sexual orientation, gender identity and

²¹¹ ILGA, *supra* note 10, at 234.

²¹² *Id.* at 241.

²¹³ Código Penal de la Nación Argentina [Penal Code of the Argentine Nation] Ley No. 11.179 art. 80(4) (unofficial translation).

²¹⁴ *Id.* at arts. 89, 92.

expression, marital status, age, affiliation, personal appearance, and illness or disability.²¹⁵

Georgia (protected classification):

Commission of a crime on the grounds of race, colour, language, sex, sexual orientation, gender identity, age, religion, political or other beliefs, disability, citizenship, national, ethnic or social origin, material status or rank, place of residence or other discriminatory grounds shall constitute an aggravating circumstance for all the relevant crimes provided for by this Code.²¹⁶

Violation of human equality on the grounds of language, sex, age, nationality, origin, birthplace, place of residence, material or rank status, religion or belief, social belonging, profession, marital status, health status, sexual orientation, gender identity and expression, political or other views or of any other signs that have substantially breached human rights, shall be punished by a fine or corrective labour for up to a year and/or with imprisonment for up to two years.²¹⁷

Lesotho (decriminalization): “[H]omosexuality between males was criminalised in connection with the wider common law dealing with sodomy. The Penal Code Act of 2010, which entered into force in 2012, would seem to have decriminalised homosexuality.”²¹⁸

São Tomé and Príncipe (decriminalization and protected classification): “The law does not criminalize consensual same-sex sexual activity.”²¹⁹ In addition, “Article 130(2)(d) of the Penal Code (2012) aggravates the crime of homicide when motivated by hatred towards the sexual orientation of the victim.”²²⁰

Venezuela (protected classification): Article 21 of Law No. 6.076 amends the Labor Code to prohibit workplace discrimination on the basis of sexual orientation.

²¹⁵ Law No. 20609 art. 2, Julio 24, 2012, D.O. (Chile); *see* ILGA, *supra* note 10.

²¹⁶ CRIMINAL CODE OF GEORGIA ch. XI, art. 53(3).

²¹⁷ *Id.* at ch. XXIII, art. 142(1).

²¹⁸ *See* Seun S. Bakare, *Country Context Report LGBT People in Lesotho*, COLLECTIVE LESOTHO 7 (2016), <https://www.sexualrightsinitiative.org/sites/default/files/resources/files/2019-12/UPR%2035%20Lesotho%20Collective%20of%20Lesotho%2C%20CAL%20and%20SRI.pdf> (The Penal Code Act of 2010 did not decriminalize homosexuality explicitly. The overall legislative intent, though, was to decriminalize.) For such cases, NGO’s have recommended stronger wording and/or a new law for total decriminalization.

²¹⁹ Sao Tome and Principe 2020 Human Rights Report U.S. DEP’T STATE 12 (2020), <https://www.state.gov/wp-content/uploads/2021/10/SAO-TOME-AND-PRINCIPE-2020-HUMAN-RIGHTS-REPORT.pdf>.

²²⁰ ILGA, *supra* note 10, at 240.

Article 21. The principle of no discrimination at the workplace. The practices of discrimination are contrary to the principles of this Law. All distinctions, exclusions, preferences or restrictions in the access and in the conditions of employment, on the basis of race, sex, age, civil status, union membership, religion, political opinions, nationality, sexual orientation, disability or social origin, that undermine the right to work are prohibited as a result of being against established constitutional principles. The actions of violators shall be void and punished according to the respective laws that govern them. Any special rulings written to protect maternity, paternity and the family, nor those pertaining to the protection of children, adolescents, elderly persons and disabled persons are not considered discriminatory.

Within employment advertisements or individual employment agreements, there can be no clauses that are contrary to this article. No person may be the subject of discrimination in their right of employment because of prior criminal history.²²¹

2013

Australia (protected classification): Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013: Amends a prior sexual discrimination act,²²² and other acts,²²³ to include explicit protections on the basis of sexual orientation.²²⁴

Brazil (protected classification): “On May 14, 2013, the National Justice Council issued a resolution stating that competent authorities are not allowed to refuse (a) to celebrate same-sex civil marriages nor (b) to convert same-sex common-law marriages (stable union) into civil marriages.”²²⁵

Fiji (protected classification): Fiji’s constitution provides that:

[a] person must not be unfairly discriminated against, directly or indirectly on the grounds of his or her— (a) actual or supposed personal characteristics or

²²¹ LEY ORGÁNICA DEL TRABAJO, LOS TRABAJADORES Y LAS TRABAJADORAS [LEY DEL TRABAJO] [LABOR CODE] GACETA OFICIAL N° 6.076 art. 21 (Venez.).

²²² *Sex Discrimination Act 1984* (Cth) (Austral.).

²²³ Specifically: *Migration Act 1958* (Cth) (Austral.) (amending references to, or definition of, “de facto partner and spouse” to include same-sex relationships); *Broadcasting Services Act 1992* (Austral.), *Fair Work Act 2009* (Austral.), *Fair Work (Registered Organisations) Act 2009* (Austral.) (amending references of “sexual preference” in the preceding three acts).

²²⁴ *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) (Austral.).

²²⁵ Casamento homoafetivo [Same-sex Marriage] Resolução no 175/2013 (Braz.), translated in CORNELL L. SCH. LEGAL INFO. INST., [https://www.law.cornell.edu/women-and-justice/resource/resolu%C3%A7%C3%A3o_n%C2%BA_175/2013_-_do_conselho_nacional_de_justi%C3%A7a_\(cnj\)_E2%80%93_casamento_homoafetivo_\(same-sex.\)](https://www.law.cornell.edu/women-and-justice/resource/resolu%C3%A7%C3%A3o_n%C2%BA_175/2013_-_do_conselho_nacional_de_justi%C3%A7a_(cnj)_E2%80%93_casamento_homoafetivo_(same-sex.))

circumstances, including race, culture, ethnic or social origin, colour, place of origin, sex, gender, sexual orientation, gender identity and expression, birth, primary language, economic or social or health status, disability, age, religion, conscience, marital status or pregnancy[.]²²⁶

Fiji also passed a law in 2013 to “[e]nsure that full regard is had to recognized universal human rights standards and public international law applicable to the protection of rights and ensure that those standards and laws are applied to the fullest extent possible . . . regardless of . . . sexual orientation.”²²⁷

Honduras (protected classification): Article 32 of the 2019 Penal Code provides that commission of certain crimes for reasons related to a victim’s sexual orientation is an aggravating circumstance.²²⁸ Articles 211 and 212 prohibit discrimination based on sexual orientation with regard to access to public services, as well as services provided by other professionals and companies.²²⁹ Article 213 criminalizes the incitement to discrimination or any form of violence on the grounds prohibited in the same title of the Code (including sexual orientation in Article 211).²³⁰

ARTICLE 32. AGGRAVATING CIRCUMSTANCES. The aggravating circumstances include the following . . . 8) Committing the crime with racist motives or others related to ideology, religion or beliefs of the victim, age, language, family situation, ethnicity, race or national origin, their sex, sexual orientation or gender identity, reasons due to gender, illness, or disability; and . . .²³¹

ARTICLE 211. THE DENIAL OF A PUBLIC SERVANT’S BENEFITS BY DISCRIMINATION. Any government official, public employee, or their respective agents, who denies a person, group, association, corporation or its members, by reason of their ideology, religion or beliefs, language, ethnicity or race, national origin, indigenous or afro-descendancy, their sex, sexual orientation or gender identity, reasons due to gender, civil status, familial or economic situation, age, illness or disability, a benefit of which they are entitled to by right, shall be punished with the penalty of imprisonment of one (1) to three (3) years, a fine of one hundred (100) to two hundred (200) days and

²²⁶ CONSTITUTION FOR THE REPUBLIC OF FIJI ch. 2, § 26.

²²⁷ HIV/AIDS Decree 2011 (Decree No. 5 of 2011) 12 REPUBLIC OF FIJI ISLANDS GOVERNMENT GAZETTE no. 12.

²³⁴ CÓDIGO PENAL [PENAL CODE] LA GACETA No. 34,940 art. 32(8) (Hondur.).

²²⁹ *Id.* at arts. 211, 212

²³⁰ *Id.* at arts. 211, 213

²³¹ *Id.* at art. 32

disqualified from public employment or holding public office from one (1) to three (3) years.²³²

ARTICLE 212. THE DENIAL OF BENEFITS IN ENGAGING IN PROFESSIONAL OR BUSINESS ACTIVITIES ON THE BASIS OF DISCRIMINATION. Anyone who, in the course of their professional, mercantile, or business activities, denies a person, group, residential area, association or corporation or its members for one of the aforementioned reasons in the preceding article, a benefit of which they are entitled to by right, shall be punished with the penalty of disqualification from participating in the profession, office, industry or commerce from one (1) to three (3) years.²³³

ARTICLE 213. INCITEMENT TO DISCRIMINATION. A person shall be punished with penalties of one (1) to two (2) years imprisonment and fine of one hundred (100) to five hundred (500) days in the following courses of conduct: (1) Anyone who directs and publicly or through communicative media or diffusion aimed at the general public, incites discrimination or any form of violence against a group, association, corporation or any part of theirs, or against a person determined on the basis of being a member [of such groups], for any of the reasons mentioned in the previous articles of this present title; and (2) Anyone who harms the dignity of the persons through actions or expressions, including graphics, that entail humiliation, disparagement or discrediting of one of the groups referred to by the previous subsection or, from a part of the same or against a person determined on the basis of being a member of such, for any of the aforementioned reasons in the previous subsections. The penalty of imprisonment shall be augmented in one third (1/3) when the described acts in the previous sections are committed by an official or public employee in the course of their duties, in which case a specific disqualification [of public employment or holding public office] shall be imposed from public employment or holding office from one (1) to three (3) years.²³⁴

Moldova (protected classification): “Article 7 of the Law on Equality (Act No. 121) (2012) specifies that discrimination on the basis of sexual orientation is prohibited in the employment sphere.”²³⁵

New Zealand (protected classification): Legalization of same-sex marriages, affording full protections of marriage to same-sex partners, and recognizing marriages between same-sex partners entered in foreign jurisdictions (where lawfully permitted). Further extending marriage protections to same-sex civil unions and domestic partnerships.²³⁶

²³² *Id.* at art. 211.

²³³ *Id.* at art. 212.

²³⁴ *Id.* at art. 213.

²³⁵ ILGA, *supra* note 10, at 232.

²³⁶ Marriage (Definition of Marriage) Amendment Act 2013 (N.Z.).

2014

Cuba (protected classification): Article 2(b) of the Labor Code (Law No. 116) establishes the right of every person to have a job, either in the private or the public sector, according to the needs of the economy and their personal choice without discrimination based on sexual orientation.

ARTICLE 2. The fundamental principles that govern the right to work are: . . .
b) equality in the workplace; every able citizen has the right to obtain employment according to economic conditions and their choice, both in the government and private sectors; without discrimination due to skin color, gender, religious beliefs, sexual orientation, territorial origin, disability, and any other basis harmful to human dignity.²³⁷

Ecuador (protected classification):

The person who, except those preceding cases [referring to preceding Article] such as affirmative action policies, propagates, practices or incites any distinction, restriction, exclusion or preference based on nationality, ethnicity, place of birth, age, sex, gender identity or sexual orientation, cultural identity, marital status, language, religion, ideology, socioeconomic status, immigration status, disability or health status with the intent of annulling or undermining the recognition, enjoyment or exercise of rights under conditions of equality, will be sanctioned with a custodial sentence of one to three years.²³⁸

Finland (protected classification):

No one may be discriminated against on the basis of age, origin, nationality, language, religion, belief, opinion, political activity, trade union activity, family relationships, state of health, disability, sexual orientation or other personal characteristics. Discrimination is prohibited, regardless of whether it is based on a fact or assumption concerning the person him/herself or another.²³⁹

Georgia (protected classification): Georgia enacted a law prohibiting discrimination, including discrimination on grounds of sexual orientation:

This Law is intended to eliminate any form of discrimination and to ensure equal rights of every natural and legal persons under the legislation of Georgia, irrespective of race, skin colour, language, sex, age, citizenship, origin, place of birth or residence, property or social status, religion or belief, national, ethnic or social origin, profession, marital status, health, disability, sexual orientation,

²³⁷ Ley de Trabajo [Labor Code] GACETA OFICIAL DE LA REPÚBLICA DE CUBA Ley No. 116 art. 2(b), translated in ORG. AMER. STATES, https://www.oas.org/en/iachr/reports/pdfs/2023/Cuba_derechoslaborales_EN.pdf.

²³⁸ CÓDIGO ORGÁNICO INTEGRAL PENAL [PENAL CODE] art. 176 (Ecuador) (unofficial translation).

²³⁹ Non-discrimination Act SUOMEN SÄÄDÖSKOKOELMA [STATUTES OF FINLAND] 1324/2014 ch. 3 § 8(1).

gender identity and expression, political or other opinions, or other characteristics.²⁴⁰

Malta (protected classification): Article 32 states:

Whereas every person in Malta is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex, *sexual orientation* or gender identity but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -

- a. life, liberty, security of the person, the enjoyment of property and the protection of the law;
- b. freedom of conscience, of expression and of peaceful assembly and association; and the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.²⁴¹

Palau (decriminalization): “Palau revised its Penal Code and decriminalized consensual same sex sexual activity in April 2014. Prior to this, ‘sodomy’ was a crime under section 2803, Chapter 28 of Title 17 of the Palau National Code.”²⁴²

Romania (protected classification):

Aggravating circumstance for criminal violations if:

...

the offense was committed for reasons related to race, nationality ethnicity, language gender, sexual orientation, political opinion or allegiance, wealth, social origin, age, disability, chronic non-contagious disease or HIV/SIDA infection, or for other reasons of the same type, considered by the offender to cause the inferiority of an individual from other individuals.²⁴³

²⁴⁰ Law of Georgia on the Elimination of All Forms of Discrimination (2014) art. 1.

²⁴¹ CONSTITUTION OF MALTA September 21, 1963 (rev. 2016) ch. IV, § 32.

²⁴² *Joint Submission of the UN Country Team for Palau for the UN Compilation Universal Periodic Review of Palau*, UN COUNTRY TEAM (2016), <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=2375&file=EnglishTranslation#:~:text=In%202012%2C%20Palau%20passed%20the,with%20criminal%20charges%20for%20DV.&text=protection%20services%20for%20survivors%20of%20domestic%20violence%20and%20child%20abuse>.

²⁴³ Criminal Code of Romania, Law No. 286/2009 art. 77(h), *translated in VENICE COMM’N*, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2018\)042-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2018)042-e) (unofficial translation).

Scotland (protected classification): Legalization of same-sex marriages through parliamentary action, repealing prohibitions on same-sex marriages and civil unions.²⁴⁴

2015

Cape Verde (protected classification): “Article 123 of the Penal Code (effective 2004) as amended by Legislative Decree No. 4/2015 (2015) aggravates the penalty for homicides committed on the basis of the victim’s sexual orientation.”²⁴⁵

Chile (protected classification): Law No. 20830 amends Civil Code to recognize same-sex civil unions.

”Article 1. A civil union agreement is a contract observed by two people that share a home, to regulate the legal effects derived from their affective life in common, of stable and permanent character. Spouses are designated civil cohabitants and are considered related in accordance with Article 42 of the Civil Code.

Its execution confers the status of civil cohabitant. The termination of this agreement restores the status the civil cohabitants had prior to the execution of this agreement, except as provided in subsection (c) of Article 26.

...

Article 12. All civil union agreements or contract equivalents, not constitutive of marriage, that regulate the common lives of two persons of the same or different sex, subject to registration and validly held abroad, shall be recognized in Chile, in accordance with the following provisions:

...

6. Any authentic act that notes the termination of one of these agreements shall be recognized in Chile, subject to applicable Chilean law in this matter.”²⁴⁶

El Salvador (protected classification):

“WHEREAS:

I. That through Legislative Decree No. 1030, dated April 26, 1997, published in the Official Gazette No. 105, Volume No. 335, dated June 10 of the same year, the Penal Code was issued.

II. That in our country there have been repudiatory crimes of intolerance and hate, especially directed against victims because of their gender, gender identity

²⁴⁴ Marriage and Civil Partnership (Scotland) Act 2014 c. 1.

²⁴⁵ ILGA, *supra* note 10, at 240.

²⁴⁶ Law No. 20830 art. 1, art. 12, April 21, 2015, D.O. (Chile).

and expression or sexual orientation. Such crimes must be investigated and punished to the full extent of the law.

III. That it is convenient to introduce aggravating circumstances to the crimes of homicide and threats in the Penal Code, in order to punish with greater rigor punishable acts motivated by racial, ethnic, religious, political, gender, gender identity and expression or sexual orientation hatred.”²⁴⁷

Ecuador (protected classification): Article 35 of Law No. 483 (April 20, 2015) amends the Article 195.3 of the Labor Code to provide protection to employees dismissed on the basis of their sexual orientation and provides a right of restoring employment to affected employees.

Article 35. The following articles are inserted into the current Article 195:

...

“Article 195.3. Effects. Considered ineffective, labor relationships shall not be affected by such dismissals and any outstanding payments shall be paid with a ten percent (10%) surcharge.

...

In any case of dismissal on the basis of discrimination, targeted at the employee due to their advanced age or sexual orientation, in any case, beyond the provisions concerning the inefficacy of their dismissal, the employee shall have the right of additional compensation provided in this article, without affecting the right of restoration . . . “²⁴⁸

Ireland (protected classification): Passed the Marriage Act of 2015, “[a]n Act to amend the Civil Registration Act 2004 to remove the impediment to marriage of the parties being of the same sex.” The Act repealed and amended sections of the Civil Registration Act that barred same-sex marriage.²⁴⁹

Kiribati (protected classification):

(1) “An employer shall not discriminate, directly or indirectly, against any employee or prospective employee in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment, or other matters arising out of the employment relationship, for a prohibited reason or for reasons including a prohibited reason.

²⁴⁷ CÓDIGO PENAL [PENAL CODE] Decreto Legislativo No. 1030, 1997 (El Sal.).

²⁴⁸ Ley Orgánica para la Justicia Laboral y Reconocimiento del Trabajo en el Hogar [Organic Law for Labor Justice and Recognition of Work in the Home] REGISTRO OFICIAL No. 483 (tercer suplemento) art. 35 (Ecuador) (unofficial translation).

²⁴⁹ Marriage Act 2015 (Act No. 35/2015) (Ir.), <https://www.irishstatutebook.ie/eli/2015/act/35/enacted/en/pdf>.

(2) For the purpose of subsection (1), a prohibited reason shall be a reason that is affected by any of the following attributes of the employee or prospective employee, whether actual or perceived:

- (a) ethnic origin, race, colour, national extraction, social origin, social class or economic status;
- (b) sex, pregnancy, marital status, sexual orientation or family responsibilities;
- (c) age, state of health, HIV / AIDS status, or disability.”²⁵⁰

Liberia (protected classification):

“Without limiting the scope of the preceding provision, all persons who work or who seek to work in Liberia are entitled to enjoy and to exercise the rights and protections conferred by this Act irrespective of: i) race, tribe, indigenous group, language, colour, descent, national, social or ethnic extraction or origin, economic status, community or occupation; ii) immigrant or temporary resident status; iii) sex, gender identity or sexual orientation; iv) marital status or family responsibilities.”²⁵¹

Mexico (protected classification): Article 1 of the Mexican Constitution states:

“Any form of discrimination, based on ethnic or national origin, gender, age, disabilities, social status, medical conditions, religion, opinions, *sexual orientation*, marital status, or any other form, which violates the human dignity or seeks to annul or diminish the rights and freedoms of the people, is prohibited.”²⁵²

Mozambique (decriminalization): “Mozambique decriminalized homosexuality in its new penal code, making it one of a few African countries where same-sex relationships are legal. The revised code drops a colonial-era clause outlawing “vices against nature.”²⁵³

Nepal (protected classification): Article 18(3) of the Constitution states:

²⁵⁰ Employment and Industrial Relations Code 2015, Part XII §107(1-2) (Kiribati). https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=102530&p_country=KIR&p_count=61, <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/102530/124003/F-49791920/KIR102530.pdf>

²⁵¹ Decent Work Act, 2015, § 1.5 (Liber.). <https://www.ilo.org/dyn/natlex/docs/MONOGRAPH/100329/122123/F-1595099170/Decent%20Work%20Act.docx>

²⁵² Constitución Política de los Estados Unidos Mexicanos [CP] [CONSTITUTION] Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 22-03-2024 art. 1 (unofficial translation).

²⁵³ *Mozambique decriminalizes gay and lesbian relationships*, BBC NEWS (July 1, 2015), <https://www.bbc.com/news/world-africa-33342963>.

“The state shall not discriminate among citizens on grounds of origin, religion, race, caste, tribe, sex, economic condition, language or geographical region, ideology and such other matters.

Provided that nothing shall be deemed to bar the making of special provisions by law for the protection, empowerment or advancement of the women lagging behind socially and culturally, Dalits, Adibasi, Madhesi, Tharus, Muslims, oppressed class, backward communities, minorities, marginalized groups, peasants, laborers, youths, children, senior citizens, *sexual minorities*, persons with disability, pregnant, incapacitated and the helpless persons, and of the citizens who belong to backward regions and financially deprived citizens including the Khas Arya.”²⁵⁴

Suriname (protected classification):

“In March 2015, Suriname legislation was adapted; in particular the Surinamese Penal Code was updated with articles sanctioning hate speech, which included sexual orientation as a ground for non -discrimination complaints. Violation of this law can result in a prison sentence of up to one year or a fine. (i.e. the Revision of the Penal Code, approved in 2015, contains a definition on discrimination (article 126a). This definition is applicable to both men and women and is line with CEDAW. In addition, article 500a of the Revised Penal Code, which deals with occupational discrimination, sexual orientation is explicitly mentioned as a ground for discrimination).

The Penal Code is also applicable when it comes to the following; “Sexual Orientation” is also mentioned as ground for insult for a group of persons (article 175 of the Penal Code as revised in March 2015) and ground for discrimination of a group of persons (article 175a, 176, 176b of the Penal Code as revised in March 2015), and ground for discrimination of one or more persons (176c of the Penal Code as revised in March 2015).”²⁵⁵

Ukraine (protected classification):

“Any discrimination in the sphere of work is prohibited, in particular violation of the principle of equality of rights and opportunities, direct or indirect restriction of rights of employees depending on race, skin color, political, religious and other beliefs, gender, gender identity, sexual orientation, ethnic, social and foreign origin, age, health status, disability, suspicion or presence of HIV/AIDS, family and property status, family responsibilities, place of residence, membership in a trades union or other citizens’ association, participation in a strike, appeal or intention to apply to a court or other authorities to protect their rights or provide support to other employees in

²⁵⁴ CONSTITUTION OF NEPAL Sept. 20, 2015 art. 18(3) (unofficial translation).

²⁵⁵ *Suriname “Country” Report: Third Multilateral Evaluation Round Follow-Up Phase*, ORG. AMER. STATES 33 (July 19, 2019), <https://gov.sr/wp-content/uploads/2022/03/final-mesecevi-country-report-suriname-19-july-2019.pdf>.

protection of their rights, notification of possible facts of corruption or corruption-related offenses, other violations of the Law of Ukraine “On Prevention of Corruption”, as well as assistance to a person in the implementation of such notification, on language or other grounds not related to the nature of work or conditions of its performance.”²⁵⁶

United States (protected classification):

“The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty. Same-sex couples may exercise the fundamental right to marry. *Baker v. Nelson* is overruled. The State laws challenged by the petitioners in these cases are held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.”²⁵⁷

2016

Belize (decriminalization and protected classification): In *Orozco v. The Attorney General of Belize*, the Supreme Court of Belize struck down domestic law criminalizing homosexuality²⁵⁸ as violating the constitutional rights to human dignity,²⁵⁹ privacy,²⁶⁰ freedom of expression,²⁶¹ and equality.²⁶² Moreover, it drew from foreign and international sources. Indeed, it went so far as to state that it was following international law:

The Belize Constitution owes its provenance to the European Convention on Human Rights which in turn was influenced by the UN Declaration on Human Rights. As such, *decisions in relation to human rights issues have been informed by developments in international law*. Indeed, the final appellate court of Belize, the Caribbean Court of Justice has *acknowledged the application of the jurisprudence from international bodies to domestic law*.²⁶³

Costa Rica (protected classification): Article 404 and 406 of Law No. 9343 amends the 1943 Labor Code of August 27, 1943 by prohibiting all discrimination in the workplace, as well as dismissals, on the basis of sexual orientation:

²⁵⁶ Кодекс законів про працю України [LABOUR CODE OF UKRAINE] art. 2, *as amended by* Law No. 198-IX, 2019, 4 (Ukr.).

²⁵⁷ *Obergefell v. Hodges*, 576 U.S. 1, 4-5 (2015).

²⁵⁸ *Orozco v. The Attorney General of Belize*, Supreme Court Claim No 668 of 2016 ¶ 97 (Belize).

²⁵⁹ *Orozco*, Supreme Court Claim No 668 ¶¶ 63-67.

²⁶⁰ *Orozco*, Supreme Court Claim No 668 ¶¶ 68-86.

²⁶¹ *Orozco*, Supreme Court Claim No 668 ¶¶ 87-89.

²⁶² *Orozco*, Supreme Court Claim No 668 ¶¶ 90-96.

²⁶³ *Orozco*, Supreme Court Claim No 668 ¶¶ 58 (citations omitted) (emphasis added).

Article 404. All discrimination at the workplace is prohibited on the basis age, ethnicity, sex, religion, race, sexual orientation, civil status, political opinion, national ancestry, social origin, filiation, disability, union affiliation, economic situation or whatever other form analogous to discrimination.

...

Article 406. The dismissal of employees on the preceding bases provided in Article 404 is prohibited.²⁶⁴

Liechtenstein (protected classification):

To ensure effective legal protection against discrimination and multiple discrimination, art. 283 of the Liechtenstein Criminal Code (StGB) was amended. The new provision entered into force in April 2016 and now contains a comprehensive prohibition of discrimination. While previously, only racial discrimination constituted a criminal offence, public incitement to hatred or discrimination on the basis of language, nationality, ethnicity, religion, ideology, gender, disability, age, or sexual orientation is now also a criminal offence punishable by a custodian sentence of up to two years.²⁶⁵

Nauru (decriminalization): “(1) The *Criminal Code 1899* (as amended by Schedule 2) is repealed.”²⁶⁶ The old criminal code criminalized homosexuality, and this act overturned it.²⁶⁷

Slovenia (protected classification):

Also in April 2016 the National Assembly adopted the Protection Against Discrimination Act (PADA) which establishes the prohibition of discrimination on all protected grounds (including sexual orientation, gender identity and gender expression) in various fields of social life, including employment, education, social security, health care, social benefits, access to housing and access to goods and services available to the public.²⁶⁸

Seychelles (decriminalization):

This Bill seeks to amend section 151 of the Penal Code in order to decriminalize unnatural offences specified in paragraph (a) and (c). The President has . . .

²⁶⁴ Reforma Procesal Laboral [Labor Procedure Reform] LA GACETA N° 16, Ley N° 9343 arts. 404, 406 (Costa Rica) (unofficial translation).

²⁶⁵ Advisory Committee on the Framework Convention for the Protection of National Minorities, *Fifth Report submitted by Liechtenstein*, COUNCIL EUR. (July 2020), <https://rm.coe.int/5th-sr-liechtenstein-en/16809f030e>.

²⁶⁶ Crimes Act 2016 (Act No. 18/2016), § 288(1) (Nauru).

²⁶⁷ See REPUBLIC OF NAURU CRIMINAL CODE § 208 (2006).

²⁶⁸ Samo Novak & Miha Lobnik, *Letter to Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, SLOVN.: ADVOC. PRINCIPLE EQUAL. (May 31, 2019), https://www.ohchr.org/sites/default/files/Documents/Issues/SexualOrientation/SocioCultural/NHRI/Advocate_of_the_Principle_of_Equality_Slovenia.docx.

highlighted the need to abolish the laws that criminalize homosexuality between consenting adults in view of the [UNHR] obligations of Seychelles.²⁶⁹

Samoa (protected classification):

In sentencing or otherwise dealing with a defendant, the court must take into account the following aggravating factors to the extent that they are applicable in the case: . . . (h) that the defendant committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and - (i) the hostility is because of the common characteristic; and (ii) the defendant believed that the victim has that characteristic.²⁷⁰

2017

Australia (protected classification): Same-sex marriage was legalized through the enactment of the Marriage Amendment (Definition and Religious Freedoms) Act 2017.²⁷¹ Additionally, the UN Human Rights Committee (“UNHRC”) published two communications establishing, or extending, protections to LGBTQ+ persons in Australia under various provisions of the ICCPR (including Optional Protocol I):²⁷²

(1) In *C. v. Austral.*,²⁷³ the UNHRC determined that Australia violated an individual’s Article 26 rights against discrimination by refusing to recognize a same-sex marriage that was lawfully performed and recognized in a foreign territory (here, Canada).²⁷⁴ Specifically, the Committee found that Australia lacked a reasonable, objective basis to refuse recognition of the marriage, given

²⁶⁹ Penal Code (Amendment) Act SUPPLEMENT TO OFFICIAL GAZETTE Act 11 of 2016 (June 7, 2016) (Sey.).

²⁷⁰ Sentencing Act 2016 SAMOA GAZETTE No. 9/2016 § 7.

²⁷¹ *Marriage Equality for Australia*, NAT’L LIB. AUSTRAL. (December 7, 2017), <https://webarchive.nla.gov.au/awa/20171220015348/http://pandora.nla.gov.au/pan/21248/20171220-1246/www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FourthQuarter/Marriage-Equality-for-Australia-7-12-2017.html>.

²⁷² See Int’l Covenant on Civ. and Pol. Rts., U.N. Hum. Rts. Comm, Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2216/2012, U.N. Doc. CCPR/C/119/D/2216/2012 (2017) [hereinafter *C. v. Austral.*]; Int’l Covenant on Civ. and Pol. Rts., U.N. Hum. Rts. Comm, Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2172/2012, U.N. Doc. CCPR/C/119/D/2172/2012 (2017) [hereinafter *G. v. Austral.*].

²⁷³ *C. v. Austral.*, *supra* note 272, ¶¶ 2–2.9.

²⁷⁴ *Id.* ¶¶ 8.1–8.7.

the marriage was legal, under Canadian law, and the parties were residents of Australia at the time of the marriage.²⁷⁵

(2) In the case of *G.*, the Committee was presented with the challenge of whether the State's legislation, which allowed an *unmarried* individual, who identifies as transgender to obtain an order legally changing their gender, including an amended birth certificate which reflects their correct gender—but prohibited *married* transgendered persons from changing (or amending) their birth certificate to reflect their correct gender, violated the provisions of the ICCPR and Optional Protocol 1.²⁷⁶ In its findings, the Committee held that the State violated Article 26 of the ICCPR, specifically:

[T]hat by legally recognizing gender reassignment and prohibiting discrimination against transgender persons, the State party is providing protection against discrimination. However, by denying transgender persons who are married a birth certificate that correctly identifies their sex, in contrast to unmarried transgender and non-transgender persons, the government is failing to afford the author and similarly situated individuals equal protection under the law as a married transgender person. [. . .] [T]he distinction being drawn by the State party is not necessary and proportionate in pursuit of a legitimate interest, and *therefore is unreasonable*. [. . .]

[I]n the absence of convincing explanations from the State party, the Committee considers that *the differential treatment between married and unmarried persons who have undergone a sex affirmation procedure and request to amend their sex on their birth certificate is not based on reasonable and objective criteria, and therefore constitutes discrimination on the basis of marital and transgender status, under article 26 of the Covenant*.²⁷⁷

Chad (protected classification): “Article 350(i) of the Penal Code (2017) establishes the aggravated punishment of imprisonment for ten to twenty years for rape committed because of the victim’s sexual orientation.”²⁷⁸

Mongolia (protected classification): Mongolia enacted a law prohibiting and punishing discrimination based on sexual orientation:

Discrimination persons or restriction of human rights and freedoms on the basis of ethnic origin, language, race, age, sex, social origin or status, property,

²⁷⁵ *Id.* ¶ 8.6. In addition to having been residents of Australia at the time of the marriage, the movant was an Australian citizen and had, prior to the marriage, been in a relationship with their partner in Australia for a period of approximately 10 years. *Id.* ¶ 2.1.

²⁷⁶ *Id.* ¶ 7.3.

²⁷⁷ *Id.* ¶¶ 7–7.15 (emphasis added).

²⁷⁸ ILGA, *supra* note 10, at 240.

occupation or post, religion, opinion, or education, *sexual orientation*, gender, health condition shall be punishable by a fine equal to from four hundred and fifty to five thousand four hundred units of amount, or from two hundred forty to seven hundred and twenty hours of community service, or a penalty of limitation of free travel right for a term from one month to one year.²⁷⁹

Peru (decriminalization and protected classification): Peru enacted a law against femicide that identified the commission of the crime on the basis of sexual orientation as an aggravating factor.²⁸⁰

Philippines (protection): The Philippines provides for protection against discrimination on the basis of sexual orientation in the administration of mental health services.²⁸¹

2018

India (decriminalization and protected classification): The Supreme Court of India held that:

- (i) Section 377 of the Penal Code, in so far as it criminalises consensual sexual conduct between adults of the same sex, is unconstitutional;
- (ii) Members of the LGBT community are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution;
- (iii) The choice of whom to partner, the ability to find fulfilment in sexual intimacies and the right not to be subjected to discriminatory behaviour are intrinsic to the constitutional protection of sexual orientation;
- (iv) Members of the LGBT community are entitled to the benefit of an equal citizenship, without discrimination, and to the equal protection of law.²⁸²

²⁷⁹ CRIMINAL CODE OF MONGOLIA art. 14.1(1) (emphasis added).

²⁸⁰ Decreto Legislativo No 1323 que Fortalece la Lucha contra el Femicidio, la Violencia Familiar y la Violencia de Género [Legislative Decree No. 1323 that Strengthens the Fight Against Femicide, Domestic Violence, and Gender Violence] EL PERUANO ¶ 4 (Jan. 6, 2017) (Peru).

²⁸¹ An Act Establishing a National Mental Health Policy for the Purpose of Enhancing the Delivery of Integrated Mental Health Services, Promoting and Protecting the Rights of Persons Utilizing Psychosocial Health Services, Appropriating Funds Therefor and Other Purposes, Rep. Act No. 11036, § 5(b) (July 14, 2017) (Phil.), <https://www.officialgazette.gov.ph/2018/06/20/republic-act-no-11036/>.

²⁸² Navtej Singh Johar v. Union of India, AIR 2018 SC 146 (India).

Micronesia (protected classification): “No law shall be enacted which discriminates against any person on account of race, sex, sexual orientation, language, or religion, nor shall the equal protection of the laws be denied.”²⁸³

Norway (protected classification):

This Act shall apply in all sectors of society Discrimination on the basis of gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression, age or combinations of these factors is prohibited. Ethnicity includes national origin, descent, skin colour and language. The prohibition includes discrimination on the basis of actual, assumed, former or future factors specified in the first paragraph. The prohibition also applies if a person is discriminated against on the basis of his or her connection with another person, when such discrimination is based on factors specified in the first paragraph.²⁸⁴

Scotland (protected classification): In June 2018, the Scottish Parliament passed legislation which granted a pardon for those “convicted of a historical sexual offence . . . if the conduct constituting the offence, if occurring in the same circumstances, would not be an offence on the day on which this section comes into force.”²⁸⁵

Trinidad and Tobago (decriminalization and protected classification): The High Court of Justice held that Sections 13 and 16 of the Sexual Offences Act criminalizing sexual relations by persons of the same sex were unconstitutional “in a society that has proper respect for the rights and freedoms of the individual” under Section 13(1) of the Constitution.²⁸⁶ The Court explained:

To this court, human dignity is a basic and inalienable right recognized worldwide in all democratic societies. Attached to that right is the concept of autonomy and the right of an individual to make decisions for herself/himself without any unreasonable intervention by the State. In a case such as this, she/he must be able to make decisions as to who she/he loves, incorporates in his/her life, who she/he wishes to live with and make a family with and not have to live under the constant threat, the proverbial “Sword of Damocles”, that at any

²⁸³ An Act to Amend Section 107 of Title 1 of the Code of the Federated States of Micronesia (Annotated), for the Purpose of Prohibiting Discrimination Based on Sexual Orientation, and for Other Purposes, C.B. No. 20-258 § 1.

²⁸⁴ A Bill for an Act Relating to Equality and a Prohibition Against Discrimination (Equality and Anti-Discrimination Act) NORSK LOVTIDEND June 16, 2017 nr. 51 §§ 2, 6 (unofficial translation) (Nor.).

²⁸⁵ Historical Sexual Offences (Pardons and Disregards) (Scotland) Act 2018, c. 3, § 3 (UK), <https://www.legislation.gov.uk/asp/2018/14/enacted/data.pdf>.

²⁸⁶ Jason Jones v. Attorney General of Trinidad and Tobago, TT 2018 HC 137, ¶¶ 4.3-4.4 (TT).

moment she/he may be persecuted or prosecuted. That is the threat that exists at present.²⁸⁷

The claimant, and others who express their sexual orientation in a similar way, cannot lawfully live their life, their private life, nor can they choose their life partners or create the families that they wish. To do so would be to incur the possibility of being branded a criminal. The Act impinges on the right to respect for a private and family life.²⁸⁸

The Court further held that “[t]he Act [sic] impinges on the right of the individual to equality before the law and the protection of the law.”²⁸⁹

2019

Botswana (decriminalization and protected classification): The High Court struck down the law criminalizing same-sex relations under the Constitution. It had this to say: “it is the decision of this Court that Sections 164(a); 164(c) and 165 of the Penal Code are declared ultra vires the Constitution, in that they violate Section 3 (liberty, privacy and dignity); Section 9 (privacy) and Section 15 (discrimination).”²⁹⁰

Brazil (protected classification):

In 2019, the Federal Supreme Court issued a decision in the joint judgment of ADO No. 26 and MI No. 4733 to include homophobic behaviour motivated by real or imputed sexual orientation under the provisions criminalising acts motivated by racial prejudice under Law No. 7.716. This decision is supposed to fill the legal void until the National Congress adopts a formal law on the matter.²⁹¹

Cuba (protected classification): Article 42 of the Constitution states:

All people are equal before the law, receive the same protection and treatment from the authorities, and enjoy the same rights, liberties, and opportunities, without any discrimination for reasons of sex, gender, *sexual orientation*, gender identity, age, ethnic origin, skin color, religious belief, disability, national or territorial origin, or any other personal condition or circumstance that implies a distinction injurious to human dignity.

...

²⁸⁷ *Id.* ¶ 91.

²⁸⁸ *Id.* ¶ 92.

²⁸⁹ *Id.* ¶ 94.

²⁹⁰ Letsweletse Motshidiemang v. Attorney General, MAHGB-000591-16 ¶ 226 (2019) (Bots.).

²⁹¹ ILGA, *supra* note 10, at 241.

*The violation of this principle is proscribed and is sanctioned by law.*²⁹²

Ecuador (recognition): The Constitutional Court of Ecuador rendered two decisions that recognized marriages between spouses of the same sex and that such marriages are equal to those between of the opposite sex. In Case No. 10-18-CN, the Court ruled that same sex marriages are constitutional upon consulting various Ecuadorian laws. In Case No. 11-18-CN, the Court's ruling confirmed that marriages between people of the same sex have the same rights and protections as those between heterosexual couples.

[10-18-CN]

98. Therefore, the Constitutional Court of Ecuador resolves:

1. To respond to the inquiry whether the provisions within Article 81 of the Civil Code and Article 52 Organic Law of Gestation, Identity, and Civil Data are unconstitutional with the following: in both laws, the expression “a man and a woman” and, in the first, the term “procreate.” The related judicial decisions regarding case No. 17230-2018-11800, presented before Rubén Darío Salazar Gómez y Carlos Daniel Verdesoto Rodríguez.

2. To declare, with the same effect as a sentence issued for constitutional review in the abstract, that is, with effect *erga omnes*, the substitutive and subtractive unconstitutionality, as appropriate, of the aforementioned parts of Articles 81 and 52 so that the content of these provisions are as follows:

[Civil Code] Art. 81 – Marriage is a solemn contract by which two people are united to live together and help each other.

[Organic Law of Identity Management and Civil Data]] Art. 52. Authority before whom the marriage is celebrated and registered. Marriage is the union of two people and performed and registered with the General Directorate of Civil Registry, Identification and Records. Outside Ecuadorian territory, it is performed and registered before the diplomatic or consular agent, if at least one of the spouses is Ecuadorian.

3. To call on the National Assembly to comprehensively revise the legislation so that it includes same-sex couples as spouses, with the same treatment as that granted to those of different sex.²⁹³

²⁹² CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION] art. 42 (emphasis added).

²⁹³ Corte Constitucional de Ecuador [Constitutional Court of Ecuador], REGISTRO OFICIAL, EDICIONES CONSTITUCIONALES [OFFICIAL REGISTER, CONSTITUTIONAL EDITIONS] No. 96, 10-18-CN ¶ 98 (2019) (Ecuador).

[11-18-CN]

300. In merit of the foregoing, in accordance with Article 428 of the Constitution and Article 143 of the Organic Law of Jurisdictional Guarantees and Constitutional Control, the Constitutional Court resolves:

1. To determine that Advisory Opinion OC24/17, “[Gender identity, and equality and non-discrimination for same-sex couples],” issued by the Inter-American Court of Human Rights on November 24, 2017, is an authentic and binding interpretation of the norms of the ACHR, which is part of the constitutional block to recognize and determine the scope of Ecuador’s rights.

2. To establish that there is no contradiction between the constitutional text and the conventional one, but rather they are complementary. In the most favorable interpretation of rights, the right of marriage held by heterosexual couples is complementary to the right of same-sex couples to marry. The Constitution, according to Article 67, and the American Convention of Human Rights, [. . .] interpreted by the Inter-American Court of Human Rights through Advisory Opinion OC24/17, recognize the right to marriage between [heterosexual] couples and same-sex couples.

3. To order the Tribunal to interpret the normative system in light of this sentence and order the Civil Registry to register the marriage of the plaintiffs, since a constitutional reform to Article 67 of the Constitution of the Republic of Ecuador is not necessary. Nor are prior reforms necessary, for the specific case, to Article 52 of the Organic Law on Identity Management and Civil Data, and Article 81 of the Civil Code.

4. To be notified, published, and complied with.²⁹⁴

Hong Kong (protected classification):

The present case is concerned with the conferment of financial benefits on spouses in the contexts of employment and taxation. Those benefits are conferred on the basis of marriage. The nature of the relationship between the appellant and Mr. Adams is one of same-sex marriage valid under the law of the place where it was entered into. It is a relationship which has the same characteristics of publicity and exclusivity which distinguish a heterosexual marriage.²⁹⁵

. . .

A mere relationship (whether opposite-sex or same-sex) will not have the same readily identifiable characteristics of publicity and exclusivity described above

²⁹⁴ Corte Constitucional de Ecuador [Constitutional Court of Ecuador], REGISTRO OFICIAL, EDICIONES CONSTITUCIONALES [OFFICIAL REGISTER, CONSTITUTIONAL EDITIONS] No. 6, 11-18-CN ¶ 300 (2019).

²⁹⁵ *Leung Chun Kwong v. Secretary for the Civil Service and Others*, [2019] 22 H.K.C.F.A.R. 127, ¶ 40 (H.K.).

that positively identify a same-sex married couple as being in materially the same position as an opposite-sex married couple.²⁹⁶

...

With great respect, we cannot agree with the Court of Appeal's analysis. Restricting these financial benefits to opposite-sex married couples on the ground that heterosexual marriage is the only form of marriage recognized in Hong Kong law is circular and therefore proceeds on the fallacious basis rejected by the Court in QT at [42]. It amounts to the application of a self-justifying reasoning process and denies equality to persons of different sexual orientation who are accepted to be in a relevantly analogous position. Ultimately, a line is merely drawn without any further attempt to justify it.²⁹⁷

Kosovo (protected classification):

If the criminal offense is a hate act, which is any crime committed against a person, group of persons, or property, motivated upon the race, color, gender, gender identity, language, religion, national or social origin, relation to any community, property, economic condition, sexual orientation, birth, disability or other personal status, or because of their affinity with persons who have the aforementioned characteristics, except if one of the enumerated characteristics constitutes an element of a criminal offense.²⁹⁸

...

Whoever publicly incites or publicly spreads hatred, discord and intolerance between national, racial, religious, ethnic and other groups or based on sexual orientation, gender identity and other personal characteristics, in a manner which is likely to disturb the public order shall be punished by a fine or imprisonment of up to five (5) years.²⁹⁹

...

Whoever deprives another person of his or her life because of a motivation, based upon the nationality, language, religious belief or lack of religious belief, color of skin, gender, gender identity, sexual orientation, or because of their affinity with persons who have one the aforementioned protected characteristics;³⁰⁰

...

Whoever due to the national or ethnic origin, race, religion, or because does not belong to any affiliation, or because of political beliefs or other beliefs, gender,

²⁹⁶ *Id.* ¶ 45.

²⁹⁷ *Id.* ¶ 71.

²⁹⁸ CRIMINAL CODE OF THE REPUBLIC OF KOSOVO art. 70, § 2.12.

²⁹⁹ *Id.* at art. 141, § 1.

³⁰⁰ *Id.* at art. 173, § 1.10.

disability, gender identity, sexual orientation, language, education, social status, social background, material condition, or any other personal characteristic, denies or restrict to the other the rights defined by the Constitution, Law or other provisions, other general acts or ratified international agreements, or gives privileges or favors on the basis of such a difference, shall be punished by imprisonment of up to three (3) years.^{301=ft}

Marshall Islands (protected classification): Section 106 of the Marshall Islands Gender Equality Act of 2019 implements international human rights law and prohibits discrimination based on sexual orientation³⁰² and Section 129 makes it a criminal offense³⁰³ while Section 133 makes it a civil offense.³⁰⁴

Monaco (protected classification):

Article 18 of Law No. 1.478 (2019) amended Articles 238-1 of the Penal Code (1968) to aggravate penalties for crimes motivated by the victim's sexual orientation. Article 19 also amended Article 239 of the Code to include "sexual orientation" among the aggravating circumstances for crimes committed against a spouse or any other person living under the same roof or having lived there durably.³⁰⁵

North Macedonia (protected classification):

Any discrimination based on race, skin colour, national or ethnic origin, sex, gender, sexual orientation, gender identity, belonging to a marginalised group, language, nationality, social background, education, religion or religious belief, political conviction, other beliefs, disability, age, family or marital status, property status, health status, personal capacity and social status, or any other grounds (hereinafter: discriminatory grounds) shall be prohibited.³⁰⁶

Portugal (protected classification): "Everyone has the right to housing, for themselves and their family, regardless of ancestry or ethnic origin, sex, language, territory of origin, nationality, religion, creed, political or

³⁰¹ *Id.* at art. 190, § 1.

³⁰² Gender Equality Act 2019 §§ 102, 106(2) (Marsh. Is.) (defining "intersectional discrimination" and "multiple discrimination" to include sexual orientation).

³⁰³ *Id.* at Part VI, § 129.

³⁰⁴ *Id.* at Part VI, § 133.

³⁰⁵ ILGA, *supra* note 10, at 247.

³⁰⁶ Law on Prevention and Protection Against Discrimination No. 08-2888/1 art. 5 (May 16, 2019) (N. Macedonia), reprinted in *North Macedonia: Law on Prevention and Protection Against Discrimination*, Opinion No. 915/2019 EUR. COMM'N FOR DEMOCRACY THROUGH L. (VENICE COMM'N) (Nov. 20, 2019), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2019\)040-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2019)040-e).

ideological beliefs, education, economic situation, gender, sexual orientation, age, disability or health status.”³⁰⁷

San Marino (protected classification): “Everyone is equal before the law regardless of their sex, sexual orientation, personal, economic, social, political, and religious conditions.”³⁰⁸

Taiwan (protected classification): “Two persons of the same sex may form a permanent union of intimate and exclusive nature for the purpose of living a common life.”³⁰⁹

2020

Haiti (protection): Haiti amended its penal code in 2020 to provide greater penalties for crimes motivated by discrimination on the basis of sexual orientation.³¹⁰

Taiwan (protected classification): The Constitutional Court of the Republic of China held that the right to homosexual marriage is protected by Article 7 and Article 22 of the Constitution. Article 7 provides for equal protection and Article 22 provides for human dignity. In specific:

Article 7 of the Constitution provides, “All citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law.” The five classifications of impermissible discrimination set forth in the said Article are only exemplified, neither enumerated nor exhausted. Therefore, different treatment based on other classifications, such as disability or *sexual orientation*, shall also be governed by the right to equality under the said Article.³¹¹

Sexual orientation is an immutable characteristic that is resistant to change. The contributing factors to sexual orientation may include physical and psychological elements, living experience, and the social environment. Major medical associations have stated that homosexuality is not a disease. In our country, homosexuals were once denied by social tradition and custom in the

³⁰⁷ Lei n.º 83/2019 de 3 de setembro [Law No. 83/2019 of Sept. 3] art. 2(1), <https://files.diariodarepublica.pt/1s/2019/09/16800/0001100033.pdf> (Port.).

³⁰⁸ Declaration of Citizens’ Rights and Fundamental Principles art. 4 (*as amended in 2019*), reprinted in ILGA, *supra* note 10 at 189 (unofficial translation) (San Marino).

³⁰⁹ Act for Implementation of J.Y. Interpretation No. 748 art. 2 (2019) (Taiwan).

³¹⁰ Sandra Lemaire, et al., *In Haiti, More LGBT-friendly Penal Code Prompts Outcry from Pulpit*, VOICE AM. (July 23, 2020), https://www.voanews.com/a/americas_haiti-more-lgbt-friendly-penal-code-prompts-outcry-pulpit/6193297.html.

³¹¹ Press Release, Constitutional Court, Republic of China (Taiwan), Press Release On the Same-Sex Marriage Case (May 24, 2017) ¶ 5 at 2.

past. As a result, they have long been locked in the closet and suffered various forms of de facto or de jure exclusion or discrimination. Besides, homosexuals, because of the demographic structure, have been a discrete and insular minority in the society. Impacted by stereotypes, they have been among those lacking political power for a long time, unable to overturn their legally disadvantaged status through ordinary democratic process. Accordingly, in determining the constitutionality of different treatment based on sexual orientation, a heightened standard shall be applied.³¹²

Tuvalu (protected classification): Prohibits discrimination on the basis of: “gender, sex, pregnancy, marital status, sexual orientation or family responsibilities.”³¹³

Barbados (protected classification):

For the purposes of this Act, a person discriminates against another person where:

- a. the person, on a ground specified in subsection (2), directly or indirectly, whether intentionally or not, makes a distinction, creates an exclusion or shows a preference, the intent or effect of which is to subject the other person to any disadvantage, restriction or other detriment; or
- b. the person, directly or indirectly, whether intentionally or not, subjects the other person to any disadvantage, restriction or other detriment in the following circumstances:
 - i. a ground specified in subsection (2) applies to the other person;
 - ii. as a consequence of the ground the other person does not comply, or is not able to comply, with a particular requirement of the first-mentioned person;
 - iii. the nature of the requirement is such that a substantially higher proportion of persons to whom the ground does not apply complies, or is able to comply, with the requirement; and
 - iv. the requirement is not reasonable in the circumstances.

(2) The grounds referred to in subsection (1) are:

- a) race;
- b) origin;
- c) political opinion;
- d) trade union affiliation;

³¹² *Id.* ¶ 6 at 2-3.

³¹³ Labour & Employment Relations Act 2017 §50(2)(b) (Tuvalu).

- e) colour;
- f) creed;
- g) sex;
- h) sexual orientation;
- i) social status;
- j) marital status;
- k) domestic partnership status;
- l) pregnancy;
- m) maternity;
- n) family responsibility;
- o) medical condition;
- p) disability;
- q) age;
- r) physical feature; and
- s) any characteristic which appertains generally or is generally imputed to a person . . . ³¹⁴

Gabon (decriminalization): “On 29 June 2020 the Parliament removed the provision in the Penal Code that criminalises homosexuality, following a lower house vote on 23 June.”³¹⁵

Scotland (protected classification): The Parliament of Scotland passes sweeping reforms to the country’s hate crimes laws, expanding laws already “in place to protect certain groups,” including protections based on an individual’s sexual orientation, gender identity, and sex.³¹⁶ The Hate Crime and Public Order (Scotland) Bill was “created to make sure that the groups covered by the Bill are protected from hate crimes. It also makes sure that the laws that provide that protection are fit for the 21st century.”³¹⁷

³¹⁴ Employment (Prevention of Discrimination) Act, 2020 § 3(1)-(2) (Barbados).

³¹⁵ *Gabon: Decriminalization of Same-Sex Relations a Welcome Step For Equality, Says UN expert*, U.N. OFF. HIGH COMM. ’R (July 2, 2020), [https://www.ohchr.org/en/news/2020/07/gabon-decriminalisation-same-sex-relations-welcome-step-equality-says-un-expert#:~:text=GENEVA%20\(1%20July%202020\)%20%E2%80%93,house%20vote%20on%2023%20June](https://www.ohchr.org/en/news/2020/07/gabon-decriminalisation-same-sex-relations-welcome-step-equality-says-un-expert#:~:text=GENEVA%20(1%20July%202020)%20%E2%80%93,house%20vote%20on%2023%20June).

³¹⁶ *Hate Crime and Public Order (Scotland) Bill: Overview*, SCOTTISH PARLIAMENT, <https://web.archive.org/web/20201001103502/https://beta.parliament.scot/bills/hate-crime-and-public-order-scotland-bill>.

³¹⁷ *Id.*

South Africa (protected classification): The Parliament of the Republic of South Africa repealed section 6 of the 2006 Civil Union Act, which had previously allowed marriage officers to opt out of performing same-sex marriages on religious grounds: “A marriage officer . . . may in writing inform the Minister that he or she objects on the ground of conscience, religion and belief to solemnising a civil union between persons of the same sex, whereupon that marriage officer shall not be compelled to solemnise such civil union.”³¹⁸ “Section 6 of the Civil Union Act, 2006 . . . is hereby repealed.”³¹⁹

United States (protected classification): In *Bostock v. Clayton County*, the United States Supreme Court held:

[I]n Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.³²⁰

2021

Angola (decriminalization and protected classification):

Parliamentarians in the southern African nation voted on Wednesday, according to news reports, to remove the so-called ‘vices against nature’ provision, in effect, decriminalizing all same-sex conduct, and established a new penal code which will prohibit discrimination.

Speaking in Geneva on Friday, the Spokesperson for the UN High Commissioner for Human Rights welcomed the development. Rupert Colville said that the Government has also prohibited discrimination against people based on sexual orientation.³²¹

2022

Taiwan (protected classification): Taiwan enacted the Gender Equality in Employment Act, which provides: “Employers shall not discriminate

³¹⁸ Civil Union Act 17 of 2006 § 6 (S. Afr.).

³¹⁹ Civil Union Amendment Act 17 of 2020 § 1 (S. Afr.).

³²⁰ 590 U.S. 644, 650-52 (2020).

³²¹ *UN Welcomes Angola’s Repeal of Anti-Gay Law, and Ban on Discrimination Based on Sexual Orientation*, UN NEWS (Jan. 25, 2019), <https://news.un.org/en/story/2019/01/1031292#:~:text=In%20a%20move%20to%20embrace,independence%20from%20Portugal%20in%201975>.

against applicants or employees because of their gender or sexual orientation in the course of recruitment, screening test, hiring, placement, assignment, evaluation and promotion.”³²²

3. *UN Instruments*

State law is not the only area that has seen a puissant shift toward supporting sexual orientation as a protected class for the purposes of persecution as a crime against humanity. In the early-2000’s, state initiatives under the UN Charter began to incorporate LGBTQ+ rights into international instruments – namely a 2002 UN resolution on the death penalty and a 2002 General Assembly resolution on extrajudicial and arbitrary executions. The death penalty resolution states:

[t]o ensure that the notion of “most serious crimes” does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent acts such as financial crimes, non-violent religious practice or expression of conscience and *sexual relations between consenting adults*;³²³

The resolution on extrajudicial and arbitrary detentions went further. It “became the first official text of the United Nations to acknowledge the obligation of member states to protect individuals on the basis of their ‘sexual orientation.’”³²⁴ It also calls for states to bring the perpetrator of crimes targeting sexual orientation to justice, which is of paramount importance for the present purposes. In this respect, it acts as a shield and a sword for the protection of LGBTQ+ rights: it shields sexual minorities from persecution and strikes out a sword to bring perpetrators to justice. It:

[r]eaffirms the obligation of Governments to ensure the protection of the inherent right to life of all persons under their jurisdiction and calls upon Governments concerned to investigate promptly and thoroughly cases of killings committed in the name of passion or in the name of honour, all killings committed for any discriminatory reason, including sexual orientation . . . [A]nd to bring those responsible to justice before a competent, independent and impartial judiciary, and to ensure that such killings . . . are neither condoned nor sanctioned by government officials or personnel.³²⁵

The inclusion of sexual orientation faced some resistance; In 2010, a group of states successfully removed the reference to sexual orientation.³²⁶

³²² Act of Gender Equality in Employment art. 7 (2022) (Taiwan).

³²³ Human Rights Council Res. 2002/77, U.N. Doc. E/CN.4/Res/2002/77, ¶ 4(b) (Apr. 25, 2002).

³²⁴ ALSTON & GOODMAN, *supra* note 71, at 227.

³²⁵ Human Rights Council Res. 2003/53, U.N. Doc. E/Cn.4/Res/2003/53, ¶ 5 (Apr. 24, 2003).

³²⁶ ALSTON & GOODMAN, *supra* note 71, at 229-30.

Yet, soon after, a United States-sponsored proposal successfully reinserted “sexual orientation” in the text.³²⁷

These were matters of strategy: inserting sexual orientation protections into instruments dealing primarily with a different subject matter. It was not until the mid-2000s that state resolutions dealing primarily with sexual orientation began to build steam.³²⁸ In 2006, 54 states issued a Joint Statement at the Human Rights Council calling for attention to be paid to violence based on sexual orientation.³²⁹ This was followed by a 2008 resolution by 66 states to the General Assembly calling for robust protection of LGBTQ+ rights, once again through a shield protecting such rights and a sword to punish those who carry out deprivations of such rights.³³⁰ In particular, the statement:

[u]rge[s] States to take all the necessary measures, in particular legislative or administrative, to ensure that sexual orientation or gender identity may under no circumstances be the basis for criminal penalties, in particular executions, arrests or detention[.]

and:

[u]rge[s] States to ensure that human rights violations based on sexual orientation or gender identity *are investigated and perpetrators held accountable and brought to justice*.³³¹

During the Human Rights Council’s 2011 session, it adopted, for the first time, a resolution aimed directly at “[h]uman rights, sexual orientation and gender identity.”³³² The resolution condemned violence based on sexual

³²⁷ *Id.*

³²⁸ The United States initially refused to sponsor the measure citing federalism concerns. It then officially joined the Statement in 2009, within the first 100 days of the Obama Administration. *Id.* at 232.

³²⁹ Specifically: Albania, Andorra, Argentina, Australia, Austria, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Chile, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Guatemala, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, Montenegro, Netherlands, New Zealand, Norway, Panama, Peru, Poland, Portugal, the former Yugoslav republic of Macedonia, the Republic of Korea, the Republic of Moldova, Romania, Serbia, Spain, Slovakia, Slovenia, Sweden, Switzerland, Timor-Leste, Ukraine, the United Kingdom, the United States of America, and Uruguay. Wegger Chr. Strømmen, Ambassador & Permanent Representative of Norway to the U.N., Joint Statement (Dec. 1, 2006), <https://arc-international.net/global-advocacy/sogi-statements/2006-joint-statement/>.

³³⁰ Permanent Representatives of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the United Nations, Letter dated 18 December 2008 from the Permanent Representatives of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the United Nations addressed to the President of the General Assembly, U.N. Doc. A/63/635 (Dec. 22, 2008).

³³¹ *Id.* (emphasis added).

³³² Human Rights Council Res. 17/19, U.N. Doc. A/HRC/Res/17/19, at 1 (Jul. 14, 2011).

orientation³³³ and requested the UN High Commissioner for Human Rights to conduct a study into such rights violations, determine how human rights law can remedy them,³³⁴ and convene a panel discussing the report at its 2012 session.³³⁵ The resultant report was a wide-ranging call to justice for LGBT rights in virtually all areas of life. Some areas even picked up the charged criminal law language of persecution. For example, under the duty of *nonrefoulement* in refugee law, whereby a state may not return an individual to a state where her life or freedom would be threatened on account of membership in a “particular social group,” “individuals who fear persecution on account of their sexual orientation or gender identity may be considered members of ‘a particular social group.’”³³⁶

In 2014, the Human Rights Council once again asked the High Commissioner to “update the 2011 report with a view to sharing good practices and ways to overcome violence and discrimination, in application of existing international human rights law and standards.”³³⁷ The resultant resolution issued in May 2015 provides, in pertinent part:

71. Three States (Mozambique, Palau and Sao Tome and Principe) have decriminalized consensual same-sex conduct, and several others have accepted recommendations to do so. The United Kingdom and several states in Australia have adopted measures to expunge the criminal records of individuals convicted of consensual homosexuality-related offences.”

72. Fiji has added an anti-discrimination clause in its Constitution prohibiting discrimination based on sexual orientation, gender identity and gender expression, and Malta has added gender identity to the list of prohibited grounds of discrimination included in its Constitution. Anti-discrimination laws have also been strengthened in several States, including Chile, Cuba, Georgia, the Republic of Moldova, Montenegro, as well as in Australia and Malta, which became the first countries to expressly prohibit discrimination against intersex persons.”

³³³ *Id.* (“Expressing grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity.”)

³³⁴ *Id.* ¶ 1.

³³⁵ *Id.*, at 2, ¶¶ 2-4.

³³⁶ International Covenant on Civil and Political Rights art. 1(A)(2), Dec. 16, 1966, 999 U.N.T.S. 171; *see* Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1967.

As an example of such state, *see, e.g., Migration Act 1985* (Cth) s 5j, ¶¶ 1, 3(c)(vi) (Austral.), defining a “well-founded fear of persecution,” with specific protections for the sexual orientation or gender identity rights of asylum seekers. The United States has similarly adopted such language. *See UNHCR’s Views on Asylum Claims based on Sexual Orientation and/or Gender Identity: Using international law to support claims from LGBTI individuals seeking protection in the U.S.*, UNHRC ASYLUM LAWYERS PROJECT at 2 (Nov. 2016), <https://www.unhcr.org/us/sites/en-us/files/legacy-pdf/5829e36f4.pdf>.

³³⁷ Human Rights Council Res. 27/32, U.N. Doc. A/HRC/Res/27/32, at 2 (Oct. 2, 2014).

73. Legal recognition of same-sex relationships was introduced in at least 12 additional States, either in the form of civil marriage (Brazil, Denmark, France, Luxembourg, New Zealand, United Kingdom, Uruguay) or civil unions (Chile, Croatia, Ireland, Liechtenstein, Malta). Argentina, Denmark and Malta established new laws that allow transgender persons to obtain legal recognition of their gender identity on the basis of self-determination, while Australia (Australian Capital Territory), the Netherlands and Sweden removed abusive sterilization, forced treatment and divorce requirements. Argentina furthermore established access to free gender-affirming treatment for those who wish to receive such treatment. Nepal and Bangladesh created a legal “third gender” category, and new passport policies in Australia and New Zealand allow individuals to choose male, female or indeterminate gender markers. The Supreme Court of India affirmed the right of transgender persons to determine their own gender and called upon the Government to ensure equal rights for transgender persons, including in access to health care, employment and education. Malta became the first State to prohibit sex-assignment surgery or treatment on intersex minors without their informed consent.

74. Other initiatives include the development of a new judicial protocol to guide adjudication of cases involving human rights violations on grounds of sexual orientation and gender identity (Mexico); implementation of employment-related anti-discrimination protections (Bolivia (Plurinational State of), Botswana); new guidance materials and training for police, teachers and/or other officials (Canada, Colombia, Croatia, Denmark, Montenegro, Norway, Mexico, Serbia, Spain); expansion of anti-bullying programmes and other anti-discrimination measures in schools (Albania, Australia, Brazil, Canada, Taiwan province of China, Ireland, Portugal, Sweden, United Kingdom), and annual reporting on discrimination and violence in schools (Brazil); LGBT suicide prevention programmes (Belgium, Japan, United Kingdom); a human rights-based comprehensive sexuality education curriculum for schools (South Africa); scholarships for transgender persons who enroll in vocational training (Brazil); construction of homeless shelters for LGBT youth (Albania, United States); and no longer requiring external corroboration of sexual orientation or gender identity for LGBT asylum-seekers (Italy, Portugal).

75. National plans of action were developed to tackle discrimination against LGBT persons in Brazil, Canada (Quebec), France, Norway, South Africa and the United Kingdom, and, in Uruguay, a plan to combat the social exclusion of transgender persons. Several States also launched national public education campaigns to counter homophobia and transphobia (Argentina, Australia, Belgium (Flanders), Brazil, Colombia, Cuba, Montenegro, Serbia, South

Africa, United Kingdom, Uruguay). Mexico has officially designated 17 May as the National Day against Homophobia.³³⁸

This was followed up by another Human Rights Council report in 2017, which provides:

States are encouraged to ratify the core international human rights treaties (if they have not yet done so) and to implement them fully, including in regard to respect for sexual orientation and gender identity, in cooperation with partners. This requires a range of human rights-sensitive measures, such as laws, policies, programmes, practices, case enforcement, mechanisms and personnel, resources (material and non-material), information and monitoring, education and capacity- building, accountability and remedies, and a participatory process and broad mobilization and networking open to civil society, with space for dialogue and reforms.³³⁹

And, most recently, a 2021 report provides:

The Independent Expert recommends that States put in place measures to identify human rights violations carried out on the basis of sexual orientation and gender identity, accompanied by fact-finding and, if appropriate, acknowledgement of responsibility and applicable reparation measures conducive to redress.³⁴⁰

During this period, the UN High Commissioner for Human Rights also issued a report entitled *Living Free and Equal: What States are Doing to Tackle Violence and Discrimination Against Lesbian, Gay, Bisexual, Transgender and Intersex People* in 2016. It provides:

United Nations, regional and national human rights bodies have identified critical gaps in the implementation of international standards to address these and related violations, and have issued a plethora of recommendations, including, among them, the repeal of discriminatory legislation and measures to protect LGBT and intersex people from discrimination, violence, torture and ill treatment, and safeguard rights to freedom of expression, association and peaceful assembly. Increasingly, Governments are taking action – whether in the form of legislation and policy measures or through targeted social and education programmes. At the United Nations Human Rights Council, more than one hundred countries from all regions around the world have voluntarily

³³⁸ Rep. of the U.N. High Comm'r. for Hum. Rts., *Discrimination and violence against individuals based on their sexual orientation and gender identity: Report of the Office of the United Nations High Commissioner for Human Rights*, U.N. Doc. A/HRC/29/23, ¶¶ 71-75 (2015).

³³⁹ *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity* U.N. Doc. A/HRC/35/36, ¶ 66(c), 19 (Apr. 19, 2017).

³⁴⁰ Victor Madrigal-Borloz, *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, U.N. Doc. A/HRC/47/27, ¶ 90, (Jun. 2, 2021). Human Rights Council

committed to take measures to end violence and discrimination linked to sexual orientation and gender identity, based on recommendations generated during the first two cycles of the Universal Periodic Review.³⁴¹

The Committee on Economic, Social, and Cultural Rights also became active in the field beginning in the early 2000s, issuing a general comment in 2000 which included the language:

By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health.³⁴²

This was followed up by another general comment in 2003, providing:

The obligation of States parties to guarantee that the right to water is enjoyed without discrimination (art. 2, para. 2), and equally between men and women (art. 3), pervades all of the Covenant obligations. The Covenant thus proscribes any discrimination on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to water.³⁴³

Moreover, the Committee on the Rights of the Child includes sexual orientation as a protected class as evidenced by a number of general comments in 2003:

States parties have the obligation to ensure that all human beings below 18 enjoy all the rights set forth in the Convention without discrimination (art. 2), including with regard to “race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other

³⁴¹ *Living Free and Equal, What States Are Doing to Tackle Violence and Discrimination Against Lesbian, Gay, Bisexual, Transgender, and Intersex People* (2016), UN OHCHR <https://www.ohchr.org/sites/default/files/Documents/Publications/LivingFreeAndEqual.pdf>.

³⁴² COMMITTEE ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 14 (2000)*, U.N. Doc. E/C.12/2000/4, ¶ 18 (Aug. 11, 2000).

³⁴³ COMMITTEE ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights General Comment No. 15*, U.N. Doc. E/C.12/2002/11, ¶ 13, (January 20, 2003).

status. These grounds also cover adolescents' sexual orientation and health status (including HIV/AIDS and mental health).³⁴⁴

And,

Of particular concern is gender-based discrimination combined with taboos or negative or judgmental attitudes to sexual activity of girls, often limiting their access to preventive measures and other services. Of concern also is discrimination based on sexual orientation. In the design of HIV/AIDS-related strategies, and in keeping with their obligations under the Convention, States parties must give careful consideration to prescribed gender norms within their societies with a view to eliminating gender-based discrimination as these norms impact on the vulnerability of both girls and boys to HIV/AIDS. States parties should, in particular, recognize that discrimination in the context of HIV/AIDS often impacts girls more severely than boys.³⁴⁵

4. *Regional Instruments*

Apart from the UN, there also exist regional organizations that address issues of sexual orientation in ways that classify sexual orientation as a protected classification. The Organization of American States, for example, passed a resolution on Human Rights, Sexual Orientation, and Gender Identity in 2008 providing that the organization:

RESOLVES:

To express concern about acts of violence and related human rights violations committed against individuals because of their sexual orientation and gender identity.

To instruct the Committee on Juridical and Political Affairs (CAJP) to include on its agenda, before the thirty-ninth regular session of the General Assembly, the topic of "Human rights, sexual orientation, and gender identity.

To request the Permanent Council to report to the General Assembly at its thirty- ninth regular session on the implementation of this resolution, the execution of which shall be subject to the availability of financial resources in the program-budget of the Organization and other resources.³⁴⁶

Similarly, the Inter-American Commission on Human Rights passed a resolution dealing with "Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas" in 2015, wherein it provides:

³⁴⁴ Office of the High Commissioner for Human Rights *CRC General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, ¶ 6, U.N. Doc. CRC/GC/2003/4, (Jul. 1, 2003).

³⁴⁵ Committee on the Rights Of The Child, *General Comment No. 3 (2003) HIV/AIDS and the rights of the child*, ¶ 8 U.N. Doc. CRC/GC/2003/3 (Mar. 17, 2003).

³⁴⁶ U.N. Doc. AG/Res. 2435 (XXXVIII-O/08), *Human Rights, Sexual Orientation, and Gender Identity, adopted at Fourth Plenary Session*, ¶ 3 (Jun. 3, 2008).

The Inter-American Commission on Human Rights (hereinafter “Inter-American Commission,” “the Commission,” or “IACHR”) is concerned about the high levels of violence against lesbian, gay, bisexual, trans, and intersex (LGBTI) persons, or those perceived as such in the Americas and the lack of an efficient response from the States. This is evidenced by the lack of adoption of effective measures to prevent, investigate, sanction and provide reparations to acts of violence committed against LGBTI persons, under the due diligence standard. Even though the IACHR acknowledges some steps forward in some Member States of the Organization of American States (OAS), violence against LGBTI persons is pervasive throughout the Americas.³⁴⁷

Moreover, regional instruments are not limited to the Americas. The African Commission on Human Rights and People’s Right passed a resolution in 2014 on “Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity.” It provides that the Commission is:

[d]eeply disturbed by the failure of law enforcement agencies to diligently investigate and prosecute perpetrators of violence and other human rights violations targeting persons on the basis of their imputed or real sexual orientation or gender identity;

1. Condemns the increasing incidence of violence and other human rights violations, including murder, rape, assault, arbitrary imprisonment and other forms of persecution of persons on the basis of their imputed or real sexual orientation or gender identity;
2. Specifically condemns the situation of systematic attacks by State and non-state actors against persons on the basis of their imputed or real sexual orientation or gender identity;
3. Calls on State Parties to ensure that human rights defenders work in an enabling environment that is free of stigma, reprisals or criminal prosecution as a result of their human rights protection activities, including the rights of sexual minorities; and
4. Strongly urges States to end all acts of violence and abuse, whether committed by State or non-state actors, including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities, ensuring proper investigation

³⁴⁷ INTER-AMERICA COMMISSION ON HUMAN RIGHTS, Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, OAS/Ser.L/V/II.rev.1, Doc. 36, ¶ 1, at 11, 12 November 2015.

and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims.³⁴⁸

The above resolution is particularly significant given that African states make up a large percentage of those states that continue to have laws criminalizing individuals based on their sexual orientation.³⁴⁹

Further, there have been joint dialogues between regional bodies, such as the 2016 African Commission on Human and Peoples' Rights, Inter-American Commission on Human Rights, and the UN's, *Ending violence and other human rights violations based on sexual orientation and gender identity: A joint dialogue of the African Commission on Human and Peoples' Rights, Inter-American Commission on Human Rights and the United Nations*.³⁵⁰

The instrument reads in pertinent part:

On 3 November 2015, a joint dialogue on sexual orientation and gender identity was held between the African Commission on Human and Peoples' Rights (African Commission or ACHPR), Inter-American Commission on Human Rights (Inter-American Commission or IACHR), and United Nations (UN) human rights mechanisms in Banjul, The Gambia, ahead of the 57th ordinary session of the African Commission.

Participants highlighted that no 'new' or specific rights were being advanced in any of the three systems in relation to LGBTI persons, but rather the application and elaboration of existing fundamental human rights standards in relation to a specific group. This approach is in line with what has been done in relation to other groups – not referred to in name in the relevant instruments – that face particular sets of human rights violations. All three mechanisms had interpreted the principle of non-discrimination as extending to all persons, including LGBT persons and other groups that face discrimination. 15 Participants emphasised that the principles and notions of human dignity and personhood, universality, nondiscrimination and equality before the law are common foundational and crosscutting principles in all three systems. As such these common values and principles were highlighted multiple times throughout the joint dialogue. 16 Participants further discussed the range of State obligations under international and regional human rights law. This includes the obligation to respect, to protect

³⁴⁸ African Commission on Human and Peoples' Rights, *Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity*, ACHPR/Res.275(LV) (2014), <https://achpr.au.int/en/adopted-resolutions/275-resolution-protection-against-violence-and-other-human-rights-violations>.

³⁴⁹ See, e.g., *infra* Part III(a)(ii).

³⁵⁰ *Ending violence and other human rights violations based on sexual orientation and gender identity: A joint dialogue of the African Commission on Human and Peoples' Rights, Inter-American Commission on Human Rights and the United Nations*, PRETORIA U. L. PRESS ¶ 1, at 10 (2016), https://www.ohchr.org/sites/default/files/Documents/Issues/Discrimination/Endingviolence_ACHPR_IACHR_UN_SOGI_dialogue_EN.pdf.

and to fulfil human rights, and the obligation to exercise due diligence including in preventing human rights violations, in investigating, prosecuting and providing remedy for human rights violations, and in creating an enabling environment for the effective enjoyment of all human rights and the work of human rights defenders, without discrimination. (citation needed).

B. NGOs

Finally, NGOs have been recognized as having a hand to play in the formation of international law.³⁵¹ Although they are not formal state bodies, NGOs can influence state behavior and collect sources that formal lawmaking bodies may use in their decision-making. Two documents stand out as advancing the rights of LGBTQ+ individuals in international law: *The International Commission of Jurists, Sexual Orientation and Gender Identity in Human Rights Law: References to Jurisprudence and Doctrine of the United Nations Human Rights System* in 2010, and the widely esteemed *Yogyakarta Principles plus 10 (YP+10)* report. According to the touchstone of sources for international law laid out in Article 38 of the International Court of Justice, “the teachings of the most highly qualified publicists of the various nations” can constitute a subsidiary source of law.³⁵² In terms of collecting sources, *The International Commission of Jurists* report:

is a comprehensive collection of jurisprudence, general comments, concluding observations, and reports from human rights treaty bodies and independent experts (also known as Special Procedures) of the UN Charter-based system. In addition, it includes speeches and press releases from the Office of the High Commissioner for Human Rights; the Joint Statement on Human Rights, Sexual Orientation and Gender Identity, signed by 66 States and presented to the General Assembly in December 2008; and excerpts from the UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity.

³⁵¹ “The products of international bodies engaged in the codification and development of international law may provide a useful resource in this regard. Such collective bodies include the Institute of International Law (*Institut de Droit international*) and the International Law Association, as well as international expert bodies in particular fields. The value of each output needs to be carefully assessed in the light of the mandate and expertise of the body concerned, the care and objectivity with which it works on a particular issue, the support a particular output enjoys within the body and the reception of the output by States.” Int’l Law Comm’n, Rep. on the work of its Sixty-Eighth Session, U.N. Doc. A/71/10, at 112 (2016).

³⁵² Statute of the International Court of Justice art. 38, ¶ 1(d), Oct. 24, 1945, 33 U.N.T.S 933; see also Fuad Zarbiyev, *On the Judge Centredness of the International Legal Self*, 32 EUR. J. INT’L L. 1139, 1141 (2021); Sir Michael Wood, Member of the U.N. Int’l L. Comm’n, 2014 Jonathan J. Charney Distinguished Lecture in Public International Law at Vanderbilt University Law School, *International Organizations and Customary International Law*, 48 VAND. J. TRANSNAT’L L. 609, 612 (2015); Aldo Zammit Borda, *A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals*, 24 EUR. J. INT’L L. 649, 650–51 (2013).

This UN compilation covers the time period January 2007 through March 2010.³⁵³

One of the ICJ's most influential projects is the *YP+10*.³⁵⁴ The original Yogyakarta Principles are the product of international experts convening in 2006 to set out principles relating to sexual orientation and gender identity in international law, which “*affirm* binding international legal standards with which all states must comply.”³⁵⁵ The *YP+10* is a 2017 report building on the 2006 document. The Principles are directly based upon various bodies and sources of IHRL, including the International Covenant of Civil and Political Rights [ICCPR] and the Universal Declaration of Human Rights [UDHR].³⁵⁶

The Principles pass muster to be recognized as a source of international law, given the extent to which States have adopted or otherwise relied upon them in the formation of their domestic laws. For example, the Federal Commonwealth of Australia's Human Rights Commission (“Aus. H.R.C.”) has repeatedly cited to, or otherwise relied upon, the Yogyakarta Principles in informing its Sexual Orientation and Gender Identity [SOGI]-rights policies, and as a means of informing the general public of its efforts and policies as recently as 2011.³⁵⁷ The “SOGI” acronym is used by several international human rights bodies, including the UN's High Commissioner for Refugees³⁵⁸ and the Aus. H.R.C., to reflect the broad identities and

³⁵³ *Sexual orientation and gender identity in human rights law, references to jurisprudence and doctrine of the United Nations human rights system – 4th edition*, INT'L COMM'N JURISTS (2010), <https://www.icj.org/sexual-orientation-and-gender-identity-in-human-rights-law-references-to-jurisprudence-and-doctrine-of-the-united-nations-human-rights-system-4th-edition/>.

³⁵⁴ See, e.g., *About The Yogyakarta Principles*, YOGYAKARTA PRINCIPLES, <http://yogyakartaprinciples.org/principles-en/about-the-yogyakarta-principles/> (“The Yogyakarta Principles are a set of principles on the application of international human rights law in relation to sexual orientation and gender identity.”).

³⁵⁵ *Id.*

³⁵⁶ See, e.g., David Brown, *Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles*, 31 MICH. J. INT'L L. 821, 833 (2010).

³⁵⁷ See, e.g., *Sexual Orientation, Gender Identity & Intersex Rights Snapshot Report*, AUSTRAL. HUM. RIGHTS COMM'N 9 (2014) [hereinafter AUSTRAL. H.R.C., *Snapshot*]; *Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination*, AUSTRAL. HUM. RIGHTS COMM'N 8 (2011).

³⁵⁸ See U.N. High Comm'r for Refugees, *Guidelines on international Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, ¶ 8, at 3 (2012), <https://www.unhcr.org/509136ca9.pdf> [hereinafter UNHCR, *Guidelines (I.P. 9)*]. The High Commissioner, as it relates to SOGI-rights and the use of the acronym, noted that: “These Guidelines are intended to be inclusive of and relevant to the range of claims relating to *sexual orientation and/or gender identity*. The concepts of sexual orientation and gender identity are outlined in the Yogyakarta Principles and this terminology is also used for the purposes of these Guidelines.” *Id.* (emphasis added). Furthermore, the High Commissioner noted: (A) that “[s]exual orientation and gender identity are broad concepts which create space for self-identification.”; and (B) that “[w]hile for most people sexual

experiences of LGBTQ+ persons. Thus, in practice, the term “SOGI” is often seen to be synonymous with—or, at times, a broader representation of—the traditional “LGBTQ,” “LGBTI,” or similar acronyms.³⁵⁹ In its 2014 “Snapshot Report,” the Aus. H.R.C., relying primarily on Principle 3,³⁶⁰ stated that,

[t]he Yogyakarta Principles are not legally binding themselves, but are an interpretation of already binding agreements from the viewpoint of sexual orientation and gender identity. Therefore, *the Yogyakarta Principles are persuasive in shaping our understanding of how existing binding human rights obligations apply and relate to people who are sex and gender diverse.*³⁶¹

And, in 2014, the Supreme Court of India issued its judgment in the matter of *National Legal Services Auth. v. Union of India, et al.*³⁶² The Court adopted the Yogyakarta Principles explicitly in holding that under the Constitution of India, transgendered individuals are considered, entitled to be, and recognised as a “third gender,” thereby decriminalizing any and all domestic laws which discriminated against transgendered persons.³⁶³ Moreover, the Court held that such discriminatory actions violated the well-established principles of IHRL, including the right to freedom of equality and expression, privacy, and healthcare.³⁶⁴ The Court further held, in relation to—and in adopting the Yogyakarta Principles as applicable to domestic law, in accordance with the Constitution of India—that the Principles were developed by “[a] distinguished group of human rights experts” from the International Commission of Jurists and International Service for Human Rights;³⁶⁵ that the Principles reflected the ICCPR, specifically Article 17’s prohibitions on discrimination; and that the Principles “address a broad range of human rights standards and their application to sexual orientation gender

orientation or gender identity are determined at an early age, for others they may continue to evolve across a person’s lifetime.” *Id.* ¶ 9.

³⁵⁹ As is the case with the various forms of LGBTQ+ acronyms used in the context of self-identification based on sexual orientation and/or gender identity, which have themselves developed and expanded overtime (e.g., LGBT, LGBTQI, to LGBTQIA+), the Australian Human Rights Commission has expanded “SOGI” rights to include Intersex persons; thus, preferring the term “SOGII” (Sexual Orientation and/or Gender Identity and Intersex). *See, e.g., SOGII Rights*, AUSTRL. HUM. RTS. COMM’N, <https://humanrights.gov.au/our-work/lgbti/projects/sogii-rights>.

³⁶⁰ *See* AUSTRL. H.R.C., *Snapshot*, *supra* note 357 (quoting Yogyakarta Principles, Principle 3, *The Right to Recognition Before the Law*).

³⁶¹ *Id.*

³⁶² *National Legal Services Auth. v. Union of India*, AIR 2014 SC 1863 (2014) ¶¶ 22–24 (India).

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Id.* ¶ 21.

identity.”³⁶⁶ The Court then directly cited and quoted Principles 1,³⁶⁷ 2,³⁶⁸ 3,³⁶⁹ 4,³⁷⁰ 6,³⁷¹ 9,³⁷² 18,³⁷³ and 19.³⁷⁴ Furthermore, the Court noted that “UN bodies, Regional Human Rights Bodies, National Courts, Government Commissions and the Commissions for Human Rights, Council of Europe, etc., have endorsed the [Principles] and *have considered them an important tool* for identifying the obligations of States to respect, protect and fulfill the human rights of all persons, *regardless of their gender identity.*”³⁷⁵

As the Supreme Court of India noted, the UN itself has relied upon the Principles and incorporated them into official reports and other works from various UN bodies. One of the most powerful and important examples of such reliance came in the Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, which concluded that:

[T]he process leading to the Yogyakarta Principles, and their update, followed an interdisciplinary standard identification methodology, and focused on treaty law, international custom, national practice, judicial decisions and doctrine, *many of which are referenced in the present report and all of which – pursuant to Article 38 (1) of the Statute of the International Court of Justice – are among the sources of international law.*³⁷⁶

³⁶⁶ *Id.*

³⁶⁷ *Id.* ¶ 22 (quoting The Yogyakarta Principles, Principle 1, *The Right to the Universal Enjoyment of Human Rights*).

³⁶⁸ *Id.* (quoting The Yogyakarta Principles, Principle 2, *The Rights of Equality and Non-Discrimination*).

³⁶⁹ *Id.* (quoting The Yogyakarta Principles, Principle 3, *The Right to Recognition Before the Law*).

³⁷⁰ *Id.* (quoting The Yogyakarta Principles, Principle 4, *The Right to Life*).

³⁷¹ *Id.* (quoting The Yogyakarta Principles, Principle 6, *The Right to Privacy*).

³⁷² *Id.* (quoting The Yogyakarta Principles, Principle 9, *The Right to Treatment With Human Dignity While In Detention*).

³⁷³ *Id.* (quoting The Yogyakarta Principles, Principle 18, *Protection from Medical Absues*).

³⁷⁴ *Id.* (quoting The Yogyakarta Principles, Principle 19, *The Right to Freedom of Opinion and Expression*).

³⁷⁵ *Id.* ¶ 23 (emphasis added). The Supreme Court of India then cites to a 2009 report of the U.N. Commission on Economic, Social and Cultural Rights, incorporating the Principles (citation omitted). As an example of one such report from a UN body, referenced by the Supreme Court of India, *see, e.g.*, UNHCR, *Guidelines (I.P. 9)*, *supra* note 358, ¶ 7 (“The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity were adopted in 2007 by a group of human rights experts and, although not binding, reflect well-established principles of international law. They set out the human rights protection framework applicable in the context of sexual orientation and/or gender identity.”).

³⁷⁶ Hum. Rights Comm’n, Report of the Independent Expert (Victor Madrigal-Borloz) on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, U.N. Doc. A/HRC/47/27, at 9-10 (2021) (emphasis added).

The Principles affirm, among other things, the rights to equality and non-discrimination,³⁷⁷ including that the “law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination”³⁷⁸ and calls on states to “[a]mend any legislation, including criminal law, to ensure its consistency with the universal enjoyment of all human rights.”³⁷⁹ More specifically, it called upon states to “[r]epeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity.”³⁸⁰ It also called on states to “[a]dopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity.”³⁸¹

Perhaps the most powerful principles for present purposes are Principles 30 and 33:

Principle 30:³⁸² Everyone, regardless of sexual orientation, gender identity, gender expression or sex characteristics, has the right to State protection from violence, discrimination and other harm, whether by government officials or by any individual or group.

STATES SHALL:

- A) Exercise due diligence to prevent, investigate, prosecute, punish and provide remedies for discrimination, violence and other harm, whether committed by State or non-State actors;
- B) Take appropriate and effective measures to eradicate all forms of violence, discrimination and other harm, including any advocacy of hatred that constitutes incitement to discrimination, hostility, or violence on grounds of sexual orientation, gender identity, gender expression or sex characteristics, whether by public or private actors;
- C) Compile statistics and research on the extent, causes and effects of violence, discrimination and other harm, and on the effectiveness of measures to prevent, prosecute and provide reparation for such harm

³⁷⁷ See *Principle 2: The Right to Equality and Non-Discrimination*, YOGYAKARTA PRINCIPLES, <https://yogyakartaprinciples.org/principle-2/>.

³⁷⁸ *Id.*

³⁷⁹ *Principle 1: The Right to the Universal Enjoyment of Human Rights*, YOGYAKARTA PRINCIPLES ¶ (b), <https://yogyakartaprinciples.org/principle-1/>.

³⁸⁰ *Principle 2: The Right to Equality and Non-Discrimination*, *supra* note 377, ¶ (b).

³⁸¹ *Id.* ¶ (c).

³⁸² *Principle 30 (YP+10): The Right to State Protection*, YOGYAKARTA PRINCIPLES, <https://yogyakartaprinciples.org/principle-30-yp10/>.

on grounds of sexual orientation, gender identity, gender expression and sex characteristics;

- D) Identify the nature and extent of attitudes, beliefs, customs and practices that perpetuate violence, discrimination and other harm on grounds of sexual orientation, gender identity, gender expression and sex characteristics, and report on the measures undertaken, and their effectiveness, in eradicating such harm;
- E) Develop, implement and support education and public information programmes to promote human rights and to eliminate prejudices on grounds of sexual orientation, gender identity, gender expression and sex characteristics;
- F) Ensure sensitivity training of judicial and law enforcement officers and other public officials on issues relating to sexual orientation, gender identity, gender expression and sex characteristics;
- G) Ensure that laws against rape, sexual assault and sexual harassment protect all persons regardless of their sexual orientation, gender identity, gender expression and sex characteristics;
- H) Establish support services for victims of rape, sexual assault and harassment, and other forms of violence and harm on grounds of sexual orientation, gender identity, gender expression, and sex characteristics;
- I) Ensure that human rights violations are vigorously investigated and, where evidence is found, those responsible are prosecuted and, if convicted, punished as appropriate;
- J) Ensure access to effective complaints procedures and remedies, including reparation, for victims of violence, discrimination and other harm on grounds of sexual orientation, gender identity, gender expression and sex characteristics.³⁸³

Principle 33:³⁸⁴ Everyone has the right to be free from criminalisation and any form of sanction arising directly or indirectly from that person's actual or perceived sexual orientation, gender identity, gender expression or sex characteristics.

STATES SHALL:

- A) Ensure that legal provisions, including in customary, religious and indigenous laws, whether explicit provisions, or the application of general punitive provisions such as acts against nature, morality, public decency, vagrancy, sodomy and propaganda laws, do not

³⁸³ *Id.*

³⁸⁴ *Principle 33 (YP+10): The Right Freedom from Criminalization and Sanction*, YOGYAKARTA PRINCIPLES, <https://yogyakartaprinciples.org/principle-33-yp10/>.

criminalise sexual orientation, gender identity and expression, or establish any form of sanction relating to them;

- B) Repeal other forms of criminalisation and sanction impacting on rights and freedoms on the basis of sexual orientation, gender identity, gender expression or sex characteristics, including the criminalisation of sex work, abortion, unintentional transmission of HIV, adultery, nuisance, loitering and begging;
- C) Pending repeal, cease to apply discriminatory laws criminalising or applying general punitive sanctions on the basis of sexual orientation, gender identity, gender expression or sex characteristics;
- D) Expunge any convictions and erase any criminal records for past offences associated with laws arbitrarily criminalising persons on the basis of sexual orientation, gender identity, gender expression and sex characteristics;
- E) Ensure training for the judiciary, law enforcement officers and healthcare providers in relation to their human rights obligations regarding sexual orientation, gender identity, gender expression and sex characteristics;
- F) Ensure that law enforcement officers and other individuals and groups are held accountable for any act of violence, intimidation or abuse based on the criminalisation of sexual orientation, gender identity, gender expression and sex characteristics;
- G) Ensure effective access to legal support systems, justice and remedies for those who are affected by criminalisation and penalisation on grounds of sexual orientation, gender identity, gender expression and sex characteristics;
- H) Decriminalise body modification procedures and treatments that are carried out with prior, free and informed consent of the person.³⁸⁵

In sum, both hard law and soft law sources powerfully demonstrate movement not only to decriminalize sexual orientation, but also to protect sexual orientation as a classification under customary international law. Any advocate arguing for persecution based on sexual orientation as a crime against humanity now has a wide and deep resource in the plethora of sources documented above to make her case.

CONCLUSION

The law has changed since 1998. A powerful array of state practice, UN, and regional instruments as well as NGOs has expanded international law to encompass within its protection the classification of sexual

³⁸⁵ *Id.*

orientation. Having shown that persecution based on sexual orientation is a crime against humanity, where do we go from here?

There is at least one widely available route for enforcing this law. Crimes against humanity fall within the rubric of “universal jurisdiction” under customary international law.³⁸⁶ This means that all states have jurisdiction to make and apply law to the offenses, or prescriptive jurisdiction, and jurisdiction to subject the perpetrators to judicial process, or adjudicative jurisdiction—even without any connection to the offenses whatsoever.³⁸⁷ What states cannot do, however, is idiosyncratically change the definitions of the offense in their parochial laws to go beyond sexual orientation as a protected classification in international law.³⁸⁸ Indeed, universal jurisdiction is best conceptualized as states, and more particularly their courts, acting as decentralized enforcement mechanisms for an international law that covers the globe.³⁸⁹ Finally, universal jurisdiction is not limited to criminal law; it can be the basis of civil suits as well.³⁹⁰ Thus, if a State A national persecutes another State A national in State A, State B may assert jurisdiction over that offense. It may do so through its criminal code, or through a civil mechanism, or both.

This Article has diligently collected an array of materials all in one place as comprehensively as possible. Its object is not simply to sit on a shelf; rather, it has provided states, lawyers, and activists with the tools to prosecute or sue perpetrators of the crime against humanity of persecution based on sexual orientation. In this sense, it is somewhat of a hybrid between a scholarly work and a legal brief. The hope is that it will be of use to the development of international law going forward and the ongoing fight for justice under the law.

³⁸⁶ See Anthony J. Colangelo, *Universal Jurisdiction as an International “False Conflict” of Laws*, 30 MICH. J. INT’L L. 881, 888-889 (2009) [hereinafter Colangelo, *Universal Jurisdiction*]; Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT’L L. 149, 150-52 (2006) [hereinafter Colangelo, *Legal Limits*]; see also RESTATEMENT (FOURTH) OF FOREIGN RELATIONS, *supra* note 5, §§ 407, 413.

³⁸⁷ RESTATEMENT (FOURTH) OF FOREIGN RELATIONS, *supra* note 5, § 413.

³⁸⁸ See *United States v. Ali*, 885 F. Supp. 2d 17, 27 (2012) (citing and quoting Colangelo, *Legal Limits*, *supra* note 386, at 150) (“If national courts prosecute on grounds of universal jurisdiction, they must use the international legal definitions—contained in customary international law—of the universal crimes they adjudicate; otherwise, their exercise of universal jurisdiction contradicts the very international law upon which it purports to rely.”); *United States v. Hasan*, 747 F. Supp. 2d 599, 610 (2010) (citing and quoting Colangelo, *Legal Limits*, *supra* note 386, at 157-162).

³⁸⁹ Colangelo, *Universal Jurisdiction*, *supra* note 386, at 882.

³⁹⁰ RESTATEMENT (FOURTH) OF FOREIGN RELATIONS, *supra* note 5, § 413, cmt. d., rep. notes ¶ 4.