

HUMAN RIGHTS' HARMFUL AND HARMLESS GENDERED OUTLAWS

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1. Introduction

The feminist legal project uncovered the premises and effects of the masculine navel around which the world, and particularly the feminine world, revolves. This contribution takes this legacy by applying a queer lens to and thereby dismantling the salient elements of the common construction of femininity and masculinity under international human rights law. I examine 'the feminine' and 'the masculine' by showing that plural postures can exist in the context of gendered power interactions. Women and girls are suicide bombers, leaders in terrorist organisations,² interrogators, prison commanders, guards, and torturers, committing or ordering atrocities – Abu Ghraib and Guantánamo are two of the most infamous places.³ Men are the target of violence and sexual abuses, especially in militarised displacement settings

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²UNGA, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, UN Doc A/72/43280 (2017), para. 29.

³ Sonia Corrêa et al., *Sexuality, Health and Human Rights* (Hoboken: Taylor & Francis, 2008), 197.

and in prisons housing suspected terrorists.⁴ Boys are subjugated to priests' and community leaders' physical and psychological violence in institutionalised contexts.⁵

In spite of these facts, the dualistic opposition of masculine power *versus* feminine vulnerability dominates the law, and its readings.⁶ Men's sexuality, and their power dominance, is the danger, and women are in danger. In fact, the depiction of women as typically being weak, dependent and vulnerable make them 'ideal victims'.⁷ If the ideal victim is weak and female, the perpetrator is strong and male – complementary and antithetical to the ideal victim.⁸ Mainstream human rights interpretations have therefore constructed a single story of gendered violations under international human rights law, relying on three narratives.⁹ First, that there are only two sexes and two genders [m/f], according to which sex is conceived as dyadic (male and female) and gender as binary (man and woman). Second, that 'gender' is the metonymic signifier for women, rather than a category concerning all gendered individuals [gender = women]. Third, that gender power relations take the asymmetrical shape of male domination *versus* female oppression [m > f].

⁴ Sonia Corrêa et al., *Sexuality, Health and Human Rights*, 197.

⁵ *Scozzari and Giunta v Italy*, Application nos. 39221/98, 41963/98, Eur. Ct. H.R 13 July 2000: see below Sect. 3(1)(i).

⁶ Katherine Franke, "Theorizing Yes: An Essay on Feminism, Law and Desire," in *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations*, ed. Martha Fineman, Jack E. Jackson, and Adam P. Romero (Farnham; Burlington: Ashgate, 2009), 43; Jeff Hearn, "From Hegemonic Masculinity to the Hegemony of Men," *Feminist Theory* 5 (2004): 49; Human Rights Committee, *General Comment No 28: Article 3 (The Equality of Rights Between Men and Women)*, UN Doc CCPR/C/21/Rev.1/Add.10, (2000); CERD, *General Recommendation XXV on Gender-Related Dimensions of Racial Discrimination*, UN Doc HRI/GEN/1/Rev.6, (2000).

⁷ Nils Christie, "The Ideal Victim," in *From Crime Policy to Victim Policy: Reorienting the Justice System*, ed. Ezzat A Fattah (London: Palgrave Macmillan, 1986), 18–19.

⁸ Christine Schwöbel-Patel, "The 'Ideal' Victim of International Criminal Law," *European Journal of International Law* 29, no. 3 (2018): 718, <https://doi.org/10.1093/ejil/chy056>.

⁹ I am indebted to Janet Halley and Dianne Otto for their theorisations on which mine draws: Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton: Princeton University Press 2006), 17-18; Dianne Otto, "International Human Rights Law: Towards Rethinking Sex/Gender Dualism and Asymmetry" in *The Ashgate Research Companion to Feminist Legal Theory*, eds. Margaret Davies and Vanessa Munro (Abingdon and New York: Ashgate, 2013), 208.

Each of these three narratives has an impact on how human rights law understands gendered power relations and identifies victims, perpetrators, and their conducts. Indeed, discourses on gendered power relations are closely connected to the attributes, attitudes and the place, time and space that specific (legal) culture ascribes to the 'man' and the 'woman.' Dismantling the salient elements of the common constructions of femininity and masculinity in international human rights law matters. It helps recognise those existences and expose those abuses that have remained invisible so far because of the application of constraining gendered norms. Briefly: increased recognition (of subjectivities) and broadened protection (against violations).¹⁰

Therefore, this feminist queer effort pushes forward the gender analysis of human rights grammar – not beyond women, but *besides* women. While acknowledging the existence of relevant international case-law,¹¹ this chapter focuses on a number of human rights reports by UN special procedures, as well as general recommendations and concluding observations by UN treaty bodies. The objective is to explore the possibilities arising from a comprehensive approach to gender dynamics by preserving the radicality of the queer project.¹² This entails the rejection of any normative inclusion of queerness by, for instance, stretching the reach of

¹⁰ For a use of the queer lens to unpack the gender-related limits and implications of, for example, the policy frameworks on sexual violence in conflict contexts: see Tamsin Phillipa Paige and Joanne Stagg, "Well-Intentioned but Missing the Point: The Australian Defence Force Approach to Addressing Conflict-Based Sexual Violence," *Griffith Law Review* 29, no. 3 (2020): 468–492, <https://doi.org/10.1080/10383441.2020.1933810>.

¹¹ See, for instance, the recent decision of the Inter-American Court of Human Rights, applying, for the first time, a human rights treaty protecting women (*Convention of Belém do Pará*) to a case of violence targeting a trans woman: *Vicky Hernández et al. v Honduras*, Serie C. No. 422, Inter-Am.Ct. H.R. March 26, 2021; see Ana Micaela Alteiro, "Latin American Feminists, Gender, and the Binary System of Human Rights Protection," *AJIL Unbound* 116 (2022): 323–327, <https://doi.org/10.1017/aju.2022.50>. See also the allegations of sexual assault before the International Criminal Tribunal for the Former Yugoslavia by men against women, and by men against women and men respectively in "Indictment", *Prosecutor v Meakic*, No. IT-95-4, I 1, ICTY, February 13, 1995), paras. 2.6, 22.1, 25.1, 26.1, 30.1; "Second Amended Indictment," *Prosecutor v Tadic*, Case No. IT-94-1-T, 2.3, ICTY, December 14, 1995, paras. 4.1, 5.1. Starting from these cases, Katherine Franke dissected the signification process by which contact with certain body parts and enactment of certain practices is understood to be exclusively sexual: Katherine M Franke, "Putting Sex to Work," *Denver Law Review* 75, no. 4 (1998): 1164–1179.

¹² Ratna Kapur, "The (Im)Possibility of Queering International Human Rights Law," in *Queering International Law: Possibilities, Alliances, Complicities, Risks*, ed. Dianne Otto (New York: Routledge, 2018), 132.

human rights protections to assimilate queer subjects in the dominant discourse.¹³ Therefore, I first challenge monolithic conceptualisations of femininity and masculinity (Section 1). Accordingly, I problematise the conception of woman-victim and man-perpetrator in human rights abuses from the viewpoint of the pairing of domination-subordination within gendered power relations (Section 2). I then argue that alternative combinations exist, which are based on plural forms of masculinities and femininities (Section 3). I conclude by encouraging multidimensional approaches to gendered positionalities to allow for a more sophisticated and concrete analysis of human rights violations.

2. Oppression and Enjoyment

Dominance feminism, focusing on women's inferior position to men's control and domination, draws the contours of gender power dynamics in line with the paradigm of the man-dominator-perpetrator and the woman-dominated-victim, according to idealised and singular masculinity and femininity.¹⁴ An example of this narrative comes from violent acts targeting women. The classification and emphasis on these acts as 'violence against women' strengthens the image of the woman as victim, and victim only.¹⁵ Appreciating the nuances of the external and internal categorical differences between and within masculinities and femininities – in the plural – is essential to capture the subjugation of women, men and all of us to the logics of heteronormative domination.

Saying that women can be someone else other than victims is not the same as saying that women cannot be victims. On different occasions, the UN Convention on the Elimination of All

¹³ Dianne Otto, "Taking a Break from Normal: Thinking Queer in the Context of International Law," *Proceedings of the Annual Meeting (American Society of International Law)* 101 (2007): 119, <https://doi.org/10.1017/S0272503700025374>.

¹⁴ See, inter alia, Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, Mass.: Harvard University Press, 1991). On the enormous attention to sexual violence by feminists in international criminal law, human rights, and peace and security - at the cost of attention to other issues – see Karen Engle, *The Grip of Sexual Violence in Conflict: Feminist Interventions in International Law* (Stanford: Stanford University Press, 2020).

¹⁵ Murray Jacob Edelman, *The Symbolic Uses of Politics* (University of Illinois Press, 1985), 6; Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, 1998), 179-181.

Forms of Discrimination against Women (CEDAW) Committee has condemned those portrayals depicting women as subordinate to men, relegated to traditional roles of wife or mother at home¹⁶ with the man being the 'breadwinner'¹⁷ or the 'head of household'.¹⁸ Yet, the condemnation of women's relegation to traditional roles as such becomes a paternalistic ban for those women who truly enjoy carrying out those activities. Many are the undertheorised realms of femininity, indeed: for example, the conservation of traditional religious and cultural practices; the enjoyment of motherhood and nurturing;¹⁹ the trade-offs between greater and lesser evil;²⁰ the bargains which women choose to make with heteronormativity by bearing the costs of gendered disadvantageous rules in order to survive concrete everyday constraints.²¹

There are other modes of enjoyment for some people, in the case at stake, for some women. In its 2005 concluding comments in relation to Italy, the CEDAW Committee expressed concern about the depiction of women as 'sex objects' in media and in advertising.²² In the view of the CEDAW Committee, passivity has a negative connotation when publicly exposed to the eyes of everyone. Leaving aside the question of women in media and advertising, what if passivity was a choice outside of the media? What if a woman wanted to be treated as an object rather than an individual? What if being a sex object was an enjoyable status? Pleasure and danger are the extremes of a pendulum by means of which we all oscillate throughout our experiences. Dynamics of power might be wanted and pleasurable. As the following sections will outline, sexuality can blur the lines between postures of domination and subordination,

¹⁶ CEDAW Committee, *Concluding Comments: Italy*, UN Doc CEDAW/C/ITA/CC/4-5, (2005), para. 26.

¹⁷ UN, *Report of the Committee on the Elimination of Discrimination against Women on Its 54th Session*, UN Doc Supp No 38, Part I, A/54/38/Rev., (1999), para. 120.

¹⁸ UN, *Report of the Committee on the Elimination of Discrimination against Women on Its 56th Session*, UN Doc Supp No 38, Part II, A/56/38, (2001), para. 79.

¹⁹ See, inter alia, Sally Baden and Anne Marie Goetz, "Who Needs [Sex] When You Can Have [Gender]," *Feminist Review* 56 (1997): 218.

²⁰ For a compelling story about the enigmatic question 'what is women's suffering?' in relation to rape, see Janet Halley, "Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict," *Melbourne Journal of International Law* 9 (2008): 116.

²¹ The expression was coined by Deniz Kandiyoti, "Bargaining with Patriarchy," (1988) 2 *Gender & Society*: 286, fn 1.

²² CEDAW Committee, *Concluding Comments: Italy*, UN Doc CEDAW/C/ITA/CC/4-5, (2005), para. 25.

pleasure and danger, depending on the time of one's life and the type of relation established with the other sexual subjects.

Opposing the understanding of oppression as a monopolising depiction of gendered relations, sex-positive feminists argue that beyond subordination lies a world of lust made of liberating choices. Being autonomous, women may express themselves both within and outside traditional gender roles, finding opportunities for joy and pleasure.²³ Dominance feminism and sex-positive feminism can be conceived of as the two extremes of a continuum of conflicting, allied, competing, secessionist and renewed theories.

Feminist critique relies on the monopoly of gender as a tool of oppression in the hands of 'men'. This is its starting point. Gender as a tool of power is exerted for the benefit of, and by a certain group, to pursue masculine interests, frequently (mis)perceived as the interests of *all* men. However, opposite to the interests of this elite are not only women, as mainstream accounts tend to emphasise, but also other persons injured by the gendered privilege, including 'other' men.²⁴

In fact, neither femininity nor masculinity are homogeneous categories. Both are the product of an intricate grid of social regulations dictating what a 'real' man or a 'real' woman should or should not do. As such, masculinity is often a site of privilege for many, but it also functions as a system constraint for others.²⁵ Starting from the paradigm of masculinity as domination, the next section explains why sexual subordination is a question of gender, and therefore power.

²³ Martha Albertson Fineman, "Introduction: Feminist and Queer Legal Theory," in *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations*, ed. Martha Albertson Fineman, Jack E. Jackson, and Adam P. Romero (Ashgate, 2009), 3; Mary Becker, "Care and Feminists" in *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations*, ed. Martha Fineman, Jack E. Jackson, and Adam P. Romero (Farnham; Burlington: Ashgate, 2009), 160; Brenda Cossman, "Sexuality, Queer Theory, and 'Feminism After' - Reading and Rereading the Sexual Subject," *McGill Law Journal* 49, no. 4 (April 2003): 850.

²⁴ Dianne Otto, "Queering Gender [Identity] in International Law," *Nordic Journal of Human Rights* 33, no. 4 (October 2, 2015): 317, <https://doi.org/10.1080/18918131.2016.1123474>.

²⁵ Russell K. Robinson, "Masculinity as Prison: Sexual Identity, Race, and Incarceration," *California Law Review* 99, no. 5 (2011): 1331, <https://doi.org/10.15779/z381h6j>.

The remainder of the chapter will navigate through different combinations of masculinity, femininity, domination and subordination in a heteronormative context.

3. Domination and Subordination

Sexual subordination is 'any act or system of dominative or otherwise exploitative classifications or characterizations interpellating sexual difference or differences'.²⁶ The link between subordination and femininity/masculinity is gender. As the many decisions by international courts on sadomasochism demonstrate,²⁷ subordination is gendered. We can all be subordinated, and, reciprocally, we can all be dominators. I present a theory of domination-subordination that multiplies the perspectives on gendered subject relations (Section 3.1) and re-elaborate the above-mentioned axiom [m > f] underlying international human rights law and its readings (Section 3.2).

3.1. From a Theory to a (New) Formula

Subordination is the consequence and the premise of domination. Furthermore, domination is a two-way process, entailing the participation of individuals submitting to power and those exercising it. 'Domination,' Jessica Benjamin argues, 'is in the heart of the dominated'.²⁸ Benjamin suggests that (a certain) feminism has constructed sexual subordination as female vulnerability oppressed by male domination without considering women's – unconscious, I would specify – participation in the dominative relation.²⁹ In other words, simplistically reducing domination to a connection between do-er and done-unto-er fails to do justice to the complexity of dominative dynamics.

²⁶ Tucker Culbertson and Jack E. Jackson, "Proper Objects, Different Subjects and Juridical Horizons in Radical Legal Critique" in *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations*, ed. Martha Fineman, Jack E. Jackson, and Adam P. Romero (Farnham; Burlington: Ashgate, 2009), 135.

²⁷ Giovanna Gilleri, "Sadomasochism in Strasbourg: A Pleasurable Danger," *Berkeley Journal of International Law* 41, no. 1 (2023): 39-88, <https://doi.org/10.15779/Z38TM7224Z>. See also Alexandra Grolimund, this volume.

²⁸ Jessica Benjamin, *The Bonds of Love: Psychoanalysis, Feminism, and the Problem of Domination*, 1st edn (New York: Pantheon Books, 1988), 5.

²⁹ See Benjamin, *The Bonds of Love*, 9.

Benjamin's analysis offers a critical insight combining psychoanalysis with the feminist method. Benjamin rethinks the dialectic of domination/subordination in terms of subject-object,³⁰ building upon Simone de Beauvoir's concept of the woman as the man's other.³¹ The complementarity of the object to the subject forms the pairing which reflects the western dualism [m/f], also incorporated into international human rights law. In the same way, gender polarity allows for the definition of gendered domination and subordination in the postures of master and slave, following the gendered asymmetry [m > f]. The dualism at stake in men-women/masculinity-femininity relationships is multifold: not only are sexes/genders said to be dual, but the logics of their power relations are said to be so as well. Dualistic thinking clashes with the chameleonic positions of dominator and subordinated which the same individual can occupy throughout life,³² as I will shortly explore.

The subject needs mutual recognition and self-assertion. However, mutual recognition structurally requires dependency on the other, meaning that one is never fully independent from the other. In order to receive recognition, one is a subject *subject* to the other's uncontrollable desire. The one-other relationship generates what Benjamin names 'circuits of recognition' as the only way to accept this paradox.³³ The tension between these two natures of self-consciousness (of the self and the other) persists only where they are 'sovereign equals'.³⁴ If recognition is denied, the subject is objectified. The break of this tension triggers situations of domination, and master-slave relationships. This occurs, for instance, (a) when the subject considers themselves as one, an absolute: completely independent from the other, they control the whole reality since nothing exists beyond their self-existence. Domination becomes the consequence of refusing to sustain the tension between contradictory impulses underlying self-assertion and mutual recognition. This rejection of

³⁰ Benjamin, *The Bonds of Love*, 7.

³¹ Simone de Beauvoir, *Le Deuxième Sexe - Vol. I* (Gallimard, 1949).

³² Dianne Otto, "Rethinking the 'Universality' of Human Rights Law," *Columbia Human Rights Law Review* 29 (1997): 29.

³³ Benjamin, *The Bonds of Love*, 221.

³⁴ Benjamin, *The Bonds of Love*, 12.

recognition establishes a dialectic of control: 'if I completely control the other, then the other ceases to exist, and if the other completely controls me, then I cease to exist'.³⁵ The tension is also broken (b) in relationships where the inability to accept and sustain the tension between auto- and hetero-recognition – that is self-recognition and recognition by the other – turns the (lack of) exchange of recognitions into domination and submission.³⁶ Only compassion, mutuality and co-feeling can break the chain which subordinates the weak(ened) to the powerful demanding control.³⁷

If the scheme of mutual recognition falls apart, (unconscious) slavery can be a way to achieve freedom. In these cases, domination can *transform*, rather than repress, the desire for recognition: submission constitutes the realisation of a specific desire of the dominated.³⁸ One subjugates the other by unilateral recognition. Accordingly, the slave recognises the master as a subject, however the master does not recognise the slave as a subject but only their object. The individual is at a crossroad: they can take the path of *either* identification with, *or* submission to more powerful others – more subtly, to the fantasy of omnipotence such powerful others personify.³⁹ Nevertheless, the existence of an individual embodying a fantasy does not imply that domination cannot become depersonalised. This has some crucial consequences for the configuration of [m > f].

3.2. The Depersonalised Element in the Asymmetry

A depersonalised legal structure constitutes the primary force of gender-based male dominative institutions and practices.⁴⁰ For the purposes of this enquiry – questioning the asymmetrical construct [m > f] underlying international human rights law – this finding has specific implications: two, at least. First, male domination is twofold in nature. It is 'individual'

³⁵ Benjamin, *The Bonds of Love*, 53.

³⁶ Benjamin, *The Bonds of Love*, 32–33, 12.

³⁷ Benjamin, *The Bonds of Love*, 48.

³⁸ Benjamin, *The Bonds of Love*, 52–54.

³⁹ Benjamin, *The Bonds of Love*, 219.

⁴⁰ Benjamin, *The Bonds of Love*, 216.

(m_i), i.e., it depends on the individual's will and (unconscious) desire. Moreover, it is simultaneously 'social' (m_s): it has social and cultural roots in rules and processes. [m_s] and [m_i] are separate yet interdependent. The individual exerts [m_i], which is partially grounded in the structural [m_s] and partially rooted in the individual will. By the same token, [m_s] exists at the level of social, legal, cultural and familiar infrastructures, but it also expresses itself through the action of single individuals in the form of [m_i], which cannot detach itself from the system [m_s] where it operates. The 'm' of [$m > f$] should therefore be read as:

$$[(m_s + m_i) > f]$$

The acknowledgement of the structural component of gender domination has a crucial consequence for the positionality of femininity in the gender formula [$(m_s + m_i) > f$]. Indeed – and this is the second implication – [$m_s + m_i$] does not correspond with hypothetical [$f_s + f_i$]. Femininity does not express itself as a socially and culturally engrained dominative structure. [f_s] simply does not find any reason to exist, at least in the western model of society and its representation in the letter and interpretations of human rights law. Hence, [$f_s + f_i$] would be an incorrect understanding of what femininity actually is, for both individuals and social institutions. The conclusion is that the 'f' and 'm' of [$m > f$] are not, to quote the above expression by Jessica Benjamin, 'sovereign equals' since 'm' is the result of a combination of factors, unlike 'f.'

A final qualification emerges from this analysis, which should remain in the reader's mind throughout the discussions contained in this contribution. The reversed [$f > m$] will never be the reciprocal of [$m > f$] because of the incommensurability of the constitutive terms of femininity and masculinity. Indeed, femininity is not endowed with any historically structural dominative dimension, unlike masculinity. Having examined the theoretical underpinnings of domination and subordination, the next sections, without pretending to be exhaustive, explore specific examples of dominative and subordinate subjectivities.

4. Multiplicitous Subject-Object Relationships

This section calls the scheme of man-perpetrator *versus* woman-victim into question by exploring power relations which differ from the model of male domination *versus* female oppression. There are infinite combinations of gendered victims and perpetrators given the fluid way in which individuals: (1) identify themselves throughout their lives; and (2) occupy shifting positions of domination and subordination. The focus of the next two subsections on men-victims (Section 4.1) and women-perpetrators (Section 4.2) is exemplificatory. The aim is to challenge the rooted conception equating domination with all men and subordination with all women by problematising the power relations between the two 'emblematic' genders. This oppositions-based structure of the chapter is meant to provide more conceptual clarity. Neat divisions hardly exist in reality. If domination and subordination, danger and pleasure, are not always easily separable one from another, the oppositional scheme is not suitable to portray all power interactions. In this sense, gender is about 'hybridisation'⁴¹ of femininities, masculinities, and something else belonging to the inner sphere of the unique subject. The result of this hybridisation is unforeseeable *ex ante* by the subject nor the socio-cultural system.

4.1. Masculinities in Danger

Masculinities have been explored in different fields of law, such as criminology⁴² the international law of war and peace,⁴³ labour law,⁴⁴ and education.⁴⁵ In human rights law, however, masculinity has remained rather unexplored, and where it has been, it has mainly been in connection with the traditional scheme of man-violator. Certainly, the harmfulness of hegemonic masculinity deserves greater attention and examination from a human rights

⁴¹ Dianne Otto, "Disconcerting 'Masculinities': Reinventing the Gendered Subject(s) of International Human Rights Law," in *International Law: Modern Feminist Approaches*, ed. Ambreena Manji and Doris Buss (Hart, 2005), 110.

⁴² Richard Collier, *Masculinities, Crime, and Criminology: Men, Heterosexuality, and the Criminal(ised) Other* (London; Thousand Oaks: Sage Publications, 1998).

⁴³ Robert Connell, "Globalization, Imperialism, and Masculinities," in *Handbook of Studies on Men and Masculinity*, ed. Michael Kimmel, Jeff Hearn, and Robert Connell (Sage Publications, 2004), 71–89.

⁴⁴ Ann McGinley, "Masculinities at Work," *Oregon Law Review* 83, no. 2 (2004): 359–434.

⁴⁵ Ann Phoenix, "Neoliberalism and Masculinity: Racialization and the Contradictions of Schooling for 11-to-14-Years-Olds," *Youth and Society* 36, no. 2 (2004): 227–46, <https://doi.org/10.1177/0044118X04268377>.

perspective. For example, in the context of counter-terrorism, and violent extremism in particular, specific models of masculinity are associated with radicalisation. For example, the Special Rapporteur on Human Rights and Counter-Terrorism at the time of writing, Fionnuala Ní Aoláin, reports that the recruitment of terrorist organisations relies on ideas of 'male identity and power, including unfettered access to women based on gender inequality and women's subordination'.⁴⁶

Yet, as already anticipated, masculinity is not set in stone. Masculinity is unstable because men, and other persons assuming a masculine posture, may oscillate between various masculinities. Over time, masculinity may take different shapes for the same person because the intensity or the nature of that effort may change, or even the choice to aspire to one ideal of masculinity rather than another may shift.

The definition of what (a certain) masculinity is varies not only culturally and chronologically, but also contingently. Two layers of context provide meaning to masculinity. One is the macro-context, for example how it is composed by a given society at a given time (such as eighteenth century Chinese society). The other level is the micro-context, including how it is constructed by a specific group of people within a certain community (e.g., the dark room in a men-only bar in Berlin or the canteen of a catholic kindergarten). The decision as to whether and to what extent a certain person is considered masculine, in both cases results from many contextual variables. All this makes the definition of masculinity highly dependent upon many factors including questions related but not limited to: who provides the definition; which types of masculinity that person has lived and seen; in which context the definition is provided; and how the definition is understood in that context.⁴⁷ A man can therefore seem a macho in one

⁴⁶ UNGA, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, UN Doc A/72/43280, (2017), para. 395.

⁴⁷ A similar set of questions applies, *mutatis mutandis*, to 'femininity': see below, Section 3.2.

(micro/macro) context, but feminine in another; one day he can appear heterosexual, another day gay,⁴⁸ and so forth.

There are a number of consequences resulting from the normativity of hegemonic masculinity. The first, quite logical, consequence is that, where the ideal of masculinity is hegemonic masculinity, men who 'fail' to adhere to it are not considered 'real' men anymore. According to dichotomous configurations described above, what is not masculine, is feminine. But that person has male biological traits which make him, in line with gender essentialism, a man. The heteronormative stance remains puzzled by this paradox. How to deal with a male (in nature) who is not perceived as a man (in society)?

The heteronormative context finds an answer. The failure to meet hegemonic masculinity leads to the perception of the non-masculine man as feminine, that is, a sign of gay identity.⁴⁹ Nevertheless – and this is another important discussion I cannot pursue further in this chapter – the identity of those men who have sexual intercourse with other men is not necessarily definable as 'gay',⁵⁰ because same-sex sex does not necessarily make a man gay. At the same time, many people do not come out as 'gay' or 'lesbian' even where they have sexual intercourse with individuals performing the same gender. Performativity *à la* Butler⁵¹ consists in the performance that the individual reiterates in front of the other. Therefore, we do not *have*, but rather we *do*, we *perform*⁵² a certain gender (identity) or sexual orientation. Therefore,

⁴⁸ Robinson, "Masculinity as Prison," 1334.

⁴⁹ Robinson, "Masculinity as Prison," 1332; see also Francisco Valdes, "Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of 'Sex,' 'Gender,' and 'Sexual Orientation' in Euro-American Law and Society," *California Law Review* 83, no. 1 (1995): 72, <https://doi.org/10.2307/3480882>.

⁵⁰ The acronym MSM, that is men who have sex with men but do not identify themselves as gay, fills the linguistic gap between sexual behaviour and personal identification; Robinson borrows the term MSM from the public health literature, which created it in order to include 'the vast community of men who have sex with men but do not identify as gay:' see Robinson, "Masculinity as Prison," 1330; Russell K. Robinson, "Racing the Closet," *Stanford Law Review* 61, no. 6 (2009): 1465, fn 3.

⁵¹ The theory of performativity was first developed by John L. Austin, *How to Do Things with Words* (J.O. Urmson and Marina Sbisa eds, Oxford: Clarendon 1975) 5–7.

⁵² Candace West and Don Zimmerman, "Doing Gender," *Gender & Society* 1 (1987): 125; Judith Butler, "Sex and Gender in Simone de Beauvoir's *Second Sex*," *Yale French Studies* 35 (1986): 45.

performativity and performance are not synonymous. Performance is a single act. Performativity is the forced reiteration of a norm, thus is made up of many repeated acts.⁵³

Actually, there are as many ways of being (performing) feminine and masculine as there are other ways of being (performing) gay, lesbian, bisexual, or trans. Implicit or explicit commands inscribed in the law, imposing one single femininity, masculinity, gayness, lesbianness, bisexuality or transness on individuals, hardly meet rights claims of individuals whose subjectivity is constantly prone to change.

The second consequence resulting from the normativity of hegemonic masculinity is the existence of other masculinities. Continuing with the vocabulary of danger, masculinity can be both *a* danger and *in* danger. In the latter case, it approaches the traditional depiction of femininity as subject to (masculine) danger. The 'other' masculinities situate themselves in the space of danger. Both masculinities-in-danger and the prevailing conception of femininity suffer from the harm of hegemonic masculinity. A conceptual clarification is needed, however.

If hegemonic masculinity is the one which aspires to match an idealised standard of man's behaviour and attitudes, it will never achieve this ideal. The ideal is the cause of that aspiration as well as its aim. While the cause is the trigger of a certain behaviour determining the traits of hegemonic masculinity, the aim is an unreachable star in the sky. Bourdieu explains the hybrid nature of (hegemonic) men who are both dominators and victims.⁵⁴ Paradoxically, danger is ubiquitous, being the norm imposed on all. Neither men with harmless masculinities nor those 'real' men performing hegemonic masculinity are safe. The latter bear the duty of constantly asserting their manliness. They are also in peril, being the victims of the ideal they try to pursue itself. Given that the ideal is, by definition, never achievable, hegemonically masculine men

⁵³ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity*, Routledge Classics (New York: Routledge, 1990): 190; Judith Butler, *Bodies That Matter: On the Discursive Limits of 'Sex'* (New York; London: Routledge 1993): 59–60.

⁵⁴ Pierre Bourdieu, *Masculine Domination* (Stanford, Calif: Stanford University Press, 2001), 49.

cannot be described as such either. They will never be masculine enough in hegemonic terms to meet that ideal. The ideal becomes a system of demands, ultimately inaccessible.⁵⁵

The risk 'real' men take in perpetuating their heteronormative masculinity is the constant surveillance under which they are put because of the insecurity of (their) identities. A gendered anxiety is brought on by others scrutinising that performance. Slips are easily possible, revealing someone's feminine or differing masculine essence.⁵⁶ Masculinity is therefore – also – in danger, but how does this relate to human rights infringements?

4.1.1. Can the *male* blame?

In the context of human rights law, masculine victimisation often occurs in the form of violence and sexual abuse in camps and militarised displacement settings, as well as prisons housing suspected terrorists.⁵⁷ The human rights violation is perpetrated on account of the exercise of harmful masculinity and, in certain cases, harmful femininity. Unquestionably, the myth of hegemonic masculinity expects invincibility from those who wear that armour as well as those who do not conform to it. The stereotype of the strong and active man can obscure abuses targeting men and boys, including sexual violence against them.⁵⁸ That boys are victims of sexual abuse has been largely ignored, apart from the infamous exceptions of institutionalised abuses committed by priests, as well as community leaders.⁵⁹ The situation of boys who are subject to various types of violence cannot be easily compared to the one lived by men. Besides gender-related considerations, boys' younger age constitutes an element of

⁵⁵ Bourdieu, *Masculine Domination*, 50-51.

⁵⁶ See Robinson, "Masculinity as Prison," 1332.

⁵⁷ Sonia Corrêa et al., *Sexuality, Health and Human Rights*, 197.

⁵⁸ What is seen as sexual (i.e. erotic) is highly contingent on, inter alia, 'the perpetrator's erotic desire that sexualizes the body part, thus making contact with that body part a sex crime': Franke, "Putting Sex to Work," 1158. It is thus the discourse that makes a crime 'sexual,' not because of a given characteristic or fact of the body: Vikki Bell, "Beyond the 'Thorny Question:' Feminism, Foucault and the Desexualisation of Rape," *International Journal of the Sociology of Law* 19, no. 1 (1991): 86.

⁵⁹ See, for example, the ECtHR case concerning the 'Forteto,' a community based in Tuscany whose leaders and co-founders were convicted of ill-treatment and sexual abuse upon the children with mental disabilities entrusted into their care: *Scozzari and Giunta v Italy*, paras. 31-46, 206-216.

vulnerability to the adults' actions and authority. This distinctive positionality of the relationship between boys and adults makes the following findings of this section applicable to young masculinities only with the appropriate adjustments.

Sexual violence against men is underreported. The causes of this underreporting are multiple and relate to gender. Elsewhere, I have applied Felstiner, Abel and Sarat's methodological framework of 'naming, blaming and claiming'⁶⁰ to the underreporting of women-targeting violence.⁶¹ This frame of reference can be used, *mutatis mutandis*, to examine men-targeting, underreported violence by considering how men feel about, understand and react to the abuse. The focus lies in the process through which men perceive injurious events, how they subsequently turn them into grievances and how these eventually become disputes.

Starting from the individual's inner experience of the abuse, the first step to claim a right is to know a right. This allows men to *name* the problem. Subsequently, the subject can *blame* the violator. This consists in the recognition that the sufferance is produced by another person's action. It is in the blaming stage, however, that men may encounter major obstacles which prevent them from reporting the violence. For instance, negative social attitudes towards homosexuality may influence men's intention to report.⁶² A victim could feel guilty about the violence suffered since it carries – as Sandesh Sivakumaran calls it – the 'taint' of homosexuality.⁶³

⁶⁰ William L.F. Felstiner, Richard L. Abel, and Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .," *Law & Society Review* 15, no. 3/4 (1980): 631–654, <https://doi.org/10.2307/3053505>; see also Mauro Bussani and Marta Infantino, "Tort Law and Legal Cultures," *American Journal of Comparative Law* 63, no. 1 (15 April 2015): 77–108, <https://doi.org/10.5131/AJCL.2015.0003>.

⁶¹ See Giovanna Gilleri, "'How Are You Actually Doing, Ladies?' Indicators of Gender Equality through the Lens of the UN Committee on the Elimination of Discrimination against Women," *The International Journal of Human Rights* 24, no. 8 (2020): 18, <https://doi.org/10.1080/13642987.2020.1717474>.

⁶² Philip N.S. Rumney, "Gay Male Rape Victims: Law Enforcement, Social Attitudes and Barriers to Recognition," *International Journal of Human Rights* 13, no. 2–3 (June 2009): 235–36, <https://doi.org/10.1080/13642980902758135>.

⁶³ Sandesh Sivakumaran, "Male/Male Rape and the 'Taint' of Homosexuality," *Human Rights Quarterly* 27, no. 4 (2005): 1274–1306, <https://doi.org/10.1353/hrq.2005.0053>.

Only after these two steps (naming and blaming), will the individual be ready to *claim* the suffering and turning it into a grievance. This stage may be difficult to achieve because reporting the violence makes the individual's experience public. Through the disclosure of facts, the subject becomes the claimant, who entrusts their private suffering to the public authority. This disclosure opens up a new scene of old fears, connected to those gender stereotypes surrounding the blaming step. The scenario of this stage is nevertheless new in that it goes beyond the personal sphere. Even where the suffering has translated into complaint, the completion of the three-phase process is no guarantee for the gender-sensitiveness of the subsequent dispute. Men claiming a gendered violence, especially rape, may have to face negative police attitudes. The police may, for example, meet the sexual assault experienced by a man with homophobia, equating the assault with 'gayness.' Authorities can downplay or deny the rape in many ways.⁶⁴ The following list mirrors some of the common heteronormative beliefs about masculine actions and sexuality that can play into this situation:

- a) *The physical impossibility of male rape.* A mechanical conception of the male body deprives men of their humanity, and sexuality of the variety of acts of pleasure as well as violence. This is a phallogocentric configuration of sexual violence, according to which the penis is the focal point of control, governing both consensual and non-consensual sexual interactions; the penis-bearer is the active subject who cannot but occupy the dominative position of control.
- b) *Masculinity as invulnerability.* Hegemonic masculinity comes with power and control. A man who is unable to protect himself from sexual attacks is flawed in his masculinity. The inability to resist the rapist is a sign of unacceptable vulnerability which does not belong to the behaviour of a proper masculinity. Thus, the penetrated man is worth less than other men being effeminate. The less-of-a-man treatment reflects homophobic attitudes already displayed towards gay men and men who have sex with men. Further,

⁶⁴ Rumney, "Gay Male Rape Victims," 238–40.

victim-blaming confirms the system's assumption that men are not weak and can successfully avoid victimisation. When a man allows another man to penetrate him without resisting the act, this receptivity equals consent and the victimisation gives way to passive gayness.⁶⁵

- c) *Gayness as insensitivity to trauma*. Another aspect of the myth of invulnerability is the belief that gay men would experience sexual violence as less traumatic than heterosexual men. This assertion relies on the idea that any sexual act constitutes pleasure if it is included among the typical acts which the person is expected to perform or receive according to their specific sexual orientation. This conception disregards the (albeit imprecise) divide between danger and pleasure. Moreover, it reduces sexual behaviours to a taxonomy of activities which can never change or be performed by individuals of 'other' sexual groups. According to this view, what makes the act a form of violence is the foreignness of the specific act to the subject who experiences it. Obviously, sexual creativity transcends the borders of any categorisation, e.g., some gay men may not have anal sex. This type of reasoning is analogous to assuming that a woman being raped by her husband would be less traumatised than a woman raped by a stranger: the existence or absence of a previous consensual sexual contact operates as a yardstick.⁶⁶

These are only a number of examples of the preconceptions hampering the visibility of sexual violence targeting men. The picture is hardly complete without at least two other specifications. First, the reluctance to acknowledge sexual violations also has its roots in the conceptions internalised by the victim. Research has shown the under-recognition of non-consensual sex as rape,⁶⁷ especially by gay men. This correlates to the more fluid definitions

⁶⁵ Rumney, "Gay Male Rape Victims," 244; see Sivakumaran, "Male/Male Rape".

⁶⁶ Irina Anderson and Kathy Doherty, *Accounting for Rape: Psychology, Feminism, and Discourse Analysis in the Study of Sexual Violence*, Women and Psychology (London; New York: Routledge, 2008), 103.

⁶⁷ Philipp Schulz, and Heleen Touquet, "Queering Explanatory Frameworks for Wartime Sexual Violence against Men," *International Affairs*, 96, no. 5 (2020): 1169–1187, <https://doi.org/10.1093/ia/iiaa062>; Marysia Zalewski, Paula Drummond, Elisabeth Prugl, and Maria Stern, *Sexual Violence Against Men in Global Politics* (London:

of sexual experiences which many gay men provided when interviewed. A range of factors makes it less likely that 'gay male rape victims would, initially at least, name their experiences as rape'.⁶⁸ Differences between situations in which they had been 'forced' or 'persuaded' to have intercourse are not that clear. In addition, naming the act as sexual violence can initially be difficult in cases where there had been a previous relationship between the rapist and the raped.⁶⁹

Another crucial factor lies with the bench and is external to the individual's perceptions of the suffered violation. The judiciary's response, at both the domestic and international levels, can be influenced by gender stereotypes including victimisation as exclusive to women and the masculine model of domination: the judge may think that, on account of 'his' nature, a man cannot be subjugated. This is not the place for an exhaustive examination of gender stereotypes permeating the judiciary, but there is much more to the story which could be addressed at another time.⁷⁰ The next subsection provides a methodological introduction on how a gender-sensitive process can be used in analyses of masculinities by asking the 'man question' as a technique to avoid man-related gender stereotypes.

4.1.2. The 'man question' (and others)

Asking the 'woman question'⁷¹ is a foundation of feminist methodology, including feminist approaches to human rights. The aim of assuming a women's perspective is to enhance the quality of gender analysis. Analogously, the 'man question' asks what the position of boys and/or men is in a given situation. This question contains other subordinate questions

Routledge, 2018); David Eichert, "'Homosexualization' Revisited: An Audience-Focused Theorization of Wartime Male Sexual Violence," *International Feminist Journal of Politics* 21, no. 3 (2019): 409-433, <https://doi.org/10.1080/14616742.2018.1522264>; Heleen Touquet, Sarah Chynoweth, Sarah Martin, Chen Reis, Josef Korbel, Henri Myrntinen, Philipp Schulz, Lewis Turner, David Duriesmith, "From "It Rarely Happens" to "It's Worse for Men": Dispelling Misconceptions about Sexual Violence against Men and Boys in Conflict and Displacement," *Journal of Humanitarian Affairs* 2, no. 3 (2020): 25-34.

⁶⁸ Rumney, "Gay Male Rape Victims," 236.

⁶⁹ Rumney, "Gay Male Rape Victims," 236.

⁷⁰ Rumney, "Gay Male Rape Victims."

⁷¹ Katharine T Bartlett, "Feminist Legal Methods," *Harvard Law Review* 103 (1990): 837.

considering the status of specific individuals and intra-group differences. This subordinated question may be formulated, for example, as follows: ‘does this apply to all boys and/or men, or only to some, or does it affect different men differently?’⁷² This method is similar to the one used in feminist analysis of intersectional discrimination, and diversity among women more generally. As such, the second question looks at the substantial effects of gendered power relations among men, highlighting that not all masculinities are doomed to prevail.

The man question helps to recognise the domination of one masculinity over the others as well as over certain femininities. Processes of gendered subordination rely on femininities and masculinities, both in their inter-relations (masculinities-femininities) and intra-relations (masculinities-masculinities, femininities-femininities). Intersections of manhood with, among others, gender identity, sexual orientation, race, class, and disability, create various forms of masculinity. These junctures do not only establish hierarchies among men who are masculine in different ways, but also support hierarchies among women.

In fact, dynamics of privilege and harm exist in the realm of femininities as well. Hegemonic masculinity is at the top of the pyramid of masculine power. This positionality has the consequence of spreading the attributes associated with the hegemonic men across femininities. As Bourdieu noted, women striving to access sites of power by pursuing the so-called masculine attitudes – leadership, strength, sacrifice – fall into a ‘double blind:’

[I]f they behave like men, they risk losing the obligatory attributes of ‘femininity’ and call into question the natural right of men to the positions of power; if they behave like women, they appear incapable and unfit for the job.⁷³

The trap of hegemonic gendered postures applies to all of us. Yet a layered gendered analysis can uncover the intricacies of power domination-submission. Dominative rules and practices

⁷² Nancy E. Dowd, “Asking the Man Question: Masculinities Analysis and Feminist Theory,” *Harvard Journal of Law and Gender* 33 (2010): 415, fn 1; see also Nancy E. Dowd, *The Man Question: Male Subordination and Privilege* (New York, N.Y: New York University Press, 2010), 66–67.

⁷³ Bourdieu, *Masculine Domination*, 66-67.

can be unveiled by asking the 'woman question,' the 'man question,' and 'many other' questions beyond the binary of femininity *versus* masculinity.⁷⁴ This chapter is necessarily incomplete since it addresses mainly the masculine-feminine coupling and oppositions. But there is still a lot of research to be done. Non-binary experiences of gender would require a more in-depth analysis, considering the victimisation of queer subjectivities by international adjudicators, the positioning of queer perpetrators, as well as the shape of pleasure beyond the binary.

In any case, the division between victims and perpetrators within gendered systems becomes rather nuanced. It is difficult, if not impossible, to ascribe one gender instead of the other to a certain category, either on the good side or on the bad side. I do not suggest that there should be no division between victims and perpetrators but that the existing line is movable and open to internal renegotiations. Rather than a wall, this is a porous frontier, where transmissions, exchanges and contaminations occur between the two sides. Each side maintains some characteristics from its dependency on the other side. Domination preserves the seeds of subordination in the same way that no hegemonic model can survive without non-conforming forms of masculinity and femininity. All together, these interactions come to mould the perception and construction of victimisation in a certain society. In this light, the next section addresses the role which femininities play in producing perils.

4.2. Dangerous Femininities

Women can be 'mothers, monsters, or whores' at different times in their life.⁷⁵ It may be true that women are structurally and individually *in* danger but it is equally true that some women can individually be *a* danger. One thing should be clear: saying that women can harm (men) is

⁷⁴ Rahul Rao, "Queer Questions," *International Feminist Journal of Politics* 16, no. 2 (April 3, 2014): 199–217, <https://doi.org/10.1080/14616742.2014.901817>.

⁷⁵ Laura Sjoberg and Caron E. Gentry, *Mothers, Monsters, Whores: Women's Violence in Global Politics* (London: Zed Books, 2007).

not the same as saying that women are not harmed (by men). This section is about abusive women and women who have pleasure.

Pleasure first. Over the decades, the CEDAW Committee has expanded its interpretation of women's right to sexual health. In this development, however, the Committee has mainly adopted the perspective of the victimisation of girls and women, as objects of the others' pleasure. For instance, General Recommendations 19, 24 and 35, dealing respectively with violence against women, women and health, and gender-based violence against women, seem to neglect the existence of girls' and women's interest in pleasure and its expression.⁷⁶ The three documents are key to the development of an interpretive body on women's rights by (1) establishing a non-discrimination standard in the context of sexual health services for women and girls, regardless of their marital status;⁷⁷ (2) requiring conditions under which women can refuse sex if the absence of precautions makes sexual intercourse unsafe;⁷⁸ and (3) conceptualising a gender-specific application of the principle of due diligence in international law in cases of state accountability for non-state actor abuses.⁷⁹ Yet, these General Recommendations do not portray girls and women as agents of desire who actively seek pleasure. Indeed, the interpretive documents do not discuss same-sex interactions among girls and women, with the exception of General Recommendation 35, where 'lesbian' is nothing more than one of the words of the ritual formula 'lesbian, bisexual, transgender or intersex'.⁸⁰ Moreover, in these documents, the CEDAW Committee fails to address the different ways in which women gender themselves and other women.

⁷⁶ CEDAW Committee, *General Recommendation No. 19: Violence against Women*, UN Doc HRI/GEN/1/Rev.9 (Vol. II) (1992); CEDAW Committee, *General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, UN Doc HRI/GEN/1/Rev.9 (Vol. II) (1999); CEDAW Committee, *General Recommendation No. 35: Gender-Based Violence against Women, Updating General Recommendation No. 19*, UN Doc CEDAW/C/GC/35 (2017).

⁷⁷ CEDAW Committee, *General Recommendation No. 19*, paras. 1, 6-7(g), 19-20; CEDAW Committee, *General Recommendation No. 24*, para. 21; CEDAW Committee, *General Recommendation No. 35*, paras. 10-11.

⁷⁸ CEDAW Committee, *General Recommendation No. 24*, para. 18.

⁷⁹ CEDAW Committee, *General Recommendation No. 24*, para. 15; CEDAW Committee, *General Recommendation No. 35*, para. 24(a)-(b).

⁸⁰ CEDAW Committee, *General Recommendation No. 35*, paras. 12, 31(a).

The identification of pleasure in the law is one side of the coin of affirmative femininities. Femininity is affirmative where it can express itself. There are different modes of expression: femininity may be performed as an act of pleasure, as well as an act of harm. Female victimisation, as present in the asymmetrical scheme of [m > f], does not account for the affirmative nature of femininities in its twofold declination. Both harm and pleasure can indeed be diversely lived in oneself and manifested to the other. The metaphor of the two sides of the same coin aids the understanding of the necessary existence of both configurations of femininity. Nevertheless, pain constitutes pleasure for some people. Pleasure and danger can become pleasure-danger with the line between the two fading more or less according to personal inclinations.

Turning now to abusive women. Dangerous femininity has been the protagonist of active torture and (sexual) humiliation in recent decades. A number of sources of international human rights law recognise that women can commit abuses. For example, the UN Committee on Economic, Social and Cultural Rights (CESCR) addresses sex discrimination in line with the symmetrical model of men and women in General Comments 16 and 20.⁸¹ This interpretation is not, however, consistent throughout the two documents as women are seen to be 'primarily' and 'generally' disadvantaged.⁸² In contrast, the UN Committee Against Torture (CAT) stands out among UN human rights treaty bodies in that it disrupts the [m/f] dualism and the [m > f] asymmetry. The Committee refers to both women and men as potential victims of torture or ill-treatment, further emphasising the need for an intersectional approach to appreciate intra-group power differentials. Non-conformity with socially determined gender roles is framed as the reason for abuses in that shifting identities among adults and youngsters are the target of violence and ill-treatment. By embracing performativity, the CAT deals with vulnerability from

⁸¹ CESCR, *General Comment No 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/2005/4 (2005); CESCR, *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2)*, UN Doc E/C.12/GC/20 (2009).

⁸² CESCR, *General Comment No 16*, paras. 12, 26–27; Dianne Otto, "Towards Rethinking Sex/Gender Dualism and Asymmetry," 208; CESCR, *General Comment No 20*, para. 20.

the perspective of multiple actual or perceived modes of gendered expression and identification.⁸³

In doing so, the CAT has followed a similar approach to the UN Special Procedure of the UN Special Rapporteur on Counter-Terrorism and Human Rights. The former Special Rapporteur Martin Scheinin (2005-2011) challenged dualism through the creative application of gender identity and sexual orientation, making gender a shifting organising category:

Gender is not synonymous with women but rather encompasses the social constructions that underlie how women's and men's roles, functions and responsibilities, including in relation to sexual orientation and gender identity, are defined and understood.⁸⁴

However, this definition found no institutional continuity. Although the subsequent Special Rapporteurs, Ben Emmerson (2011-2017) and Fionnuala Ní Aoláin (2017-present) have not embraced this expansive definition, reports by the latter abandon a number of stereotypes on asymmetrical female victimisation [m > f]. At the outset of her mandate in 2017, Fionnuala Ní Aoláin explained that the equation women = victims is a gender stereotype;⁸⁵ that women can be perpetrators of terrorist violence;⁸⁶ that masculinities (but not femininities) and gender identity are indispensable categories to integrate a gender perspective into the work of the Special Rapporteur by going beyond [gender = women].⁸⁷ Usually, women enter the stage of counter-terrorism in playing the roles of terrorists' mothers, sisters, wives and daughters. Otherwise, they meet the archetype of the 'ideal victim' seen above: the vulnerable and weak

⁸³ CAT, *General Comment No 2: Implementation of Article 2 by States Parties*, "UN Doc CAT/C/GC/2 (2008), para. 22.

⁸⁴ UNGA, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, UN Doc A/64/211 (2009), para. 20.

⁸⁵ UNGA, *2017 Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, para. 53.

⁸⁶ UNGA, *2017 Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, para. 29; cf Jayne Huckerby and Fionnuala Ní Aoláin, "Gendering Counterterrorism: How to, and How Not To," *Just Security* (blog), May 1 2018, <https://www.justsecurity.org/55522/gendering-counterterrorism-to/>.

⁸⁷ UNGA, *2017 Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, paras. 31–32.

individual subject to the cruelty of a male terrorist. Terroristic violence is therefore highly gendered in the depiction of international harms. The Special Rapporteur moreover stated that women are rarely considered perpetrators even if the violence they commit is increasingly visible, in cases such as female suicide bombers and women occupying leadership positions in terrorist organisations.⁸⁸ For example, a recent study of Boko Haram's suicide-bombing attacks showed that, between 2011 and 2017, at least fifty-six per cent of the bombers were women.⁸⁹

Further examples of women perpetrators can be found in the violence at the hands of women interrogators, prison commanders and guards at Abu Ghraib and Guantánamo; female Rwandan Hutu officials ordering atrocities; and Hindu women goading men to mutilate and rape Muslim women in their communities in Gujarat.⁹⁰ Child abuse in peacetime is another area where harmful femininity is performed. Physical abuse disproportionately targets boys who are mainly battered by women.⁹¹ Agents of harmful femininity can be heterosexual women [f > m], lesbian women and bisexual women in same-sex relationships [f > f], on their own or as co-offenders. The malleability of gender can be well understood in this transformation of the asymmetrical stance of masculine domination over feminine subordination into feminine complicity in sexualised (religionised and racialised) violence and masculine victimisation.

Nevertheless, the mother and the wife still maintain the monopoly on the imaginaries of femininity. The full recognition of a dangerous connotation of femininity is difficult to achieve. As in the case of men-targeting violence, underreporting has specific causes. The origins of the

⁸⁸ UNGA, *2017 Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, para. 29.

⁸⁹ See Jason Warner and Hilary Matfess, "Exploding Stereotypes: The Unexpected Operational and Demographic Characteristics of Boko Haram's Suicide Bombers" (West Point: Combating Terrorism Centre, 2017), 22–32; on the rise in numbers of suicide attacks committed by women in the Middle East, particularly Palestine and Iran, as well as the changing notions of masculinities and feminisation of martyrdom, see Roja Fazaeli, "Martyred Women and Humiliated Men," in *Exploring Masculinities: Feminist Legal Theory Reflections*, ed. Martha Fineman and Michael Thomson (Farnham: Ashgate, 2013), 39–53.

⁹⁰ See Corrêa, Petchesky, and Parker, *Sexuality, Health and Human Rights*, 197.

⁹¹ Dowd, "Asking the Man Question," 422.

invisibility of noxious femininity are sometimes complementary to those addressed above in the context of masculine victimisation. Here again, a number of stereotypes constitute obstacles to the disclosure of the violence, including:

- a) Women are weak and vulnerable, and therefore nonthreatening.⁹²
- b) Women do not have a penis, so they are physically unable to commit harmful acts; 'no penis, no violence'. The mantra seems to be that man-driven penetration is the only harmful sexual act which could be performed.⁹³
- c) A 'real' man always wishes to have sex with a woman. Behind the reluctance to understand female-perpetrated violence is the ideal of a perpetual heteronormative welcoming by men of any opportunity of sex with women. In such cases, danger is misperceived as pleasure under any circumstances:⁹⁴ from the external and the internal perspectives.⁹⁵

The consequences of these stereotyped portrayals of femininity are multiple. These relate to the invisibility of situations where individual women may occupy privileged positions compared to not only other women but also marginalised men.⁹⁶ For example, in cases of violence against men perpetrated by women, the idea of violent femininity is so unimaginable that the actual roles are commonly reversed.⁹⁷

Men are held responsible for the abuse because of the dominative attributes stereotypically associated with their gender, and particularly with their penis in cases of rape. In different

⁹² On stereotypical understandings of women as sexually harmless, particularly the misconceptions held by professionals in fields of law, public health, mental health and social work, see Lara Stemple, Andrew Flores, and Ilan H Meyer, "Sexual Victimization Perpetrated by Women: Federal Data Reveal Surprising Prevalence," *Aggression and Violent Behavior* 34 (2017): 309, <https://doi.org/10.1016/j.avb.2016.09.007>.

⁹³ Stemple, Flores, and Meyer, "Sexual Victimization," 308.

⁹⁴ See Stemple, Flores, and Meyer, "Sexual Victimization," 308.

⁹⁵ See Michelle Davies and Paul Rogers, "Perceptions of Male Victims in Depicted Sexual Assaults: A Review of the Literature," *Aggression and Violent Behavior* 11, no. 4 (July 2006): 372, <https://doi.org/10.1016/j.avb.2006.01.002>.

⁹⁶ Martha Albertson Fineman, "Feminism and Masculinities: Questioning the Lure of Multiple Identities," in *Exploring Masculinities: Feminist Legal Theory Reflections*, ed. Martha Albertson Fineman and Michael Thomson (Farnham: Ashgate, 2013), 19.

⁹⁷ Stemple, Flores, and Meyer, "Sexual Victimization," 302.

situations, namely in the context of intimate relationships between lesbian and/or bisexual women, heteronormativity is the obstacle to the revelation of the violence suffered – some sex seems better than other, indeed.⁹⁸ Lori Girshick decisively states that ‘to admit that woman-to-woman sexual violence exists means to accept that women engage in sexual behaviour with other women’.⁹⁹ Women may not report the violation because they are afraid to come out as lesbian or bisexual, and thereby be subject to the heteronormative stigma.

Prevailing interpretations of human rights law reflect the scheme of [m > f] where masculinity is harmful, and femininity is harmless. The above illustrative examination has, instead, stressed that danger and pleasure, masculinity and femininity, intermingle to create an oft-unpredictable grid of dominative and submissive postures.

5. Conclusion

I have provided some renewed configurations of gendered power differentials. I have challenged three narratives that prevail in international human rights law, by disrupting the dualistic [m/f], the asymmetrical [m > f] and the metonymic [gender = women]. In doing so, I have also illustrated that a more complex network of interactions exists, connecting positionalities of domination and subordination with masculine and feminine performances in manifold ways. Dominative and subordinate roles on the one hand, and femininities and masculinities on the other, intersect to create an infinite range of possible interpretations of gendered subjectivities and human rights configurations. Therefore, the phenomenology of gender as a socio-legal category relates intimately to the floating nature of the power attached to it. Submission and domination are, indeed, two different but interdependent modes of manifestation of gendered positionalities. Human rights analyses should not prescind from this plurality of intersubjective meanings.

⁹⁸ See Gayle Rubin, "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality," in *Culture, Society and Sexuality*, ed. Richard Parker and Peter Aggleton (London, New York: Routledge 2006) 152-155.

⁹⁹ Lori B. Girshick, "No Sugar, No Spice: Reflections on Research on Woman-to-Woman Sexual Violence," *Violence Against Women* 8, no. 12 (2002): 1502, <https://doi.org/10.1177/107780102237967>.