Sex and Gender in International Human Rights Law through the Prism of the ‘Women’ Category in Recent Case Law

Ekaterina Yahyaoui Krivenko*

ABSTRACT

This article problematises the current understanding of sex and gender in international human rights law, especially as it manifests itself in its treatment of the ‘women’ category. The problematic nature of the current state of international human rights law in this regard came recently to light in two cases: the majority judgment in the YvFrance case of the European Court for Human Rights and the dissenting opinions in the Vicky Hernández case of the Inter-American Court of Human Rights. Arguments and statements emerging from these two authoritative recent sources coming from two arguably progressive jurisdictions exemplify continuing inadequacies of the dominant approach. Through a critical engagement with these arguments, supplemented by the discussion of the broader framework of international human rights law, the article not only points out the precise nature of the existing shortcomings but also formulates strategies for overcoming them.

KEYWORDS: sex, gender, women, YvFrance, Vicky Hernández et al. v Honduras

1. INTRODUCTION

International human rights law (IHRL) has a long-standing tradition of protecting women’s rights whether at the universal or regional levels. Within the structure and operation of the United Nations (UN), this is mirrored by the preoccupation with gender mainstreaming and the ensuing creation of the UN Women.¹ In all these initiatives, the concept of a ‘woman’ was taken for granted and regarded as self-explanatory. The problematic nature of this assumption came to light recently with the judgment of the Inter-American Court of Human Rights (IACtHR) in the Vicky Hernández et al. v Honduras case² as well as the judgment of the European Court of Human Rights (ECtHR) in the YvFrance case.³ Both cases are different in that one deals with

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¹ UNGA Resolution, System-Wide Coherence, A/RES/64/289, 2 July 2010.
² IACtHR Series C 422 (2021).
³ Application No 76888/17, Judgment, 31 January 2023. At the time of writing only available in French. All translations are my own.

* Associate Professor of Human Rights, The Irish Centre for Human Rights, School of Law, University of Galway, Ireland. Email: ekaterina.yahyaoui@universityofgalway.ie. I express my deepest gratitude to the anonymous reviewers.
transgender while the other with intersex individuals. They also emerge within distinct regional human rights systems. However, they raise the fundamental question about sustainability of the currently dominant reliance of IHRL on the men/women and sex/gender binaries from two complementary perspectives. They also put the role of international law and more specifically the existing international human rights framework in sustaining these binaries into a sharper light raising the question of human rights’ potential for moving beyond these binaries. Using both cases as complementary lenses, this article critically engages with arguments of the defenders of the binary vision of sex/gender as exemplified by arguments of dissenting judges in the Vicky Hernández case and the majority judgment in the Y v France case. It is paramount to examine the arguments either directly defending or indirectly sustaining the binary vision of sex/gender through the prism of these two recent cases because, emerging from bodies and individuals tasked with the defence of human rights, they exemplify insufficiencies of international human rights framework in its current form. Several arguments that the article advances have already been made by others over the past decade. However, within the current context marked by heated and not always best-informed debates, a careful critical engagement with the existing arguments is indispensable. Based on this critical engagement, the article argues that IHRL cannot fulfil its promise of equal rights to all ‘without distinction of any kind’ while maintaining sex/gender and men/women binaries even if it adds the discourse on sexual orientation and gender identity to its current framework. The article proposes two moves that can be initiated within the existing framework to shake these binaries and, as a result, pave the way for a more fundamental systemic change.

The article first summarises each of the judgements focusing specifically on elements indispensable for the development of the argument. It then moves on to critically review IHRL’s approach to sex/gender. The next three sections of the article analyse arguments defending or sustaining the binary vision of sex/gender emerging from the dissent in the Vicky Hernández case as the most recent version of these arguments, namely, the deployment of the ‘women’ category, the question of feminism and violence against women and finally the issue of treaty interpretation. The analysis uses the majority position in the Y v France case to shine additional light on deficiencies of arguments presented in the dissent in the Vicky Hernández case. The ultimate section is dedicated to the discussion of two moves that can be deployed within the existing system to destabilise the sex/gender binary and thus prepare the ground for its dissolution.

2. RECENT JUDGMENTS

A. Vicky Hernández Case

Vicky Hernández was a trans woman who died from a gunshot to her head on the streets of San Pedro Sula in June 2009. The death occurred against the background of a coup d’état in Honduras, during a curfew when the streets were closed to all but military and police forces. The case raises important legal issues related to the obligation of the state to investigate and prosecute as well as not only state responsibility for arbitrary or extrajudicial killings but also

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4 The different historical trajectories of these two systems certainly played a role in outcomes in these cases. However, for reasons of space, this point cannot be addressed here.
5 When referring to IHRL documents, the article refers to either sex or gender depending on the usage of terms within these contexts. However, one of the main arguments of this article is the impossibility to separate the two within the reality of human existence. Therefore, when criticising the existing human rights framework or developing proposals, the article refers to sex/gender. This approach is further substantiated in Section 3.
7 Facts of the case are presented at paras 28–59 of the judgment; circumstances surrounding her death at paras 40–47 (supra n 2).
8 Ibid. at paras 36–39 and 42.
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protection against discrimination. Within the context of this article, only the later argument is pertinent and discussed further. Various human rights bodies and experts recorded a pattern of discrimination and violence against members of LGBTIQ community in Honduras during the relevant time.\(^9\) The reports available to the Court highlighted particular vulnerability of trans persons.\(^{10}\) In this context of generalised violence and prejudice, the death of Vicky Hernández as well as its inefficient investigation is attributed by the Court not only to the general functioning of the state of Honduras or the peculiarities of the case but also to the discriminatory treatment of trans people in Honduras at the relevant time.\(^{11}\) The inclusion of gender identity as one of the grounds for discrimination into the general equality guarantee of Article 1.1 of the American Convention on Human Rights did not raise any difficulties.\(^{12}\) In addition to the general guarantee of non-discrimination, both the petitioners and several authors of amicus curiae briefs invoked the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (‘Belém do Pará Convention’).\(^{13}\) The Court in its judgment agreed with the petitioners and found that state authorities violated articles 7(a) and 7(b) of the said Convention.\(^{14}\) The Court accepted the applicability of the Belém do Pará Convention to trans women based on the Convention’s definition of violence against women that identifies gender as an operative feature of violence.\(^{15}\) To reinforce its reasoning, it referred not only to developments within the Inter-American system but also to the universal soft law documents such as general recommendations of the Committee on the Elimination of Discrimination Against Women as well as a report of the UN High Commissioner for Human Rights.\(^{16}\) With regard to the former, the IACtHR highlighted the Committee’s preference for the term ‘gender-based violence against women’ as a more precise term than ‘violence against women’.\(^{17}\) In the report of the High Commissioner, the Court highlighted the description of gender-based violence as ‘being driven by a desire to punish those seen as defying gender norms’.\(^{18}\)

While all judges agreed on the outcome of the case which found in favour of Vicky Hernández, two judges expressed partially dissenting opinions disagreeing with the application of the Belém do Pará Convention to the case.\(^{19}\) In the opinion of these two judges, a convention that aims at protecting women does not apply to trans women. Both judges insist, though in different ways, on the obviousness of the ‘women’ category as well as the possibility to clearly demarcate sex as biological from gender as social. In the dissenting opinion of one of the judges, a particular vision

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\(^9\) A summary of these reports is available ibid. at paras 30–35.
\(^{10}\) Ibid. at para 31.
\(^{11}\) Ibid. at paras 100–102 in particular.
\(^{12}\) See ibid. at para 67. The case is situated in the long trajectory of the IACtHR’s affirmation of rights of people with diverse expressions of sexuality and gender. Already in 2017, the Court stated that gender identity is one of the protected characteristics under article 1(1) of the American Convention on Human Rights (IACtHR), Gender Identity, and Equality and Non-Discrimination with Regard to Same-Sex Couples. State Obligations in Relation to Change of Name, Gender Identity, and Rights Deriving from a Relationship between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24 in relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, 24 November 2015, Series A No 24, at para 68.
\(^{14}\) Supra n 2 at paras 126–136.
\(^{15}\) Article 1 of the Convention states: ‘For the purposes of this Convention, violence against women shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere’. In interpreting this article in its previous case law, the Court already highlighted the role of power inherent in the concept of gender centring violence as being based on a system of patriarchal domination deeply rooted in gender stereotypes, a point which re-emerged in the Court’s reasoning in the Vicky Hernández case. See supra n 2 at para 128 and references to previous case law in footnote 145 at 33.
\(^{16}\) Ibid. at paras 131 and 128, respectively.
\(^{17}\) This document and its relevance to the argument is discussed in Section 5.
\(^{19}\) Judge Odio Benito and Judge Vio Grossi.
of feminism and of gender-based violence relevant to the argument developed in this article is also produced. Arguments of these dissenting judges form the basis for further discussion since they are enigmatic examples of the underlying presumptions of the current IHRL approach to sex/gender as demonstrated in Section 3.

B. Y v France Case

In the Y v France case, the ECtHR rejected the contention of the intersex claimant that state’s unwillingness to add a neutral or third gender marker on the official documentation constitutes an undue interference with the right to privacy.

The claimant clearly established that their biological condition did not allow a classification as a man or as a woman. For example, the judgment highlights that a medical examination late in life established that any reproductive organs whether male or female or gonads where absent. Despite this, the applicant was labelled as ‘male’ in all official documentation and even had to undergo a testosterone-based treatment to artificially produce a more male appearance. This incongruity between the applicant’s biological body and society’s perception of the applicant, especially as imposed by the official label ‘male’, led to a constant state of psychological distress and suffering.

The Court fully recognised the applicant’s positionality as neither a male nor a female as well as the significance of the burden caused to the applicant by this mismatch between the applicant’s identity and the official ‘male’ label. In that sense, the suffering of the applicant was fully acknowledged. However, the judgment denied existence of a violation of Article 8.

The core discussion evolved around the question of whether the state’s obligation implicated in this case was of a positive or of a negative nature and the ensuing scope of the margin of appreciation of the state. The applicant argued that the non-recognition of the erroneous nature of the sex indicated on their documents constitutes an undue interference by the state into their right to private life and thus required an analysis from the angle of the negative obligation of the state to abstain from interfering.

In essence, the applicant affirmed that their identity that is neither male nor female and thus the very reality of their existence was simply suppressed by the state through maintenance of a system based on the male/female binary.

The Court, in the final analysis sided with the state preferring to view the situation from the angle of state’s positive obligations. Contrary to the applicant, the Court viewed the situation as presenting a case of a gap in legislation or state inaction instead of a purposeful imposition by the state of a system not corresponding to reality. Within the context of this positive obligation, the Court accorded to France a large margin of appreciation and thus was able to affirm the absence of a violation of applicant’s right to private life despite recognising their suffering and acknowledging a discrepancy between reality and French legislation.

As discussed later in this article, the arguments utilised in justifying the state’s position, the large margin of appreciation and ultimately the Court’s ruling are revealing of several incongruities of the male/female binary and its blatant artificiality.

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20 Supra n 3 at paras 6–9.
21 Ibid. at para 5.
22 Ibid. at paras 10–11.
23 Ibid. at paras 42, 43.
24 Ibid. at paras 82, 83.
25 One judge, namely, judge Šimáčková, issued a dissenting opinion.
26 Supra n 3 at para 50.
27 Ibid. at paras 49–54.
28 Ibid. at para 69.
29 Ibid. at paras 80, 92.
3. SEX/GENDER AND IHRL

The UN Charter and the UDHR, the foundational instruments of the contemporary system of human rights protection, utilise the term ‘sex’ when addressing the issue of discrimination.30 Adopted in 1966, the two Covenants also employ the language of sex when enumerating discrimination grounds;31 some provisions of the Covenants expressly refer to the equal marriage rights of men and women.32 Thus, in this period of historical development of human rights, international law equated the concept of sex to the binary biological vision of humans as being neatly classifiable as men or women exclusively. These origins of IHRL in a biological certainty of the binary significantly impacted subsequent developments. When the concept of gender as a social perception of sex roles slowly appeared on the human rights agenda, it had to position itself against the already ossified biological certainty of the male/female binary. As a result, gender also became a binary certainty of men/women duality. However, it also firmly entrenched itself as clearly separate from biology.33

The inadequacy of this vision of both sex and gender as well as the binary men/women duality was demonstratable through the lens of medical and broader social knowledge from the early days of the contemporary international system of human rights protection. As revealed in my previous work, IHRL was always behind the latest developments not only in medical but also in broader social sciences.34 According to my estimations, this equates to a gap of at least 20 years between the latest developments in medical or broader social sciences and the IHRL’s approach to sex/gender. The reliance on knowledge emerging from science and medicine in this article should not be interpreted as an unconditional acceptance of any statement or claim that either medical or broader scientific community made in the past or might be making in the future, since parts of this community were historically complicit in the stigmatisation and discrimination of individuals not fitting the dominant binary vision of sex/gender and even in the creation and sustenance of the binaries.35 Moreover, the use of scientific knowledge in legal litigation in relation to sex/gender remains a contested issue.36 Nonetheless, it is important to acknowledge, as this article demonstrates, that a timely, deeper and more nuanced engagement with knowledge produced by biomedicine, especially if it is operationalised in tandem with latest findings from social science, can assist IHRL with moving faster towards overcoming of the sex/gender binary. For example, at the time of drafting of the UDHR, the concept of gender as a social dimension of sex was already widely documented by anthropologists and representatives of other disciplines working across culturally diverse societies.37 The term ‘gender’ itself became popularised in

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30 Charter of the United Nations 1945, 1 UNTS XVI Article 1(3); UDHR supra n 7 Article 2.
31 International Covenant on Civil and Political Rights (ICCPR)1966, 999 UNTS 171 Article 2(1) and International Covenant on Economic Social and Cultural Rights 1966, 993 UNTS 3 Article 2(2).
32 See, e.g. Article 16 UDHR (supra n 7) or art 23 ICCPR (supra n 32).
34 Ibid.
36 Most recently, e.g. Yang, ‘Per Scientiam ad Justiciam? The Mythical Role of Emancipatory Science in the Decriminalisation of Same-Sex Sexual Conduct Through Constitutional Litigation’ (2023) 49 Australian Feminist Law Journal http://dx.doi.org/10.1080/13200968.2023.2259957; see also Holzer supra n 36.
the sexology and psychology in the 1950s further problematising the relationship between biological determinants and social factors well ahead of the drafting of the two Covenants. However, all these developments were not taken into account by the emerging norms of IHRL. It is only in the 1970s, when the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was being drafted, that the discussions about the artificial nature of certain social roles ascribed to women emerged at the human rights arena. This is reflected especially in Article 5 CEDAW, which requires states to eliminate social and cultural patterns of conduct based on ‘the idea of the inferiority or the superiority of either of the sexes’. In this example, it is also visible how the social dimension of sex is simply superimposed on the already pre-existing biological binary vision of sex. This vision of social roles being imposed on the biological sex is reminiscent of liberal feminists’ ideas that can be traced at least to the first half of the twentieth century but by the time of the drafting of the CEDAW were already being overtaken by radical feminists who advocated for a significantly more advanced vision of sex and gender.

Despite these developments recognising the social dimension of sex, the terminology of gender itself, which as mentioned appeared in the study of sex already in the 1950s, remained absent in the UN work on IHRL until late 1980s. The first uses of the term ‘gender’ in this particular sense in official UN documents occurred because states begun using the terminology of gender in their discussion of periodic reports bringing this terminology from their domestic systems. The CEDAW Committee itself used the term ‘gender’ for the first time in 1989. In this first deployment of ‘gender’, the Committee still equates gender with biological certainty of men/women duality (or sex if we use the earlier terminology) since it recommended states to produce data that are ‘disaggregated according to gender’. A more profound engagement with the term ‘gender’ and its meanings within IHRL occurred only in the 1990s. This timeline is symptomatic of IHRL’s disconnect not only from medical science but also broader social science and feminism where the term ‘gender’ became widespread with the growth of radical feminism and at least since the late 1970s became more widely used than the term ‘sex’.

37 See, e.g. Durkheim, ‘La prohibition de l’inceste et ses origines’ (1896–1897) 1 L’Année sociologique 1. In this work, Durkheim even suggests that the very duality of men and women is not required by biology but is determined by social factors. See also Mead, Male and Female: A Study of Sexes in a Changing World (1949). The introduction of the term ‘gender’ in this context was pioneered by John Money and his collaborators John and Joan Hampson. The first article where they employed the terminology of gender is Money et al., ‘Hermaphroditism: Recommendations Concerning Assignment of Sex, Change of Sex, and Psychologic Management’ (1955) 97 Bulletin of the Johns Hopkins Hospital 284.

38 The introduction of the term ‘gender’ in this context was pioneered by John Money and his collaborators John and Joan Hampson. The term ‘gender’ before being applied to the context of study of human sex was most widely deployed in the linguistic sense to designate classes of nouns and pronouns such as masculine, feminine, neuter or common as well as more broadly to designate other classes of words that refers back to the meaning of the Latin word genus signifying ‘race’ or ‘kind’. See Oxford English Dictionary, ‘Gender’, sense 1 (a) and (b).


40 Article 5(1). Another element dealing with the social dimension of sex in the CEDAW is the distinction between maternity as a biological function and parenting as a social and thus shared function: see Articles 5(2), 11(2), 16(1)(d).

41 Perhaps the most famous quote from the era of liberal feminism expressing this idea is ‘one is not born, but rather becomes, a woman’ from Simone de Beauvoir’s The Second Sex, which was first published in France in 1949: De Beauvoir, The Second Sex (tr Parshley 1953) 273. On radical feminism, see n 50 and the accompanying text.

42 For a history of feminism, see, e.g. Hannam, Feminism (2007).

43 See my further elaboration on this point in supra n 34, at 48–49.

44 These references occur in the 1988 reporting cycle: see CEDAW, 7th session, Summary Records of the 118th meeting, CEDAW/C/SR.118, 1 March 1988, at 14 and Summary Records of the 111th meeting, CEDAW/C/SR.111, 25 February 1988, at 8. Earlier UN documents where the term ‘gender’ appears use it in the traditional sense described in the previous footnote.


46 Ibid.

47 See my further elaboration on this point in supra n 34, at 48–49.

The introduction of the terminology of gender had a great potential for transforming IHRL’s approach to sex/gender like the case of radical feminist thinking demonstrates where the terminology of gender and a deep reflection on the consequences of this terminological change led some radical feminists to go beyond liberal feminists’ acceptance of the supposedly biological obviousness of the category of women.\textsuperscript{49} However, being inscribed by IHRL into an already-rigid biological certainty of the men/women binary and given IHRL’s disconnect from medicine and broader social sciences, it resulted in an extremely simplistic and reductive vision of the interaction between social and biological factors. Gender medicine as a dedicated branch of research that emerged in 1980s demonstrated that social and biological factors interact in extremely complex ways: social shapes biological and vice versa so that at times, it is impossible to clearly state whether a particular feature of our bodies while being reflected in their functioning is an immutable biological fact or is due to social conditioning over years.\textsuperscript{50} This complexity revealed by gender medicine is compounded by the complexity of biological determinants of sex and sex/gender differentiation in humans. While the foundational binary distinction indeed underlies all sex/gender differentiation in humans, the outcome of this binary differentiation in an individual human being is not a simplistic men/women binary but an extremely large, potentially infinite spectrum of variations of this binary code. When we attempt to reduce this spectrum to the men/women binary, we make arbitrary decisions that result in harm through the pathologisation of bodily and psycho-social diversity. To illustrate this point, we can refer to an authoritative recent study aimed at developing better measures of sex, gender and sexual orientation.

This study was completed in 2022 and thus, reflecting the latest findings in relevant medical and biological science disciplines, is based on expertise of leading specialists in such disciplines as medicine, psychology, sociology and statistics. Discussing components related to the biological make-up of our bodies the study states:

These classifications in government records are only rough categorical proxies for more detailed and often continuous measures of sex traits, including aspects of anatomy (such as internal organs or external genitalia), physiology (such as hormone milieu), or genetics (such as chromosomes). Studies of sex traits show that human variation is not fully captured by a male–female binary distinction.\textsuperscript{51} This multiplicity of human bodies’ variations is easily dismissed by some as a disease or an abnormality. However, not only did the medical study of human sex traits move away from pathologising language, e.g. by replacing the term ‘disorders of sex development’ with the term ‘differences of sex development’\textsuperscript{52} but also recent studies of sex traits revealed that many

\textsuperscript{49} See in particular the work of Christine Delphy who already in the late 1970s deplored the dominant minimalist understanding of gender as a social role based on sex as well as its constant association with sex as a biological foundation and insisted that whatever anatomical differences exist, they are made relevant only through a social practice (Delphy, \textit{Close to Home, A Materialist Analysis of Women’s Oppression} (1986) at 24–25, 144–145) a proposition, which many people identifying as feminists have difficulty accepting even today (see, e.g. Bassi, LaFleur, ‘Introduction: TERFs, Gender-Critical Movements, and Postfascist Feminisms’ (2022) \textit{9 Transgender Studies Quarterly} 311 and other articles in this special issue).

\textsuperscript{50} For an example, see contributions in Klinge & Wiesemann (eds) \textit{Sex and Gender in Biomedicine: Theories, Methodologies, Results} (2010). The importance of distinguishing sex and gender in some contexts is also highlighted in the recent authoritative study: National Academies of Sciences, Engineering, and Medicine, \textit{Measuring Sex, Gender Identity, and Sexual Orientation} (2022) 39–43. However, the study also emphasises that these are categories created to measure and identify certain characteristics of humans for certain purposes but in the reality of human existence, they remain intertwined: ‘Both sex and gender and their interactions can influence molecular and cellular processes, clinical characteristics, as well as health and disease outcomes’ (ibid. at 43).

\textsuperscript{51} Ibid. at 104. References omitted.

\textsuperscript{52} This is visible in any literature review of academic work on the topic over time as well as on official webpages of governmental health services. See also Intersex Human Rights Australia, Joint Statement on the International Classification of Diseases-11 (2019), available at www.ihra.org.au/35299/joint-statement-icd-11/ [last accessed 21 June 2023] and Johnson et al.,
individuals considering themselves as simply male or female are bearers of intersex traits without knowing it:

Biologically, intersex variations are highly heterogeneous, can involve any sex trait, and may not be apparent from an external examination. Most people with intersex traits are assigned male or female sex at birth. The majority of people with intersex traits are not identified as having an intersex variation until later in life—if at all.\footnote{National Academies of Sciences, supra n 51 at 15.}

Thus, intersex conditions are not as exceptional as some perceive them. Finally, the recognition of this diversity does not stop at the level of our bodies; it affects the psycho-social aspect of our existence too. The authors of the manual affirm that there is a "long-standing line of research in psychology that demonstrates femininity and masculinity should not be seen as polar "opposites" because people can also be low on both scales, high on both scales, or somewhere in between".\footnote{Ibid. at 104.} This means that the male/female binary as a certainty of assignment of each individual human being to either a male or a female category is not only wrong biologically but also unsustainable at the social level since psychologically, we also often do not neatly align with one of the binary pairs to the exclusion of the other.

Unfortunately, until today, despite many positive developments, IHRL has not fully recognised this complex reality and, as a system, might be unable to fully accommodate it if it continues to operate on the assumption of the obviousness and naturalness of the male/female and sex/gender binaries. The addition of the discourse on sexual orientation and gender identity into the IHRL landscape provides only a partial relief to this deficiency. The main problem relates to the continuing operationalisation of discrete categories mapped onto a pre-existing binary structure into which the complexity of individual experiences has to fit in order to be recognised.\footnote{One of the earliest critiques is Waites, ‘Critique of “Sexual Orientation” and “Gender identity” in Human Rights Discourse: Global Queer Politics Beyond the Yogyakarta Principles’ (2009) 15 Contemporary Politics 137.} Such a picture not only does not correspond to the reality of many individual experiences of sex/gender but also, as demonstrated by several authors, these clearly defined categories emerging from the historical experience with sex/gender and sexuality in the West, which itself can be described as a history of imposition of the binary vision of humanity, do not necessarily correspond to the experiences of people in other parts of the world.\footnote{See, e.g. contributions to Herdt (ed) Third Sex, Third Gender: Beyond Sexual Dimorphism in Culture and History (2020), which discuss non-binary sex/gender in the history of the West and in non-Western cultures. For a historical demonstration of the construction of the binary vision of sex in the West, see Dreger, Hermaphrodites and the Medical Invention of Sex (2000). From human rights and legal perspectives, see, e.g. McGill, ‘SOGI … So What? Sexual Orientation, Gender Identity and Human Rights Discourse at the United Nations’ (2014) 3 Canadian Journal of Human Rights 1, at 25–31 and Gonzalez-Salzberg, Perisanidi, ‘Belonging Beyond the Binary: From Byzantine Eunuchs and Indian Hijras to Gender-Fluid and Non-Binary Identities’ (2021) 48 Journal of Law & Society 669.}

The arguments emerging from the \textit{Y v France} case and the \textit{Vicky Hernández} case discussed in the next three sections demonstrate continuing resistance of IHRL to the latest knowledge about sex/gender as it emerges from both biomedical and broader social science.

### 4. THE “WOMEN” CATEGORY

Our societies are structured around identity categories. Sex and gender, woman or man, are just some of these categories. The artificial nature of some of the identity categories is obvious in many cases. Even the supposedly biologically certain category of race is a construction that reveals its artificiality once we consider the diversity of mixed-race people and historical state

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legal and policy measures such as apartheid or regulation of marriage that aimed at keeping races clearly separate to maintain their existence.\(^57\) This issue is also visible in states where indigenous populations, on the one hand, aim to affirm and preserve their cultural heritage and, on the other hand, have to confront the artificial creation of indigeneity through law.\(^58\) In all these examples, despite the biological underpinning of traditional racial classifications, at some point, a person emerges who cannot be ‘naturally’ classified as belonging to one group or another and law makes artificial and arbitrary distinctions. ‘Men’ and ‘women’ categories are of a similar nature: For many individuals, the label attributed to them is an artificial and even arbitrary category to which they try to conform to fit into communities and societies in which they live. This fact, however, is more difficult to recognise since we can see how the skin tone or face traits change over generations in mixed-race people but we do not see the diversity of human bodily composition in relation to sex traits as we do not see the complexity of psychological strategies, some of which are causing great burden and harm to individuals, that people adopt to position themselves against the socially prevalent male/female binary.

The partially dissenting opinion of judge Odio Benito in the Vicky Hernández case expresses many stereotypes related to the women category still dominant in parts of IHRL and feminism\(^59\) that contribute to the maintenance of the artificial men/women binary and as a consequence the sex/gender binary. To establish the basis for the argument about the certainty of the women category, the dissent starts with the affirmation of a clear difference and a ‘necessary distinction’\(^60\) between sex as biological and gender as social. As discussed in the previous section, while such a distinction is necessary in some contexts, particularly medical and biological, it is an artificial distinction to be used with extreme care and contextually. Unfortunately, IHRL imposed and maintained this distinction as an absolute truth mappable onto the reality of human existence without due regard to its functionality in contexts.\(^61\) The artificial nature and, as a consequence, the harmful effect of this strict and all-pervasive separation between sex as biological and gender as social are further reinforced by the fact that in IHRL, it is always accompanied by the male/female binary applied to each human body as a unitary block.\(^62\) As highlighted in the previous section, from the perspective of latest knowledge in biomedical science, sex traits are carefully circumscribed to elements of our bodies so that the binary male/female distinction is biologically accurate at various levels of granularity but in most cases is untenable and becomes an artificial convention at the level of an entire body of an individual human being. Thus, while the concept of sex is irrefutable as judge Odio Benito correctly affirms in her partially dissenting opinion,\(^63\) it is so only at a very granular level of certain components of human bodies. When we move to a more generic level of a human body as a unitary entity, it becomes impossible to talk about sex of one’s body without having previously agreed which of its granular components we consider and to what extent. The ‘women’ category is obvious only if we continue to disregard

\(^57\) For an example from the USA context, see Pascoe, What Comes Naturally: Miscegenation Laws and the Making of Race in America (2009).


\(^59\) The dissent from Judge Elizabeth Odio-Benito reads like the standard taking-points for Trans Exclusionary Radical Feminism rhetoric—an anti-trans hate movement that has little relevance to feminism and is grounded in regressive bio-essentialist gender roles and performance.’ (Paige and Stagg, ‘Queer Approaches to International Adjudication’ in Ruiz-Fabri (Ed) Max Planck Encyclopedia of International Procedural Law (2021) at para 15, available at: https://opil.ouplaw.com/ [last accessed 20 February 2024].

\(^60\) Supra n 2, Partially Dissenting Opinion of Judge Odio Benito, at para 4.


\(^62\) This was widely addressed by several authors. See, e.g. references in n 34.

\(^63\) Supra n 2, Partially Dissenting Opinion of Judge Odio Benito, at para 13.
newest findings in medical science and operate based on perceptions, social conventions and thus stereotypes.

In this regard, it is wrong to affirm that in its current state, ‘the theory of human rights . . . is based on objective and scientific categories, rather than on feelings and perceptions’.64 In light of the state of the art in biomedical science, IHRL’s insistence on the rigidity of male/fame and sex/gender binaries for each individual human being is a pure subjective perception that appears as an anachronism, a relic of the past desperately struggling to survive by ignoring latest scientific knowledge and insights from social science, as well as reality of people’s lives as the Y. v France case demonstrates. If ‘woman’ is such an obvious category as the dissent in the Vicky Hernández case affirms, its corollary, ‘man’, should also be as obvious. However, the very existence of the claimant, as well as medical and scientific evidence presented to the ECtHR, challenge this view. Although the ECtHR never directly expresses the simplistic view of ‘men’ or ‘women’ categories so prominent in the dissent in the Vicky Hernández case, the judgement is indirectly espousing the same view. The jurisprudence of the ECtHR regarding trans people was correctly analysed by scholars as having quite a prominent tendency to pathologize trans people.65 This pathologization was underpinned by a strong reliance on various forms of purportedly scientific knowledge described by Gonzalez-Salzberg as passing through stages of ‘fascination with biology’ substituted by ‘passion for genital surgery’ and most recently ‘the medical diagnosis of suffering a mental disorder’.66 In this context, the ECtHR’s decisions on legal gender recognition effectuated through the prism of purportedly scientific knowledge presented legal gender recognition as ‘a form of truth-acknowledgement’67 as if law simply recognises a pre-existing reality.68 Due to the way the ECtHR operated with arguments from medical science, such an effect was achieved even when the Court recognised that the legal determination of gender does not need to follow strict biological criteria.69

In the Y v France case, the Court reverses its stance on science, biology and medicine, thus demonstrating that what mattered to it is only the maintenance of the normalising power of law,70 the continuing positioning of law as a source of production of truth,71 not the scientific knowledge. Moreover, the binary vision of sex/gender as both a social/biological and a male/female duality constitutes the foundation of this power. The claimant produced several certificates and testimonies, including from medical professionals, attesting that it is impossible to classify them as either male or female. Based on this evidence, the ECtHR had no choice but to accept that there is a discordance between the claimant’s legal and biological identity.72 However, this does not lead the Court to accept the claim of Y as the logic based on science and biology would require. Instead, the ECtHR immediately emphasises the arguments of the State, which highlight among others the need to preserve social and legal organisation of the French system based on the binary vision of sexes.73 Such an affirmation occurs despite the availability of not only medical and scientific evidence dismantling the binary vision but also authoritative human

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64 Ibid. at para 15.
65 See e.g. Cannoot, supra n 36.
67 Theilen, supra n 34, at 251.
68 Gonzalez-Salzberg, supra n 34, at 807.
69 Ibid., at 814–815.
70 Ibid., at 811.
72 Y v France, supra n 3 at para 83. The medical certificates produced by the claimant also attest to their suffering (para 11), which could have been expected to satisfy the latest manifestation of ECtHR’s fascination with science and medicine following A.P., Grarçon, and Nicot v France case (Application Nos 79885/12, 52471/13 and 52596/13, Judgment, 6 April 2017), but did not move the Court to accept claimant’s arguments.
73 Y v France, supra n 3 at paras 84, 89.
rights experts’ statements as to the desirability of flexibility in the choice of gender markers, including the possibility of not choosing a specified gender marker. The ECtHR, by accepting medical and other evidence submitted by the claimant, indirectly recognises that the binary vision of sexes is an artifice, not a scientific fact. However, it refuses to prioritise this fact over the needs of the French legal system. This demonstrates that IHRL is not based on science, at least as far as the categories of ‘man’ and ‘woman’ are concerned.

Because the argument about the obviousness of the ‘woman’ category is based on a simplistic understanding of human sex, it comes as no surprise that in the dissent in the Vicky Hernández case, it also leads to the simplification of transgender experience equating it with a ‘feeling that can change from one day to the next’. Not only the complexity of transgender-lived experiences but also interconnections between biological and psychological factors in these experiences are sufficiently clear within the medical field today. For instance, given the diversity of this experience, the latest Standards of Care for The Health of Transgender and Gender Diverse People devote an entire chapter to the issue of terminology and most appropriate language to use by health professionals. In addition, studies confirm that what we perceive and what is experienced by individuals as transgender is often underpinned by the existence of intersex traits that go unnoticed. However, independently of the types and nature of transgender experiences, disregarding the feelings and subjective experiences of people as being less important than ‘objective and scientific categories’ relegates human rights law into an era when the masculinist standard of the reasonable (man) was instrumentalised to consign women and all other people not fitting this standard to the status of second-class citizens. Such a position also neglects decades of research in various branches of social science, including law, which highlight the importance and centrality of emotions to law. Finally, it is not fully respectful of human rights principles such as human dignity, autonomy and self-determination that the ECtHR placed at the centre of its evolving jurisprudence on the rights of trans people and that also play a central role in the IACtHR’s advisory opinion 24/2017 on LGBT rights. The reversal of the position of the ECtHR in the Y v France case creates doubts as to the sincerity of this commitment even in its so-far partial form.

5. THE ROLE OF FEMINISM AND VIOLENCE AGAINST WOMEN
Another argument used to oppose the application of the Belém do Pará Convention to trans women connects the previously defined vision of a ‘woman’ to the continuing relevance of feminism and struggle against violence affecting women. From this perspective, the only valid category of feminist theory is that of a biologically certain woman. It is no denying that the initial question of early feminism was ‘the woman question’. This question remains central to many contemporary strands of feminism and beyond. However, the centrality of the ‘woman’ category to feminism can be explained by the historically dominant role of this category for the

74 Instead of many, see, e.g. The Council of Europe Human Rights Commissioner, Human Rights and Intersex People (2015) at 9 and 37–40 as well as several submissions to the ECtHR by third parties.
75 Supra n 2, Partially Dissenting Opinion of Judge Odio Benito, at para 14.
77 National Academies of Sciences (supra n 51 at 41) summarising two separate studies highlights that gender dysphoria, a condition experienced by many transgender people before they transition, is significantly more prevalent in individuals with intersex variations than in general populations.
79 See, e.g. ECtHR’s emphasis on autonomy in the context of Article 8 in one of its latest judgments in Semenya v Switzerland, Application No 10934/21, Judgement, 1 July 2023, at paras 124, 187; autonomy was also a central notion in the landmark case of Christine Goodwin v The United Kingdom, Application No 28957/95, Judgment, 11 July 2002, at para 90.
80 IACtHR, supra n 13.
construction of the status and infliction of suffering. This centrality of the ‘woman’ category is not based on any obvious or natural unshakable reality as the previous section demonstrated. Moreover, as this section argues, it is inaccurate to reduce feminism to this category exclusively and affirm that any shift away from this category necessarily means disappearance of feminism, leads to the inability of people identified by the society or self-identifying as women to affirm their rights and ‘chaos and retrogression’ as the dissent in the Vicky Hernández case affirms.\(^83\)

In social science, the non-binary vision of sex/gender is prominently defended and elaborated upon by multiple feminist authors. One representative example are the works of Judith Butler who is simultaneously credited as a poststructural feminist and as a queer theorist.\(^84\) Butler’s articulation of the performativity of gender dismantles the binary fixed vision not only of the male/female duality but also the opposition between sex as biological and gender as social.\(^85\) Another prominent example is works of Rosi Braidotti on posthumanist feminism that emphasise the productive, disruptive nature of sexuality, which ‘cannot be adequately contained within the dichotomous view of gender’.\(^86\) For these strands of feminism, the category of ‘women’ simply exemplifies how gender is utilised to construct rigid categories that enable domination, including in the form of patriarchy. Moreover, several feminists have been emphasising the importance of social struggles to address needs of marginalised communities generally, not only women.\(^87\)

The initial focus of IHRL was indeed on violence against women.\(^88\) This vision simply acknowledged that violence against women is gender-based privileging the ‘woman’ category as a defining factor over the deeper exploration of gendered causes of violence. This stance is modified in the CEDAW’s general recommendation 35 where ‘gendered causes and impacts’ of such violence come to the forefront.\(^89\) The Committee explicitly adjusts its language and privileges the term ‘gender-based violence against women’, thus implicitly acknowledging that women are only some of the victims of gender-based violence and individuals identified by society as men or other genders/sexes can also suffer from gender-based violence.\(^90\) The Committee expressly insists on the term ‘gender-based violence against women’ as more precise and reflective of the causes of violence.\(^91\) Although due to the nature of its historical mandate, the Committee focuses on women, one can discern from this general comment that the Committee accepts the fact that such causes of violence as men’s entitlement and privilege or social norms regarding masculinity are the root cause of any form of gender-based violence, whether it is directed at women or other human beings. This stance of the Committee correctly recognises a fundamentally shared nature of causes of gender-based violence independently of sex/gender of its targets that is evidenced by case studies in various contexts and countries as well as by more generic social analyses. For example, varied forms of violence such as male-to-male rape, violence against intersex, transgender persons or against gays or lesbians are all attributed to effects of patriarchy and visions of gender roles along the lines of the binary vision of biological

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\(^{83}\) IACHR, supra n 2, Partially Dissenting Opinion of Judge Odio Benito at para 15.

\(^{84}\) See, e.g. Beasley, Gender & Sexuality: Critical Theories, Critical Thinkers (2005) chapters 8 and 9.

\(^{85}\) The main works in this tradition are Butler, Gender Trouble: Feminism and the Subversion of Identity (1990), Bodies that Matter (1993) and Undoing Gender (2004).


\(^{87}\) Bell hooks, Feminism is for Everybody: Passionate Politics (2000).


\(^{90}\) Ibid.

\(^{91}\) Ibid. at para 19.
certainty. Therefore, any denial of a shared nature of causes of gender-based violence of which violence against women is just one manifestation is simply counter-factual. Unfortunately, this denial transpires in the partially dissenting opinion of judge Odio Benito when she attempts to distinguish violence against women from violence against trans people, intersex individuals and other sexually and gender diverse individuals. She emphasises that violence is perpetrated against women due to the sex with which they were born, while other reasons trigger violence against trans, intersex or other sex/gender diverse individuals.93 The Y v France case is a vivid illustration of the erroneous nature of this position. The claimant in this case is neither a man nor a woman seeking an identification as either ‘intersex’ or ‘neutral sex’ on their identity document. The judgment details the claimant’s suffering, whether physical or phycological, and fully recognises this suffering. However, instead of offering at least some form of remedy to this suffering, the ECtHR condemns the claimant to continuing suffering in the name of the binary vision of sex/gender around which French system is constructed, the same binary vision and the same duality that is maintained and reinforced when women suffer gender-based violence.

Unfortunately, IHRL as an institutional system continues to perpetuate the simplistic dichotomous view of sex/gender by running two separate parallel projects: Historically, first is the project of gender equality combined with gender mainstreaming, which basically amounts to reinstating the women category in its rigidity and presumed obviousness (CEDAW, UN Women). Subsequently, a second project was established, namely, that of sexual orientation and gender identity, which introduces a few additional categories by superimposing them on or adding them to the sex/gender and men/women binary. The role of existing human rights structures in the form of treaties in artificially maintaining this project is visible in the final argument related to treaty interpretation formulated in dissenting opinions in the Vicky Hernández case.

6. TREATY INTERPRETATION

In the opinion of the dissenting judges, the ordinary meaning attributed to the term ‘women’ in the Belém do Pará Convention prevents its application to trans women. Judge Vio Grossi articulated the argument deriving from the rules of interpretation in a significant level of detail. He affirmed that not only the ordinary meaning, which is the starting point of interpretation according to the rules codified in the Vienna Convention on the Law of Treaties,94 but also the context and the object and purpose of the Belém do Pará Convention militate against its applicability to trans women.95 He also highlights that the principle of evolutive interpretation has no place in this context because there is no agreement or practice of states parties that would enable an interpretation of ‘gender’ that includes trans women.96 Judge Odio Benito emphasised the origin and purpose of the Belém do Pará Convention more than the ordinary meaning of the term.97 However, in her emphasis on the type of violence states parties aimed to combat by adopting the Convention, namely, violence against women, she simply presumes that the ‘women’ category is a self-explanatory and obvious term, thus taking its ordinary meaning for granted.

93 IACHR, supra n 2, Partially Dissenting Opinion of Judge Odio Benito, at paras 16–21.
95 IACHR, supra n 2, Partially Dissenting Opinion of Judge Vio Grossi at paras 6–30.
96 Ibid. at para 21.
Considering recent scientific knowledge about sex traits in humans a different perspective on interpretation of the concept of women in the Belém do Pará Convention and any other convention dealing with women’s rights can be proposed. The ordinary meaning of the term ‘women’ might have had some stable meaning applicable to the entirety of a human body at the time of drafting of the Convention, but the current scientific knowledge transforms this meaning in a way that makes impossible to apply this concept to a human being as a unit in all cases. Since we do not operate on everyday basis with a precise set of criteria for the determination of whether a person is a woman or not, we should expand it to include any gender-based beliefs in the inferiority or superiority of some over others. The ordinary meaning of the term ‘woman’ that existed at the time of the adoption of many women-specific treaties does not hold any more. Just like in the *Y v France* case, the binary vision of sex/gender imposed by the legal system is a simple artificial construction not corresponding to the material reality of many human beings, so the ordinary meaning of the word ‘woman’ as it existed a few decades ago and as it is presented in the dissenting opinions in the *Vicky Hernández* case is not reflective of the reality of human bodies. This can be exemplified by the series of definitions Judge Vio Grossi reproduces in his dissenting opinion:

by ‘women’ should be understood ‘persons of the feminine sex’. It should be added that ‘feminine’ means ‘of or characteristic of women’, ‘having qualities associated with women’ or ‘said of an individual endowed with organs that can be fertilized’.\(^98\)

This definition is circular since it defines women by their femininity and their characteristics which, in turn, refer to the womanhood. The only substantive definitional element is that of being ‘endowed with organs that can be fertilized’. In scientific terms, reproductive organs constitute only one element in the panoply of human sex traits. The focus of this definition on external sexual organs and the reproductive function is problematic. Many people with apparently fertilisable reproductive organs have malfunctioning reproductive organs that, despite their appearance, cannot be fertilised. On this definition, such individuals are not really women and a hierarchy of womanhood becomes inherent in such a definition. Reducing women to their reproductive function is also problematic from a feminist perspective that fought hard to overcome such a reductive view of women. Finally, the history of attempts to define womanhood in sports illustrates all the conundrums this represents as well as ultimately the erasure of some individuals within the binary vision historically implemented in sports.\(^99\) Some could object that a scientific understanding of sex traits in humans is too complex to occupy the place of an ordinary meaning. However, if we reject the scientific knowledge about human sex traits and replace it with some more simplified and accessible version, the question of whose ordinary meaning we privilege emerges. IHRL or the rules of treaty interpretation provide no justification for preferring as ‘ordinary’ the meaning of those whose beliefs fit the dominant gender and

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99 For a detailed overview up to 2016, see Pieper, *Sex Testing: Gender Policing in Women’s Sports* (2016); for the most recent overview of the issue, see, e.g. Posbergh, ‘Contradiction or Cohesion? Tracing Questions of Protection and Fairness in Scientifically Driven Elite Sport Practices’ (2023) *Sociology of Sport Journal* https://doi.org/10.1123/ssj.2022-0198. The case of Caster Semenya is perhaps the most notable in terms of human rights implications; see Semenya v Switzerland (supra n 80) and for an analysis of the preceding juridical saga, Holzer, supra n 36. The Caster Semenya case was referred to the Grand Chamber so the final outcome is still pending. However, the available judgment of the Third Section already raises many perplexing questions with regard to the ECtHR’s attitude compared to the *Y v France* case. Due to word-count constraints, these cannot be considered here. However, I would note that the fact that Caster Semenya always identified as a woman and thus accepts the category of ‘women’ presenting fewer challenges to the continuing operation of the binary system is one of the main factors enabling the success of her case. Another important factor is that a failure of the Swiss legal system that allowed only a limited review of the decisions of the Court of Arbitration for Sports was a key factor that ECtHR could not ignore if it wanted to protect the normalising power of law.
sex stereotypes. If IHRL has the ambition to be based on scientific knowledge of topics which it regulates, it has to grant higher weight to the latest biomedical knowledge of sex/gender in defining the ordinary meaning of the term ‘women’. Moreover, it must continually adapt that ordinary meaning to the constantly evolving biomedical knowledge. In this sense, even the first step of interpretation as defined in the Vienna Convention on the Law of Treaties, namely, recourse to the ordinary meaning of terms in absence of a specific definition in treaties, requires that this meaning is not frozen, but constantly evolves in tandem with science. Freezing the meaning of the term ‘women’ contributes to the complicity of IHRL in the maintenance of the binary vision of sex/gender as well as erasure of individual experiences and thus harm as illustrated by the continuing infliction of suffering on the claimant in the Y v France case. The ECtHR positions itself in this regard in a paradoxical situation: It accepts some arguments from science and rejects others. I would argue that ECtHR’s jurisprudence illustrates vividly less commendable ways of recourse to science in treaty interpretation and legal litigation more broadly.

7. CONTINUING COMPLICITY OF IHRL AND A WAY FORWARD

As already mentioned in Section 3, the UN discourse on sex/gender historically started from the presumably biologically certain and evident category of women inscribed within the male/female and sex/gender binaries. This approach continued for decades without a significant questioning of its premises. When the issue of violence and discrimination against sexually and gender diverse people was brought to the UN fora, it was included as a topic separate from the previous long-standing preoccupation with the ‘women’ category. For example, despite the emergence of the recognition of gender-based violence as a phenomenon going beyond violence against women as discussed in Section 5, the international human rights system lacks any mechanism addressing gender-based violence as a complex phenomenon in its totality but always partitions issues into discrete topics. The arguments developed in this article aimed to demonstrate that at least part of the explanation for these insufficiencies resides in an inadequate engagement of IHRL with the latest scientific knowledge on sex traits in humans that, when compounded by unfamiliarity with lived experiences of people and related sociological studies, results in IHRL inflicting harm on people instead of protecting their rights. While the position of the ECtHR in the Y v France as well as the position of dissenting judges in the Vicky Hernández case might seem to some as an unfortunate exception to the otherwise progressive development towards a more accepting and inclusive IHRL, I suggest that vigilance is still called for.

The most troubling is that indices of a not fully up-to-date vision of sex/gender that is still clinging to the binary can be found even in the widely celebrated advisory opinion 24/2017 of the IACtHR on which the majority judgment in the Vicky Hernández case relied heavily in order to justify its reasoning in favour of the claimants. Thus, the vision of sex is simultaneously presented as a spectrum and as a binary:

Strictly speaking, the word sex refers to biological differences between men and women, their physiological characteristics, the sum of biological characteristics that define the spectrum of humans as females and males . . . characteristics based on which an individual is classified at birth as either male or female. Given that this word only establishes subdivision between men and women, it does not recognize the existence of other categories that do not fit within the female/male binary system.100

100 IACtHR supra n 13, at para 32, emphasis added.
In this statement, the IACtHR, on the one hand, correctly refers to sex as a spectrum, but, on the other hand, brings it back to the binary alleging some unchangeable meaning of the word ‘sex’.\footnote{A similar conclusion but from a slightly different perspective can be found in Gonzalez-Salzberg, ‘A Queer Approach to the Advisory Opinion 24/2017 on LGBT Rights’ in Gonzalez-Salzberg and Hodson (eds) Research Methods For International Human Rights Law: Beyond the Traditional Paradigm (2019) 98 at 112.} This is difficult to justify given that words do not have meaning beyond the one that we attribute to them. Moreover, as demonstrated in Section 3, medical science recognised decades ago—and even centuries if we take into account the basic fact of acknowledging the existence of intersex conditions whether in Western or non-Western cultures—that the biological makeup of human bodies is irreducible to the male/female binary. In the same paragraph of the advisory opinion, the Court then provides definitions of gender, gender identity and transgender that it maps into the binary vision of sex, thus reducing their disruptive force and significance. It comes as no surprise then that these very definitions are utilised by a dissenting judge to ground and justify his disagreement with the applicability of the Belém do Pará Convention to trans women.\footnote{IACtHR, supra n 2, Partially Dissenting Opinion of Judge Vio Grossi, at para 10.} The danger that lurks behind this incomplete deconstruction of the binary is compounded by the fact that the Vicky Hernández case is a case of hatred and violence against trans people. As demonstrated by Paige and Stagg, the binary vision and heteronormative standards are not as prominent in this type of cases as in some other areas.\footnote{Paige, Stagg, supra n 59.} Therefore, the victory of the claimants in the Vicky Hernández case is unfortunately not a guarantee that IACtHR will not return in its future cases to the binary vision of sexes it preserved in its advisory opinion 24/2017. The current structure of IHRL based on binaries requires their more systematic and deeper overhaul that cannot be achieved by a simple reference to inclusion of all in the existing instruments.\footnote{Currently, this remains the dominant strategy for human rights courts and tribunals and many other IHRL structures. See, e.g. Kirichenko, ‘Queer Intersectional Perspective on LGBTI Human Rights Discourses by United nations Treaty Bodies’ (2023) 49 Australian Feminist Law Journal 55.} It is notable that, e.g. the CEDAW, a body that already demonstrated some sensitivity to the non-binary vision, is able to issue in the same year a decision that affirms that ‘the rights enshrined in the Convention belong to all women, including lesbian, bisexual, transgender and intersex women’\footnote{CEDAW, Rosanna Flamer-CalderavSri Lanka, CEDAW/C/81/D/134/2018, 21 February 2022 at para 9.7.} and note ‘with concern . . . the gradual dilution of the concept of “sex” and its replacement by the concept of “gender” across policies and legislation’\footnote{CEDAW, Concluding Observations: Portugal, CEDAW/C/PRT/CO/10, 12 July 2022 at para 18.} and recommend to a state ‘avoiding the broad use of the concept of “gender” when addressing the rights of women’.\footnote{Ibid. at para 19.} The problematic issue is forcefully revealed: The meaning of the term ‘woman’ remains hidden behind purportedly self-explanatory obviousness that is connected to the biological certainty of binaries.

A move forward beyond binaries does not require a complete erasure of the ‘woman’ category, but two simultaneous moves: (1) a move away from its siloed position that, at most, enables it to be put side by side with sexual orientation and gender identity without a true interaction and (2) a move away from taking its meaning as self-explanatory. Both moves are possible within the existing system of IHRL but require constant, systematic and deep engagement with the latest knowledge in both biomedical and social science beyond law as detailed in the remaining paragraphs.

A move away from the siloed position of the ‘woman’ category is already visible in the theoretically quite widespread in IHRL acceptance of the shared nature of causes of gender-based violence and discrimination but remains too timid in practice, especially of UN institutions and structures. An example of such an attitude that needs to receive a wider diffusion in the work of existing UN human rights mechanisms is the 2017 report on gender-sensitive
approach to arbitrary killings by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.\footnote{UN GA, Human Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on a Gender-Sensitive Approach to Arbitrary Killings, A/HRC/35/23, 6 June 2017.} This report, unlike many other documents dealing with gender, is not dedicated solely to women. It also discusses sexually and gender diverse people. The report is organised thematically aiming at achieving a comprehensive and coherent view of gender dynamics within specific thematic areas without separating women from sexually and gender diverse people. This attempt is complicated by the already-mentioned historical trajectory of IHRL that maintains separate legal regimes for women on the one hand and sexual orientation and gender identity on the other.\footnote{Dianne Otto, supra n 62, insists on the need for alliances between feminist and queer human rights advocates. The point made here aligns with the call formulated by Otto but emphasises structural problems of IHRL and questions whether such alliances can effectively overcome structural and institutional barriers created by separate legal regimes. For more details, see my work in Yahyaoui Krivenko, supra n 34 in general.}

Therefore, at times, the Special Rapporteur has no other choice but to separate the discussion of specific issues according to these two legal regimes. Despite some drawbacks resulting from this separation, such an approach also enables the Rapporteur to acknowledge specificity of each group’s experience as well as the harm perpetrated by the continuing persistence of binary dynamics within societies without compromising the comprehensive view of gender as the underlying cause of violence. Such an approach, which combines holistic analysis of gender-based causes of certain harms while acknowledging continuing persistence of binary categories reinforcing these harms in societies, is precisely the approach that can enable IHRL to overcome its historical shortcomings. This approach needs to be replicated in wider international human right structures and actively institutionalised. For the moment, it remains dependent on sensibilities of individuals assuming certain functions within the IHRL system. This could be addressed, e.g. through a consolidation of relevant elements of the two existing mandates—that of the Special Rapporteur on Violence against Women and Girls, its Causes and Consequences and that of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity—into a single mandate dedicated to gender-based violence.

The second strategy follows from the discussion of the ordinary meaning of the term ‘woman’ in light of the latest scientific knowledge in Section 5. The ordinary meaning of terms is not fixed but evolves over time. This concerns not only terms related to such currently debated topics as ‘sex’ and ‘gender’ but also a wide variety of everyday terms. In most cases, such a change in the meaning occurs almost seamlessly over centuries so that the contrast and change is visible only retrospectively.\footnote{For an example, see the reversal of meaning between terms ‘subject(ive)’ and ‘object(ive)’ which is well documented, e.g. in Ritter et al., *Historisches Wörterbuch der Philosophie*, Vol 13 (1987) entry ‘Subjekt’ or for a snapshot, Karskens, ‘The Development of the Opposition Subjective versus Objective in the Eighteenth Century’ (1992) 35 *Archiv für Begriffsgeschichte* 214.} However, in the case of current debates on sex/gender and a panoply of associated terms, changes occur at a faster pace so that we can witness and notice these changes. This faster pace of change makes it challenging for some to accept the changes and complicates the adaptation of legal and institutional structures to this change. Nonetheless, institutional actors must take a lead role in the wider diffusion and acceptance of this change. In the IHRL context, treaty monitoring bodies and human rights courts and tribunals play a central role in this regard. It becomes a task for these bodies to maintain their level of knowledge about the latest developments and ensure that states are properly informed and, in turn, take the task of informing their populations seriously. Such an attitude might require placing stronger emphasis on the type of interdisciplinary knowledge required in corresponding treaty-monitoring bodies or courts, which can also be achieved by involving specialists from relevant non-legal areas. The CEDAW Committee could envisage drafting and issuing a general recommendation dedicated
to a profound interdisciplinary discussion of the concept of women. Without fixing this dis-
cussion by the contents of its general recommendation since knowledge, including knowledge
about sex traits in humans or mental health associated with imposition of sex/gender binary,
evolves, the general recommendation could provide an up-to-date conceptual framework that
then can be regularly updated similarly to CEDAW’s views on gender-based violence.

With this strategy, it is also possible to envisage going a step further in acknowledging
and fully recognising the interconnected nature of gendered harms within existing women-
focused instruments, such as the CEDAW or the Belém do Pará Convention. This step requires
embracing the shared nature of harm caused by gender stereotypes. The example of parental
leave entitlements illustrates this point. Historically, parental leave entitlements were reserved
for women. The trajectory of jurisprudence of the ECtHR is reflective of this historical legacy.
In 1998, the ECtHR was still able to grant states a margin of appreciation regarding payment of
parental leave allowance to women exclusively.\textsuperscript{111} This position became untenable in 2012.\textsuperscript{112} These cases brought by men and challenging their inability to benefit from parental leave entitle-
ments available to women were decided based on general guarantees of Article 14 (prohibition
of discrimination) taken in conjunction with Article 8 (right to respect for family and private
life). However, it is also reasonable to raise the question whether men deprived of their parental
leave entitlements could have brought the same type of claims to the CEDAW Committee.
This question is legitimate because in this situation, although a man suffers from a disadvantage
(inability to benefit from a parental leave entitlement), this disadvantage results from a gendered
stereotype positioning women as exclusive or better caretakers. Thus, maintenance of such a
stereotype through legislation denying parental leave entitlements to men or to any other person
not identified as a ‘woman’ violates several provisions of the CEDAW. It not only impedes
eradication of gender-based stereotypes, a goal set in Article 5(1) CEDAW, but also actively
promotes and ossifies such stereotypes. This situation falls under the definition of discrimina-
tion against women contained in Article 1 CEDAW since it at least impairs recognition and
enjoyment of rights by persons identifying as women. The Optional Protocol to the CEDAW
does not require that only such persons can submit complaints or that victim status can only
be recognised to women.\textsuperscript{113} Similar interpretative pattern can be applied in many cases and
situations where sex/gender-diverse people are affected in their rights due to their status as
sex/gender-diverse individuals, especially in situations where like in the Vicky Hernández case,
a person is punished for assuming and fulfilling what is traditionally regarded as female roles or
functions. Such a person is punished in this type of situations for mixing roles and functions,
thus contesting their traditional separation and hierarchy and therefore contributing to the
elimination of stereotypes ‘based on the idea of the inferiority or the superiority of either of
the sexes or on stereotyped roles for men and women’.\textsuperscript{114} Such an interpretative move offers
promising possibilities for challenging and weakening the men/women and sex/gender binaries.
Nonetheless, it should not be regarded as a panacea. Ultimately, over time, IHRL will need to
rethink its foundational structuring elements while developing instruments and mechanisms
more specifically targeting harms experienced by various groups of individuals due to long-
standing societal binary vision of sex/gender. The proposed interpretative approach combined
with the first move described earlier in this section has a strong potential to open up the space for
discussions on sex/gender diversity that in the contemporary IHRL faces significant opposition

\textsuperscript{111} Petrovic v Austria, Application 20,458/92, Judgment (Merits and Satisfaction) 27 Mars 1998.
\textsuperscript{112} Konstatnin Markin v Russia, Application 30,078/06, Judgment (Merits and Satisfaction) 22 Mars 2012 [GC].
\textsuperscript{113} Optional Protocol to the CEDAW 1999, 2131 UNTS 83, Article 2 states: ‘Communications can be submitted by or on behalf
of individuals or groups of individuals’.
\textsuperscript{114} CEDAW Article 5(1). A similar argument was made in a different context in Grey et al., ‘Gender-Based Persecution as a
from certain states and individuals alike. However, if not accompanied by a constant interaction with the latest findings in biomedical study of human sex traits or developments in other scientific disciplines investigating human behaviour, mental health or psychology, IHRL runs the risk to ossify another inadequate representation of reality in the name of its best intentions.