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SYMPOSIUM ON QUEERING INTERNATIONAL LAW

QUEERING REPARATIONS UNDER INTERNATIONAL LAW: DAMAGES, SUFFERING, AND (HETERONORMATIVE) KINSHIP

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It is a long-standing principle of international law that every breach of an international obligation that results in harm gives rise to a duty to make adequate reparation. Reparations can take different forms, from the ideal of full restitution to the provision of satisfaction, and the payment of compensation. Notwithstanding reparation's main aim—to ameliorate, if not eradicate, the detrimental consequences of an internationally wrongful act— it also serves other purposes, such as reinforcing the authority of the norm breached, acknowledging the injury, and recognizing the bearer of harm (the victim). This essay adopts a *queer* approach to examine the role played by reparation— in particular, compensation—in determining what (and whose) suffering matters to international law. With a focus on internationally wrongful acts that result in deprivation of life, this piece discusses who is seen as worthy of redress when a violation of the right to life has taken place, as this, in turn, speaks volumes about who is seen as legally entitled to suffer, to mourn and, ultimately, to love. This essay argues that reparation orders from international human rights courts offer a valuable opportunity for re-evaluating—and perhaps even overcoming—heteronormative understandings of kinship.

Queer Theory and the Nuclear Family

Defining "queer theory" is a particularly difficult task,[1] not least because *queer* itself lacks a precise meaning, having been described as "whatever is at odds with the normal, the legitimate, the dominant," hence, resisting a concrete definition while embracing a shifting "positionality vis-à-vis the normative."[2] Despite such definitional difficulties, queer theory can be given a working meaning for the purpose of this essay, as a deconstructive strategy that aims at denaturalizing traditional conceptions of gender, sexuality, and kinship.[3] Queer theory contests *heteronormativity*, understood as the set of discourses, norms, and institutions that present heterosexuality as the normal and coherent organizing principle of society.[4] Central to queer thinking is the continuous interrogation of the regulatory forces that sustain, reproduce, and idealize the nuclear family as the essential and/or desired foundational unit of the social order.

International law has contributed to the reification of the nuclear family, thereby reinforcing normative ideas of gender, sexuality, and kinship. Both the Universal Declaration of Human Rights and the International Covenant

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[1] Carl F. Stychin, Law's Desire: Sexuality and the Limits of Justice 140 (1995).

[2] David M. Halperin, Saint Foucault: Towards a Gay Hagiography 62 (1997).

[3] Nikki Sullivan, A Critical Introduction to Queer Theory 81 (2003).

[4] Chrys Ingraham, *The Heterosexual Imaginary: Feminist Sociology and the Theories of Gender*, 12 Sociological Theory 203, 204 (1994).

on Civil and Political Rights provide an understanding of the family as "the natural and fundamental group unit of society,"[5] reflecting a metanarrative of a specific familial structure as a pre-social institution, grounded in nature, which requires recognition and protection from the law due to its fundamental character.[6] Despite the absence of any description as to the type of family envisioned by the aforementioned provisions, the context of adoption of both international instruments evidences that the family structure the drafters had in mind was that of the nuclear family,[7] composed of the dyadic conjugal unit and their offspring. That is, family was understood as a couple comprised of one man and one woman (united by marriage) and their biological children, whom the law would recognize as husband/father and wife/mother and their children.

Of course, under international law, the general rule of treaty interpretation stipulates that terms should be understood according to their ordinary meaning, within their context, and in light of the treaty's object and purpose. The drafters' intent is not paramount for the interpretation of provisions, but becomes relevant only to either confirm an understanding or to resolve any ambiguity in meaning following from the general rule of interpretation, or when the application of the general rule leads to a manifestly absurd or unreasonable result.[8] This means that what constitutes a family under international law is not restricted to what the drafters had in mind at the time of the adoption of the aforementioned instruments, but that it can evolve in definition and scope through time. Indeed, when treaties are intended to last for a long period or to have a "continuing duration," their terms are subject to an evolving interpretation.[9] This is especially true for human rights instruments, as these have been construed as "living instruments" whose protective provisions develop with time.[10] Nevertheless, even if the evolving structure of the family could be (and has been) broadened to incorporate the protection of relationships alien to the traditional model, the idealized family type retains significant normative and regulatory power. It is this particular family model that overwhelmingly remains the archetype when international actors draft treaty norms and when judicial institutions apply them.

Furthermore, the general belief in the nuclear family as the ideal form of kinship is itself underpinned by a multiplicity of normative assumptions, including, but not limited to: the understanding of individuals in complementary gender binary terms; the belief in (hetero)sexual desire as a universal norm; the conception of couplehood as the ideal form of relationship; the expectation that reproduction is an anticipated and desired human achievement; and the presumption that the biological parental dyad is the preferred unit for child-rearing.[11] Yet, the rules of kinship, which prescribe the accepted rituals surrounding the most fundamental forms of human interaction and dependency—including births, child-rearing, deaths, and relations of sexual exchange and emotional support—are alterable, even if strongly embedded in culture.[12]

[5] Universal Declaration of Human Rights, Art. 16(3), Dec. 10, 1948, GA Res. 217.A(III); International Covenant on Civil and Political Rights, Art. 23(1), Dec. 16, 1966, 999 UNTS 171.

[6] Martha Albertson Fineman, The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies 145 (1995).

[7] Damian A. Gonzalez-Salzberg, Sexuality and Transsexuality Under the European Convention on Human Rights: A Queer Reading of Human Rights Law 94–95 (2019).

[8] Vienna Convention on the Law of Treaties, Arts. 31–32, May 23, 1969, 1155 UNTS 331.

[9] Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), 2009 ICJ Rep. 213, para. 66 (July 13).

[10] Tyrer v. the United Kingdom, App. No. 5856/72, Judgment, para. 31 (ECtHR Apr. 25, 1978); Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, para. 146 (Aug. 31, 2001).

[11] Gonzalez-Salzberg, *supra* note 7, at 20–21.

[12] Judith Butler, Antigone's Claim: Kinship Between Life and Death 72 (2000).

Victims and Beneficiaries: Within the Nuclear Family and Beyond

International law engages with family/kinship in different ways, including through the adoption of international norms protecting the family or the rights of family members, and the subsequent interpretation of these norms by judicial institutions. For instance, the European Court of Human Rights and the Inter-American Court of Human Rights have both ruled on the scope of the protection of the family and family rights. The courts have acknowledged that the family is an evolving institution and, consequently, certain forms of kinship arrangement that depart from the traditional nuclear family have managed to acquire familial status that is protected under the respective regional treaty.[13] However, this substantive recognition provided to alternative kinship types does little to question the heteronormative understanding of family. Extending the privileges of recognition to couples that mimic the heterosexual married couple amounts to a small sacrifice, one that leads to maintaining a more flexible heteronormativity in place. This revised (hetero)normativity might sacrifice the strictly-assumed heterosexuality of the couple, but maintains the privileged position of the nuclear family, now extended to include domestic(ated) same-sex couples. This leaves intact other heteronormative aspects, such as the reification of couplehood as the ideal type of relationship as well as parenting model.

However, the practice of human rights regional courts concerning reparations following human rights violations provides a largely unexplored manifestation of international law's recognition of additional forms of kinship. In particular, this recognition has taken place in the context of a breach of the right to life, as these courts must decide who is entitled to reparations for such a violation, either as the victims' beneficiaries/heirs or as (indirect) victims themselves. The courts generally award compensation for "non-pecuniary damage" to the victims pursuant to human rights violations.[14] This type of damage is additional to any material harm suffered by the victims and encompasses the harmful effects of a human rights violation that are not financial in nature, such as the suffering and distress caused to the victim and to their next-of-kin, and the impairment of values that are highly significant to them.[15] When it concerns an arbitrary deprivation of life, the courts' case law has fluctuated as to whether it is the suffering experienced by the direct victim themselves that is monetized, and that can then be inherited by the victim's next-of-kin, or if the next-of-kin should themselves be considered indirect victims and compensated due to their own suffering following the loss of a loved one. Examples of both scenarios can be found in the courts' evolving jurisprudence.[16]

Importantly, the courts' case law clarifies that the determination of beneficiaries/indirect victims is a matter to be decided under international law, independently of states' domestic rules on family and inheritance law.[17] I propose that both recognition as a beneficiary/heir of the non-pecuniary damage awarded to the direct victim and

[13] X, Y and Z v. United Kingdom, 1997-II Eur Ct. H.R., para. 37 (Apr. 22, 1997); Schalk and Kopf v. Austria, App. No. 30141/04, Judgment, para. 94 (ECtHR June 24, 2010); Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24, para. 189 (Nov. 24, 2017).

[14] Ringeisen v. Austria (Article 50), App. No. 2614/65, Judgment, para. 26 (June 22, 1972); Velásquez Rodríguez v. Honduras, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 7, para. 26 (July 21, 1989); Beneficiaries of Late Norbert Zongo Abdoulaye Nikiema, Ernest Zongo and Blise Ilboudo & the Burkinabe Movement on Human and Peoples' Rights v. Burkina Faso, Judgment on Reparations, 1 AfCLR 258, para. 111 (ACtHPR June 5, 2015).

[15] "Street Children" (Villagrán Morales et al.) v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 77, para. 84 (May 26, 2001).

[16] Çakıcı v. Turkey [GC], 1999-IV Eur. Ct. H.R., para. 130 (July 8, 1999); *"Street Children" (Villagrán Morales et al.) v. Guatemala*, *supra* note 15, para. 93.

[17] Castillo Páez v. Peru, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 43, para. 49 (Nov. 27, 1998); Velikova v. Bulgaria (dec.), App. No. 41488/98, Judgment (ECtHR May 18, 1999); *Beneficiaries of Late Norbert Zongo Abdoulaye Nikiema, Ernest Zongo and Blise Ilboudo & the Burkinabe Movement on Human and Peoples' Rights v. Burkina Faso*, *supra* note 14, paras. 45–49.

acknowledgement as an indirect victim are clear manifestations of international law's validation of experienced grief. In this sense, they constitute the legal recognition of a person's right to mourn the loss of a loved one which, in turn, legitimizes their bond. If we accept that such an award of compensation by international courts—either as beneficiary or indirect victim—provides validation to the kinship bond between the direct victim and the beneficiary/indirect victim, then the law of damages for international human rights violations becomes an enticing realm of possibilities for re-evaluating—and even overcoming—domestic heteronormative understandings of kinship.

Queering the Meaning of Kinship

There are several examples of supranational human rights courts' validation of "untraditional" bonds of kinship through the award of reparations for non-pecuniary damage. One of the most renowned cases is that of *Aloeboetoe*, which concerned the execution of seven individuals, members of the Saramaka people, in Suriname.[18] As I have argued elsewhere, in *Aloeboetoe*, the Inter-American Court of Human Rights ordered payment of compensation to redress the non-pecuniary damage experienced by the direct victims themselves and then established who should be awarded these amounts as successors.[19] When determining the beneficiaries, the Court took into account the customary norms of the Saramaka people, a matrilineal society where polygamy was the norm, and decided that the distribution of awards should be on equal terms among the wives of each victim.[20] The resort to local cultural norms to trump assumptions about Western forms of kinship has not been limited to this case, and has continued to appear in the court's jurisprudence, mainly to decide questions concerning the distribution among beneficiaries of the amounts awarded to compensate the non-pecuniary damage experienced by direct victims.[21]

Human rights courts have given precedence to real affective bonds over legally assumed ones on numerous occasions, including in the absence of specific customary local rules of kinship. The Inter-American Court has recognized the bonds existing between individuals and multiple sentimental companions, dividing among them their respective portions as beneficiaries of the non-pecuniary damage awarded to the direct victim. The Court has also gone on to examine the relationships in each case to decide the amount of non-pecuniary damage to redress the suffering experienced by each companion, as indirect victims themselves.[22] The European Court seems to have followed a similar approach in its case law.[23] Moreover, the validation of kinship bonds beyond the traditional nuclear family by these courts has not been limited to sexual partnerships/marriage-like relationships. Close ties of affection that unite direct victims with distant relatives have constituted grounds for recognizing the suffering experienced by relatives beyond the nuclear family. Aunts/uncles, nieces/nephews, and cousins have all had their own suffering acknowledged through the award of compensation for non-pecuniary damage as indirect

[18] Aloeboetoe et al. v. Suriname, Merits, Inter-Am. Ct. H.R. (ser. C) No. 11 (Dec. 4, 1991).

[19] Damian A. Gonzalez-Salzberg, *Non-Pecuniary Damage Under the American Convention on Human Rights: An Empirical Analysis of 30 Years of Case Law*, 34 Harv. Hum. Rts. J. 81, 93 (2021).

[20] Aloeboetoe et al. v. Suriname, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15, paras. 97–98 (Sept. 10, 1993).

[21] Bámaca Velásquez v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 91, paras. 53, 67 (Feb. 22, 2002); Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, para. 226 (Mar. 29, 2006).

[22] 19 Merchants v. Colombia, Merits, Reparations, and Costs, Judgment (ser. C) No. 109, paras. 100, 230, 252 (July 5, 2004); Juan Humberto Sánchez v. Honduras, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 99, paras. 164, 177–78 (June 7, 2003).

[23] Taniş and Others v. Turkey, Eur. Ct. H.R. 2005-VIII, paras. 233–35 (Aug. 2, 2005).

victims.[24] The opposite also holds true: members of the nuclear family have been disavowed by the courts in their claims to compensation, when their legal bond was not accompanied by the existence of emotional ties.[25]

This finding allows us to infer that the nuclear family, while remaining a point of reference for the assumption of emotional ties between individuals, has been neither necessary nor sufficient for their ultimate legal recognition by human rights courts. The courts' jurisprudence thus partly demystifies the symbolic power of this kinship model as the archetypical family unit. If the award of non-pecuniary damages purports to redress the suffering experienced due to the loss of a loved one, then, to fulfill its purpose, it should be grounded on the factual existence of such emotions and not rely on legally acknowledged ties, which can act only as an imperfect proxy. Neither blood, nor a sexual bond, is a prerequisite for the existence of affective and supportive relationships.[26] Hence, the entitlement to damages should be—as it is becoming—an empirical matter, subject to proof and argumentation. Damages should be awarded to those emotionally harmed by the loss of a loved one, rather than to those who can evidence the existence of a traditionally accepted relationship. Indeed, why should international law privilege idealized familial ties, instead of recognizing real emotional bonds?

The adoption of this approach in international law can open up a universe of opportunities for reimagining the legitimation of bonds of kinship that go beyond the traditional nuclear model.[27] If what lies underneath the legal recognition of the ability to love and, consequently, the capacity to mourn the loss of a loved one, is the actual emotional bond and not a familial status, then the heteronormative ideal of kinship can no longer impose a limit to possible claims. In turn, this could lead future applicants to demand recognition of the sentimental bonds that matter, of family units composed by multiple non-consanguineous individuals; of different formations of sexual partnerships; and of coparenting configurations that need not stop at two.

Conclusion

International law, in particular the international law of human rights, is providing fertile grounds for *queering* the meaning of kinship. While the understanding and scope of the institution of the family under treaty law has been slowly expanded to incorporate within its protection structures of kinship that mimic the traditional nuclear family, recognition of the suffering experienced for the loss of a loved one is where (perhaps, inadvertently) further progress has been made. The acknowledgment of our entitlement to mourn beyond traditional familial ties implies the legal validation of the existence of this love. Future claims to redress the suffering experienced by the loss of such love could lead to furthering the recognition of emotional ties that bind individuals beyond traditional ideas of what families should look like. By following this path, international law can provide a degree of recognition to affective bonds that is absent in the domestic jurisdiction of most states.

[24] Caracazo v. Venezuela, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 95 (Aug. 29, 2002); Myrna Mack Chang v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101 (Nov. 25, 2003); Musayev and Others v. Russia, App. Nos. 57941/00, 58699/00, 60403/00, Judgment (ECtHR July 26, 2007); Takhayeva and Others v. Russia, App. No. 23286/04, Judgment (ECtHR Sept. 18, 2008.

[25] Garrido and Baigorria v. Argentina, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 39, para. 65 (Aug. 27, 1998); Gómez Palomino v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 136, para. 120 (Nov. 22, 2005).

[26] Aeyal Gross, *The Burden of Conjugality*, *in* Diversity and European Human Rights: Rewriting Judgments of the ECHR 265, 288 (Eva Brems ed., 2013).

[27] Judith Butler, Undoing Gender 127 (2004).