

A QUEER READING OF INTERNATIONAL LAW AND ITS ANXIETIES*

- Robini Sen**

I. INTRODUCTION: A QUEERING TOOLKIT

In 2018, I was pedagogically struggling with a particular component in my Critical Approaches to International Law¹ course titled Many Faces of International Law: Critiques and Limits² – interrogating the notion of statehood and sovereignty. I frame it as a pedagogical struggle for three reasons. Interrogating statehood required approaching the perceived “core of international law” in different (and difficult) ways and, in disentangling purportedly fundamental theoretical concepts of the discipline. It needed a gentle but consistent unlearning/‘untraining’ of students from other doctrinal premises associated with law, namely the powerful meta image of the state.³ And, it demanded a realignment of my own understanding of concepts of law, religion and statehood at a fundamental level. None of these were easy, least of all subjecting my own understanding to close scrutiny. But the process proved to be irreversible and invaluable. In course of this critical inquiry, I chanced upon a host of scholarship that examined international law in different ways. And while I am deeply indebted to and informed by each of those methods/readings, for the purpose of this paper, I will adopt a particular gaze – queering. Queering may be understood as a process that decentres, de-categorizes and refuses definition by way of knowledge. Here, I use queering in a sense that offers two interesting ways around this pedagogic predicament.

The first, is the idea of queer curiosity as understood in feminist and post-colonial scholarship.⁴ Cynthia Enloe registers queer curiosity as an important characteristic of feminist epistemology.⁵ And Cynthia Weber employs ‘queer intellectual curiosity’ as an (international relations) method

* This work is the product of exhausting pandemic labour and I am indebted to a host of people for simply being able to complete it in its current form. Dianne Otto’s Queering International Law forms the bulwark of this queer reading and is present throughout the text, the intertextual and the subtext. I am particularly grateful to GNLU Law and Society Review’s editorial team and Keertana for being extremely patient with my many failings to complete this text on time. And, I am grateful to Oishik Sircar for giving me the heuristics that eventually lead to this framing.

** Assistant Professor, Jindal Global Law School and PhD Candidate, University of Warwick.

¹ Hereinafter referred to as CAIL/CIL (Critical Approaches to International Law/Critical International Law).

² For a brief overview of the state of teaching of International Law in India and my course manual, see <http://rsrr.in/2020/12/24/international-law-in-indian-law-schools/>.

³ Anne Orford provides an excellent account of how to demystify and truly see the sovereign beyond this mythical grand narrative in her analysis of the Island of Palmas Arbitral Award in Anne Orford, *A Jurisprudence of the Limit, in INTERNATIONAL LAW AND ITS OTHERS* 8 (Anne Orford ed., Cambridge University Press 2006) [hereinafter Orford].

⁴ I understand both of these terms as moving spectrums of contesting and diverse views as opposed to fixed bodies of knowledge. To understand this better, see generally, Clare Hemmings, *Telling feminist stories*, 6(2) FEMINIST THEORY 115-139 (2005); Gurminder K Bhambra, *Postcolonial and decolonial dialogues*, 17(2) POSTCOLONIAL STUDIES 115-121 (2014).

⁵ Cynthia Enloe, *A Conversation with Cynthia Enloe on Curiosity, Confidence, and Feminist Questions*, 38(2) FLETCHER FORUM OF WORLD AFFAIRS 13, 14 (2014).

which ‘refuses to take for granted the personal-to-international institutional arrangements’ and adds sexuality as a variable to see if it changes our way of looking at things and mapping relations of power.⁶ Queer curiosity, observes Otto, “brings to the mix of emancipatory (improper) curiosity and their critical analytical potential, an element of sexuality and the part they play in bringing to sight hierarchical relations of power both as attached to material body and to structures of understanding that posture as universal ‘norms and practices’ of international law”.⁷ And the second, is deploying queering as an analytical tool where we examine the visual ‘form’ of international law as it appears in classrooms, readings and texts – predominantly in inter-textual and interstitial ways. In this paper, I offer two *sights* and *sites* of international law using queering *through* queer curiosity as a methodological approach and an analytical category. In one, we encounter ‘who is international law’ as it appears to us through its ‘many fathers’ – the intertextual apparition of the European⁸ Christian male. And in the other, we *see* the institutionalization of this figure in the notion of sovereignty and statehood. These sights and sites appear in no particular order and are dialogically constructed through each other in the text.

I will start, then, with a provocation – mainstream international law, at its core, is a European Christian Male. And this figure consistently maintains three things – a persistent divide between its objects and subjects, the incomplete integration of the object-participant and the peripheral participation of the non-mainstream representative-instrument. The objects and subjects here, are moving targets but the centrality of the European, Christian male figure as the most legitimate subject of the discipline is more or less consistent.⁹ The object-participants are the category of legal entities who are granted increasing legitimacy in this dynamic system depending on where they are in what Tzouvala¹⁰ calls the oscillating spectrum of civilisation between the ‘logic of biology’ and the ‘logic of improvement’. For instance, Third World states that are granted institutional rights and powers in different parts of mainstream international law while still remaining ‘a step behind’

⁶ Cynthia Weber, *QUEER INTERNATIONAL RELATIONS: SOVEREIGNTY, SEXUALITY AND THE WILL TO KNOWLEDGE* 19 (Oxford University Press 2016).

⁷ *QUEERING INTERNATIONAL LAW: POSSIBILITIES, ALLIANCES, COMPLICITIES, RISKS* (Dianne Otto ed., 1st ed. Routledge 2017) [hereinafter Otto].

⁸ By European, I refer to the figure of the white colonizer and not Europe as a homogenous metropole. Priyamvada Gopal’s *Insurgent Empire* is a good account of questioning and dismantling this sense of homogeneity as within the empire itself. See PRIYAMVADA GOPAL, *INSURGENT EMPIRE: ANTI-COLONIAL RESISTANCE AND BRITISH DISSENT* (Verso 2019) [hereinafter GOPAL].

⁹ See generally, ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (Cambridge University Press 2005); B. S. CHIMNI, *INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES* (2nd ed. Cambridge University Press 2017); *INTERNATIONAL LAW AND ITS OTHERS* (Anne Orford ed., Cambridge University Press 2006); IRENE WATSON, *ABORIGINAL PEOPLES, COLONIALISM AND INTERNATIONAL LAW* (Routledge 2016).

¹⁰ NTINA TZOUVALA, *CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW* (Cambridge University Press 2020) [hereinafter Tzouvala].

its hegemonic excesses. And the non-mainstream object-participant are, among others, the aspirational ‘global gay’¹¹ who now ‘exist legally’ because the system recognises them and prescriptively offers them what is (according to the normative) best for them. In this state of precarity, they are mostly recipients of norms and identities within a pre-existing but seemingly reformative process.¹² And it is this system that instructs them to adapt a form that is legally empowering and ‘acceptable’.

This is not to say that international law is inflexible or that reformist projects are not viable or possible within a certain framing of progress, dignity and development.¹³ Nor is this a simple moral evaluation or denunciation of a system that is deeply entrenched in our lives as a tool of valence where the choices presented rest between complete obliteration and some form of acknowledgment. This is a way of understanding *how* a system presents itself and, the implications of these interstitial and inter-textual images that are deeply embedded in our psychic impulses. In stating this, I emphasize the deep need to negate the common charge of mainstream positivism¹⁴ - any ‘reflexive, theoretical engagement with law is a luxury’ and the ‘pragmatic focus’ of international legal scholarship requires that all critique be directed towards programmatic change. This is simply not true. How we *see, read* and *understand* things forms the basis of what we engage with and address. And our capacity to problematise with nuance can help us make that significant distinction between what constitutes symptoms and what are the problems. In this instance, the increasing visibility and participation of international law’s others¹⁵ as *sites* and *sights* of law making still operates within the inimical anatomy of norms with distinct male, western epistemological

¹¹ Ratna Kapur, *On Gender, Alterity and Human Rights: Freedom in a Fishbowl*, 122 FEMINIST REVIEW (2019) [hereinafter Kapur].

¹² The fact that some form of inclusion allows for diversity of views and presence is the idea that typically informs this position on the reformative potential of international law. But this category of international lawyers rarely subjects the structures to interrogation in a way that explains their continuity.

To engage with this strand of critique, see generally CHINA MIEVELLE, *BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW* (Brill 2004); Robert Knox, *Valuing race? Stretched Marxism and the logic of imperialism*, *London Review of International Law*, 4(1) LONDON REV. INT’L L. 81 (2016); Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN’S RTS. L. REP. 213 (1992); Tzouvala, *supra* note 10; ROSE PARFITT, *THE PROCESS OF INTERNATIONAL LEGAL REPRODUCTION: INEQUALITY, HISTORIOGRAPHY, RESISTANCE* (Cambridge University Press 2019) [hereinafter Parfitt]; Susan Marks, *Human Rights and Root Causes*, 74(1) MOD. L. REV. 57 (2011).

¹³ A robust debate persists here within Marxist, TWAIL and deconstructionist approaches on the perils and promises of critique. See Tzouvala, *supra* note 10, at 36; Mari J. Matsuda, *Beyond and Not Beyond, Black and White: Deconstruction has a Politics*, in *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 6* (Francisco Valdes et al. eds., Temple University Press 2002).

¹⁴ Nathaniel Berman, *In the Wake of Empire*, 14(6) AM. U. INT’L L. REV. 1515 (1999).

¹⁵ Third World states, women, children, refugees, LGBTQIA groups and any other categories that are being ‘added’ to international law or subjected to legislative acknowledgment in relation to and by the Eurocentric, capitalist core of mainstream international law.

basis.¹⁶ The developed states remain ‘developed’ and ahead, the Third World states (and their inhabitants) are nudged towards free market neo-liberalism in a linear model of progress and all those claiming recognition/legality are only constructed relationally to the central figure of the European, Christian male.¹⁷

This work then, is mostly an account of *how* we perform this queering in our reading along with the anxieties they generate both within and outside this process. While our anxieties are concomitant with those who are reading ‘against’ the mainstream, it also points to a deeper, structural anxiety in mainstream international law itself. Contrary to what a standard law school Public International Law (PIL) syllabus tells us, the anxiety of mainstream international law is much more than the uncertainty of outcome and how they deviate from established legal principles.¹⁸ Mainstream international law’s dilemma does not rest in how exploited (and hence realist) it is by the powerful states as against a universal legal framework. Through queering, the terms of the debate are placed on an entirely different axes – of who international *is* as against all those who are operating at some distance from this *sight* and *site*. For the mainstream structures, the anxiety lies in how well concealed its normative figure remains in order to make its universality palatable. And for others, this is represented in the uncertainty and secondary status of their position as knowledge makers and norm-taking objects. Because international law, in its true iteration is a European, Christian male, the inherent othering of all other identities invariably produces an exclusionary, desirable international legal personality. The trajectory of legality (and legitimacy) is a spectrum, representing the proximity to and from this figure, and the queer toolkit reading unveils this figure for what it visually represents and textually generates.

¹⁶ That the state is perceived as male and imbued with male traits has been examined in detail both in part three of this article as well as in feminist and post-colonial critiques of international law in Terry Threadgold, *Introduction, in FEMININE–MASCULINE AND REPRESENTATION* 11, 13 (Terry Threadgold & Anne Cranny-Francis eds., Routledge 1990); GAYATRI CHAKRAVORTY SPIVAK, *THE POSTCOLONIAL CRITIC: INTERVIEWS, STRATEGIES, DIALOGUES* 96 (Sarah Harasym ed., Routledge 1990); Anne Orford, *Misreading the Texts of International Law, in READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW* (Cambridge University Press 2007); EDWARD W. SAID, *CULTURE AND IMPERIALISM* (1993); Hilary Charlesworth, *Cries and Whispers: Responses to Feminist Scholarship in International Law*, 65 *NORDIC J. INT’L L.* 557, 563 (1996).

¹⁷ This relational configuration is unpacked rigorously in Jasbir Puar’s *Terrorist Assemblages: Homonationalism in Queer Times*, where, in the backdrop of War on Terror, she looks at the tenuous inclusion of some queer subjects only as against the production of orientalist terrorist bodies. See JASBIR PUAR, *TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES* (Duke University Press 2007) [hereinafter Puar].

¹⁸ In other words, the Kennedy-Koskenniemi binary of ‘law as fact’ and ‘law as idea’. See MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (Cambridge University Press 2006); David W. Kennedy, *Theses About International Law Discourse*, 23 *GERMAN YEARBOOK OF INTERNATIONAL LAW* 353 (1980).

The paper itself will demonstrate two readings from this point onward. In most of Part I, we will look at how international law operates through the state which is historically grounded in the image/form of the European, Christian Male. This part is deliberately textually opaque and it is up to the reader to make what they will of this section of the text. In Part II, we perform the queering and *seeing* together. Here, each iteration and account of international is subjected to critique as well as assigned an image. And finally, the conclusion accounts for a sense of collective anxiety of living international law that this text is likely to generate.

II. INTERNATIONAL LAW AS THE EUROPEAN CHRISTIAN MALE

A BRIEF ACCOUNT OF THE 'MALE' STATE

Mainstream international law understands statehood and sovereignty as categorical imperatives. 'Being' a state is demonstrated foremost through the possession of a defined territory¹⁹ while the remaining characteristics follow from the establishment of borders, containment, governance and the recognition of such governance – of people, culture and movement.²⁰ The modern state is also a Weberian state²¹ that monopolises all use of force within its territory as an act of ordering and enforcement. If being a state is rooted in the fundamental axiom of exercising exclusive power over its territory,²² then becoming a state entails a) possessing these characteristics in themselves (declaratory theory) and b) being recognised by other states (constitutive theory).²³ This construct of Westphalian, territorial statehood, however, has a distinctly Eurocentric, patriarchal and deleterious heritage. As Pahuja and Eslava observe, Europe's centralised socio-political form morphed into the eventual nation-state.²⁴ And with the crystallisation of European positivist praxis as international law, 1945 became the moment of invisibilisation where all post-colonial states were compelled to undergo a process of 'international legal reproduction'²⁵ in the form of this nation-state. In its current iteration, the post-colonial, neo-liberal state envisions a flexible relationship between the public and the private sectors with increased decentralisation of state led development.

¹⁹ Even if borders of this territory are contested, it has no bearing on its capacity to remain a sovereign state. In fact, borders conflicts appear as immanent to the idea of statehood as the possession of territory itself.

²⁰ Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19.

²¹ MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* (Guenther Roth & Claus Wittich eds., University of California Press 1978).

²² Malcolm Shaw, *Territory in International Law*, 13 *NETHERLANDS YEARBOOK OF INTERNATIONAL LAW* 61(1983).

²³ MALCOLM N. SHAW, *INTERNATIONAL LAW* (Cambridge University Press 2008).

²⁴ Luis Eslava & Sundhya Pahuja, *The State and International Law: A Reading from the Global South*, 10 *HUMANITY: AN INTERNATIONAL JOURNAL OF HUMAN RIGHTS, HUMANITARIANISM AND DEVELOPMENT* 1 (2019) [hereinafter Eslava & Pahuja].

²⁵ Rose Parfitt describes 'International Legal Reproduction' as international law's role in establishing and perpetuating inequalities of wealth, power and pleasure. See ROSE PARFITT, *THE PROCESS OF INTERNATIONAL LEGAL REPRODUCTION: INEQUALITY, HISTORIOGRAPHY, RESISTANCE* (Cambridge University Press 2019).

This capitalist, imperialist mainframe of colonial Europe and its metamorphosis into mainstream international law is well documented in CAIL scholarship.²⁶ However, unlike its colonial origins, the masculine construction and continuation of the international legal system is relatively less visible and displaced onto other oppressive practices. This is in part because TWAIL scholarship seems to reproduce the same patriarchal citation politics as the mainstream.²⁷ And because the pathologies of complex masculinities of law and statehood (both colonial and post-colonial) are constantly subsumed by the minutiae of *what* they should address as opposed to *who* they embody. In other words, we *know* that mainstream international law is both patriarchal and male²⁸ but, the sense of knowing is largely observed through structural critiques²⁹ that are ‘less mainstream’³⁰ than TWAIL and, non-structural processes.³¹ Queering follows this knowing. And queering acknowledges feminist and post-colonial interventions while simultaneously going beyond them. Through its particular form of analytic, queering reveals *who* international law is - a systemic representation of the European, Christian male where structures, subjects and objects acquire legitimacy and identity depending on their degree of divergence from this pivotal normative reference frame. And subsequently, asks for a sense of non-category that may provincialise, if not replace this normative image.

The legacy of international law and its European, Christian origins is unquestionable³² and will not be a subject of detailed inquiry in this piece beyond what has been stated. What we will engage with is one of its central structures – the state. TWAIL has resoundingly and convincingly located the dominant narrative of statehood and sovereignty in international law to the universal imposition of the Westphalian model. Since then, states no longer possess porous borders, are

²⁶ Otto, *supra* note 7; Kapur, *supra* note 11.

²⁷ Rohini Sen, *Critical Pedagogy Symposium: The Emotional Labour of Teaching: A Feminist Critique of Teaching Critical International Law*, OPINIO JURIS (Sept. 3, 2020), <https://opiniojuris.org/2020/09/03/critical-pedagogy-symposium-the-emotional-labour-of-teaching-a-feminist-critique-of-teaching-critical-international-law/> (last visited May 29, 2021).

²⁸ These terms are not used interchangeably. Patriarchal speaks of law’s operational processes whereas male speaks of its visual imagination and most ideal subject. They perform similar functions of creating and sustaining the various others but this distinction is important to emphasise the difference between who law *is* and how it does what it does.

²⁹ Post-colonial and feminist thoughts have interrogated statehood’s masculinity and male apparition very often, but the overarching concerns of imperialism as raised by TWAIL ends up taking center-stage or at least, a place of relatively more prominence even as seen by the mainstream.

³⁰ The irony of using mainstream to describe TWAIL is not lost on me!

³¹ In the manner that we understand flow of labour, power and agency in public and private spaces. See generally TRINH T. MINH-HA, *WHEN THE MOON WAXES RED: REPRESENTATION, GENDER AND CULTURAL POLITICS* 95 (Routledge 1991).

³² Otto, *supra* note 7; Kapur, *supra* note 11. See generally C. H. ALEXANDROWICZ, *AN INTRODUCTION TO THE HISTORY OF THE LAW OF NATIONS IN THE EAST INDIES (16TH, 17TH AND 18TH CENTURIES)* (Clarendon Press, Oxford 1967) [hereinafter Alexandrowicz]; SABA MAHMOOD, *RELIGIOUS DIFFERENCE IN A SECULAR AGE: A MINORITY REPORT* (Princeton University Press 2016) [hereinafter Saba Mahmood].

self-contained and exercise territorial integrity and political independence.³³ Sovereignty, however, is not just a product of the colonial encounter³⁴ but it has also been subjected to permutations and perversions by and through the post-colonial states.³⁵ Statehood has been at the centre of international law's articulation as a universally warranted legal system and, entry to this system has been contingent on a process of transmutation and homogenisation of non-European sovereignty (to *this* form) in the colonies elsewhere.³⁶ In order to achieve this homogeneity, colonial Europe relied on subjugation and transformation through extraterritoriality where colonial territories were subjected to divisive and differential laws to address the colonial other.³⁷ This form of othering was produced through the gaze³⁸ of the prototype—the colonial European, Christian male master (and later, subject) and a legal system emerged around this 'appearance'. Much like its imperial continuities, the legal system formally erased its inherent maleness. But unlike the protean significance given to civilisation as the site of imperial and capitalist machination³⁹ in international law the 'male' and patriarchal state was mostly vilified in visibly gendered instances of war, policing and sexual violence.⁴⁰ This is both perplexing and unsurprising given how TWAIL itself generates a gendered gaze. It also draws attention to the fact that despite rich feminist scholarship on statehood and international law, the *sight* and *site* of the discipline's maleness remains relatively imperceptible in its readings and imaginations.

Dedicated body of work in social sciences travails the length and breadth of masculinisation of sovereignty⁴¹ and feminist writers in particular, have etched out connections between gender, law and the state, identifying it as representative of and guaranteeing male dominance.⁴² The state is seen both as stabilising and reproducing gender hierarchies through a variety of legal and social mechanisms which allow for the male subject to remain at the center of law making and social control of all non-male subject-objects.⁴³ The male and the patriarchal state of modern day is based

³³ See generally MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960* (Cambridge University Press 2002).

³⁴ Alexandrowicz, *supra* note 32.

³⁵ Eslava & Pahuja, *supra* note 24.

³⁶ *Id.*

³⁷ MOHAMMED BEDJAOU, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* (Holmes & Meier 1979).

³⁸ EDWARD SAID, *CULTURE AND IMPERIALISM* (Chatto & Windus 1993).

³⁹ Tzouvala, *supra* note 10; Parfitt, *supra* note 12.

⁴⁰ Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85(4) AM. J. INT'L L. 613 (1991) [hereinafter Charlesworth, Chinkin & Wright]; Kapur, *supra* note 11.

⁴¹ I am not using state and sovereignty interchangeably. The sovereign expression of territorial statehood and statehood itself are both masculine.

⁴² Mark A. Liddle, *State, Masculinities and Law: Some Comments on Gender and English State-Formation*, 36(3) BRITISH JOURNAL OF CRIMINOLOGY 361 (1996) [hereinafter Liddle].

Chinkin and Charlesworth, Kapur and Orford make similar evaluations of state centric international law and, the law centric state.

⁴³ *Id.*

on competing masculinities (colonial, post-colonial), which are neither static nor uncontaminated by each other. This complex masculinity is stabilised not simply in relation to femininity but, to all non-binary, non-male gender identities that are subsumed by hetero-normative constructs in its wake.⁴⁴ This organisation and interplay between the male and the non-male subjects are in a constant state of struggle in which this hegemonic masculinity allows for the state to bring within its fold all others, by setting the terms of this inclusion *as* the state.⁴⁵ For instance, the demand for recognition of sexual identities and practices besides heterosexuality leads to new legislative frameworks and international conventions. This is a result of conflict and contestation where European, Christian male international law is forced to ‘cede space’ and recognise all those who are not it. And we are allowed, for a moment, to hope that inclusion and reform are possible. This ceding of space, however, is only as long as it fits a normative understanding of these categories generated by the juridical power of complex masculinities of the modern-day state itself. In other words, the recognition has to be sanctioned by none other than the state (as a law making entity).

LOCATING THE METROPOLE – FROM THE ENGLISH STATE TO THE POST-COLONIAL STATE OF AFFAIRS

The state, as one of its modes, is a structure of cathexis (distribution and analysis of desire, emotions and sexuality).⁴⁶ And this structure predates the notion of Westphalian sovereignty, locating itself roughly in the historical English state. The English state maps its emergence to the long sixteenth century against the backdrop of significant interrelated developments in Europe,⁴⁷ much of which led to the formulation of the *jus publicum Europaeum* within the European context.⁴⁸ As an offspring of both the Enlightenment and European colonial expansion, the *jus publicum Europaeum*, and subsequently the nation-state, reflected the prevailing social transformations and Eurocentric cultural understandings⁴⁹ that were embedded in the English state. And much of the prevailing social transformations of/in the English state was marked by instances of gynophobia⁵⁰ masculinisation of female generativity, state encroachment into the private (namely kinship) and the emergence of the ‘patriarchal unconscious’ through Cartesian masculinisation of thought⁵¹ in

⁴⁴ Maria Lugones, *Toward a Decolonial Feminism*, 25(4) HYPATIA 742 (2010) [hereinafter Lugones].

⁴⁵ Liddle, *supra* note 42; Carol Cohn & Cynthia Enloe, *A Conversation with Cynthia Enloe: Feminists Look at Masculinity and the Men Who Wage War*, 28(4) SIGNS 1187 (2003); CYNTHIA ENLOE, *THE CURIOUS FEMINIST: SEARCHING FOR WOMEN IN A NEW AGE OF EMPIRE* (University of California Press 2004).

⁴⁶ Tim Carrigan, Bob Connell & John Lee, *Toward a new sociology of masculinity*, 14 THEORY AND SOCIETY 551 (1985).

⁴⁷ R.W. Connell & James W. Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19(6) GENDER AND SOCIETY 829 (2005) [hereinafter Connell & Messerschmidt].

⁴⁸ Brett Bowden, *The Colonial Origins of International Law: European Expansion and the Classical Standard of Civilization*, 7(1) JOURNAL OF THE HISTORY OF INTERNATIONAL LAW 13 (2005).

⁴⁹ Eslava & Pahuja, *supra* note 24.

⁵⁰ Liddle, *supra* note 42; Susan Bordo, *The Cartesian Masculinization of Thought*, 11(3) SIGNS 439 (1986).

⁵¹ *Id.*

the early 15th and 16th century. Much of this continues to find resonance in law's mythical, 'objective' form in contemporary discourse⁵² (in that it denies its own paradoxes, emotions and myths by claiming self-sustainability and reason – like men!). This shift in Western masculinity and state formation across Europe, pioneered by the rise of the English nation state is where we trace the hegemonic masculinity of the modern state.

Between the early 17th and the late 18th century, the expansion process of the empire transformed into the full-scale colonisation project. Aggressive imposition of 'Englishness' was evinced in 17th century England's efforts to bring "civility, order and government among . . . [the] barbarous and unsubjected"⁵³ leading to attempted homogenization and 'othering'. This 'Englishness' was a heavy mix of a gendered social order resting precariously yet decidedly on ideas such as Bacon's 'masculine birth of time',⁵⁴ a hysterical and redundant account of all other forms of gender-sexuality and a preponderance of male power in the state and its agencies.⁵⁵ But most interestingly, the colonising feature of the English state allowed a diversity of masculinities to flourish and co-exist in differential degrees of juxtaposition/absorption within the civilisation and subsequent urbanisation, dialectically to the global gender order.⁵⁶

The European Christian male retained centrality but, was also reproducing itself in relation to the native masculinity of third world nationalism. And with the consolidation of the capitalist state in the 18th and 19th century, 'bourgeoisification' of aristocratic masculinity created an interesting hegemonic spectrum where devaluation of effeminacy became distinctly homophobic, leading to the eventual subordination of all other forms of sexuality and being.⁵⁷ There was now a distinct binary of gender and sexuality and the advent of punitive legislation against the homosexual in late 1880s⁵⁸ was one of the earliest legal interventions to consolidate this complex spectrum of maleness. This was followed by the emergence of the working class in this new public sphere alongside professions, careers and the new sciences, leading to diverse forms of masculinity among

⁵² PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* (Routledge 1992).

⁵³ HELEN SMITH, *MASCULINITY, CLASS AND SAME-SEX DESIRE IN INDUSTRIAL ENGLAND, 1895-1957* (Palgrave Macmillan 2015).

⁵⁴ Sanctioned by a very Christian England and coupled with his efforts to reshape the law as a distinctly masculine project.

⁵⁵ Vandra Burstyn (1983) and her pyramid structure of male power; male domination of state personnel in Liddle, *supra* note 42.

⁵⁶ In the New World, wilderness represented the masculine and a subsequent devaluation of the feminine, associated with culture and cities. While in colonies, urban masculinity also showed tendencies of imposing culture and law upon the 'lawless' savage.

⁵⁷ Kapur, *supra* note 11.

⁵⁸ Inherited and practiced by the post-colonial states as part of their legal heritage.

working men.⁵⁹ These developments were also accompanied by a gradually nuclear form of family which reinforced the public-private dichotomy by systemic exclusion of women from the trade union movements and all kinds of workplaces.⁶⁰

In reproducing itself as a capitalist state through the civilisational metric and the public-private distinction (in moving forms) the state formally invisibilised its core of European Christian maleness (constantly made and unmade by other masculinities) into what were now perceived as aspirational governance forms and milestones to achieve for all states.⁶¹ And law, particularly international law, was a significant mode of relationship between international legal reproduction and capitalism.⁶² Subsequently, post-colonial and feminist traditions⁶³ allowed us to make a link between 'law's status as an androcentric, positivist discipline and this gendered (masculine) nature of law's governance, institutions, and jurisprudence'.⁶⁴ Akin to Cartesian masculinity that introduced the 'universal' and the 'reason', second phase feminism⁶⁵ unearthed classic tenets of liberal legalism, such as individualism, reason, autonomy, and freedom which were rooted in misguided ideas of inherently masculine values⁶⁶ and by-products of the scientific state of the 16th century.

This account of law and (as) state through its purported neutrality was once again a reiteration of masculine hegemonic power.⁶⁷ Deploying antiessentialist⁶⁸ and intersectional⁶⁹ critiques, feminist work began to focus and carve out a differential spectrum of masculinity where groups of men, despite their divergence in culture, identity, social-political-economic capital and access to structural equity still remain beneficiaries and primary subjects (or subject-objects) of the

⁵⁹ Liddle, *supra* note 42.

⁶⁰ Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONSTITUTIONAL COMMENTARY 319, 337 (1993); Ruth Gavison, *Feminism and the Public/Private Distinction*, 45(1) STANFORD LAW REVIEW 1 (1992); ASHLEY BOHRER, *MARXISM AND INTERSECTIONALITY: RACE, GENDER, CLASS AND SEXUALITY UNDER CONTEMPORARY CAPITALISM* (Columbia University Press 2020) [hereinafter Bohrer].

⁶¹ Bohrer, *supra* note 60.

⁶² Parfitt, *supra* note 12; Tzovala, *supra* note 11.

⁶³ Orford, *supra* note 3, GAYATRI SPIVAK, *A CRITIQUE OF POSTCOLONIAL REASON: TOWARD A HISTORY OF THE VANISHING PRESENT* (Harvard University Press 1999). The "second phase" work on the masculine nature of law is also criticized for its tendency to homogenise all men and deal with law as an embodiment.

⁶⁴ Lugones, *supra* note 44; Ngairé Naffine & Mary Heath, *On Law and the Sexes: A Conversation*, 41(1) AUSTRALIAN FEMINIST LAW JOURNAL 19 (2015).

⁶⁵ I use this term with trepidation and instrumentally keeping in mind Hemming's cautionary account of what these phases really represent.

⁶⁶ CAROL SMART, *FEMINISM AND THE POWER OF LAW* (Routledge 1989).

⁶⁷ See MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (University of Chicago Press 1991); Catharine A. Mackinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 644 (1983).

⁶⁸ FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER (Nancy E. Dowd & Michelle S. Jacobs eds., New York University Press 2003).

⁶⁹ Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853 (2006).

patriarchal state system. This, within the contradictory poles of civilisation meant that the prize was one's closest approximation of the European, Christian (now secular in the liberal constructive sense)⁷⁰ male. Thus, through decolonial, post-colonial and queer feminist interrogation, the state looked like an ever morphing figure of complex masculinities through which everyone else was relationally (re)constructed.

So, what does one make of this post-colonial state of affairs? The state, as we see it now, is a historically changing ideological construct⁷¹ and a product of competing masculinities and masculine anxieties. And there are divergent forms of hegemonic masculinity located in statehood and thus, in international law today. In response (and in relation to) the European, Christian male state, there exists hybrid, native masculinities with their own complex identities from colonial assimilation and resistance to it. Represented as inferior to the white coloniser in reifying the civilising mission, native masculinity is set up in contradistinction to the European, Christian man where they try to emulate and resist him at the same time.⁷² Because it is 'inferior', the European, Christian male state is *still* the ideal and the most legitimate iteration of the state.⁷³ At the same time, this dialogical construction forces this ideal state to keep moving and changing in a way where it is always able to maintain its distinction against this native state. Systemic erosion of epistemologies and identities indigenous to colonies⁷⁴ has led to the formation of a post-colonial masculine state with a conflicting and essentialised value system⁷⁵ – both subordinate to the coloniser and, as the hyper-masculine and invigorated native champion of anti-colonial struggles.⁷⁶

And as for the others (and the other) – their forms and beings never fully make sense because they were produced relationally to the white male and not because of an *actual* engagement with other ways of being.⁷⁷ It is important to note that all of this takes place amidst various feminist, queer, Marxist, indigenous contestations and competing dialogical movements, but we know of them

⁷⁰ Saba Mahmood, *supra* note 32.

⁷¹ KARL MARX, *DAS KAPITAL* (Friedrich Engels ed., Regnery Publishing 1996).

⁷² GAYATRI CHAKRAVORTY SPIVAK, *A CRITIQUE OF POSTCOLONIAL REASON: TOWARD A HISTORY OF THE VANISHING PRESENT* (Harvard University Press 1999); FRANTZ FANON, *BLACK SKIN, WHITE MASKS* (1952) [hereinafter FANON]; Homi Bhabha, *Of Mimicry and Man: The Ambivalence of Colonial Discourse*, 28 *DISCIPLESHIP: A SPECIAL ISSUE ON PSYCHOANALYSIS* 125-133 (1984) [hereinafter Bhabha].

⁷³ Connell & Messerschmidt, *supra* note 47.

⁷⁴ Lugones, Spillers and a host of others understand each of these as colonial constructs, including the contemporary idea of what we call gender. They refer to this particularly while reviving the black woman and her ethereal presence (visible absence) in these constructive spaces. In other words, the black woman makes no sense because the category of woman was produced relationally to the white male and not because of an actual engagement with the black form of subject.

⁷⁵ Lugones, *supra* note 44.

⁷⁶ Puar, *supra* note 17.

⁷⁷ See generally, Kapur, *supra* note 11; Lugones, *supra* note 44.

only *subsequently or not at all*. It tells us two significant things – one, the state is gradually crystallising into various forms of masculinity and institutionalising them; At the centre of the state is the hidden male subject that lets everyone else coalesce around it. And two, *how* this central narrative came to dominate our social and legal imagination is extremely important.⁷⁸

SIGHTS OF INTERNATIONAL LAW: MILITARY MASCULINITY AND THE STATE SYSTEM

It is at that this juncture, that we begin the task of queering as a pedagogic exercise. Imagine you are reading of/for international law. Who do you *see* when you think of the state? And *what* do you see when you search for international law in non-textual domains? In both instances, the answer is most likely a series of empanelled men, considered to have changed the course of history, celebrated as solitary figures of heroism – entirely formed by and yet, completely divorced of their context. And if the images curated from patriarchal reading of archives were not enough– the more troubling aspect lies in the interstices of these texts. Who did *we* imagine when we thought of international law and the figure of the state without the aid of google? *European men*. The pathologies of the male hegemonic state run so deep that it takes us a moment to confront how well we perform the inadvisable – we *are* Bhaba’s mimic man. For this native other (us), the European, Christian man invokes equal parts envy and hatred producing a spectrum of desire - of equity, legitimacy or escaping this epistemological containment. We can never *be* international law and so, we oscillate on this spectrum of most proximal appropriation, assimilation and refusal to integrate.

So now, when I say the structural and linguistic maleness⁷⁹ of the institutions of international law are well embodied in the primary functions of the Security Council, you *see* a group of male/masculine⁸⁰ representatives of these hegemonic states. They sit in well-lit rooms, think very little of others and make decisions that affect our long-standing fate. And when I state that the use of force of regime is the very definition of statist masculinity, you envision war and ravage where the faces of women and children make for the very subject of rescue, pity and male patronage. Or perhaps, you see the great statesman and strategist figure of the ‘state’ setting democracy ‘right’ and planning its next conquest. Not far behind are the capitalist trade regime of WTO where the

⁷⁸ What we centre in our narratives, readings and knowledge archives is producing history and not simply recording it. This is discussed in various forms and disciplines through the works of Michel-Rolph Trouillot, *Silencing History*; Karthika Nair, *Until the Lions*; Claire Hemmings, *Feminist Readings* etc.

⁷⁹ The security regime of international law is couched in vocabulary of male violence and aggression. Dianne Otto, *Power and Danger: Feminist Engagement with International Law Through the UN Security Council*, 32 AUSTRALIAN FEMINIST L. J. 97 (2010).

⁸⁰ Masculinisation of a system/structure envisions non male others playing these parts as well. Not nearly as good as them and certainly not as effective/assertive/fearful.

‘rational’, ‘economic minded’ white male subjects impose economic sanctions and trade embargoes as tools of administrative violence. Efficiency, we are told, comes best served as the working male (resting victoriously on the labour and skill of others). And in contemporary thought, the white masculinity of international statehood is best located in the idea of techno-scientific capitalism - the core of the technophilic super-power state.⁸¹ Technology is an important political discourse in constructing the contours of the state through military masculinity and its war machines seem to be the primary apparatus through which modern sovereignty is expressed.⁸² White colonial masculinity as a scientific practice⁸³ is the new age ‘male’ where society is (bo)ordered⁸⁴ through the scientific development⁸⁵ and the international security regime where the dependence on international law (of terror)⁸⁶ is secured through heavily militarised technophilic states. “Technology” writes Dinerstein, “has long been the unacknowledged source of European and Euro-American superiority within modernity...It is not social justice or equitable economic distribution that will reduce hunger, greed, and poverty, but *fables*⁸⁷ of abundance and the rhetoric of technological utopianism”.⁸⁸ Every time the state generates its newest technological weapon, we celebrate the male protector leadership, ponder about its ‘rational’ economic implications, wonder if it will be ‘enough’ against our militarising neighbouring states. And somehow, as international lawyers, scholars and students, that is all we seem to be doing, even as numerous movements and acts of resistance continue from the anti-colonial (b)order against this state.⁸⁹ Everything becomes a question of sight and gaze. What will you *choose* to see after this reading today?

So, where do we locate these complex masculinities in what is now a system of institutionalised imperialism through notions of good governance and development?⁹⁰ As things are, the sovereign hierarchy and hegemony of the international community remains intact where the politics of gender, race, religion and class in the constitution of the state remained largely unaddressed and,

⁸¹ Dibyadyuti Roy, *Of Men, Machines and Apocalypses: Masculine Anxieties in Indian Speculative Fiction*, 2(1) SANGLAP: JOURNAL OF LITERARY AND CULTURAL INQUIRY 50 (2015) [hereinafter Roy].

⁸² *Id.*

⁸³ Connell & Messerschmidt, *supra* note 47.

⁸⁴ I borrow this formulation from Jayan Nayar where he understands territorial and sovereign bordering as a form of ordering post-colonial subjects.

⁸⁵ Technology allowing for mechanisms that improve social and economic opportunities and greater consumption.

⁸⁶ Weeramantry makes a similar observation in his dissent, pages 329, 552, paragraph 2 in the Nuclear Weapons case; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8).

⁸⁷ Emphasis, mine.

⁸⁸ Joel Dinerstein, *Technology and Its Discontents: On the Verge of the Posthuman*, 58(3) AMERICAN QUARTERLY 569 (2006).

⁸⁹ Jayan Nayar, *On the Elusive Subject of Sovereignty*, 39(2) ALTERNATIVES: GLOBAL, LOCAL, POLITICAL 124 (2014).

⁹⁰ See generally James Thuo Gathii, *Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law*, 5 BUFFALO HUMAN RIGHTS LAW REVIEW 107 (1999); James Thuo Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFFALO LAW REVIEW 1013 (2007); BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* (Cambridge University Press 2003).

subsumed by a seemingly universal international legal system.⁹¹ The post-colonial state, unsurprisingly, fits very well within this contradictory system. But unlike its white predecessor and hegemonic contemporary, the post-colonial state is anxious to shed its subordinate native masculinity⁹² and challenge the dominant hegemonic white masculinity through aggressive weaponisation, homegrown technophilic advancements and production of the national militarised male.⁹³ So while it is constantly advancing national interests and challenging white hegemony as the site of international law making,⁹⁴ it is simultaneously constructing itself (native masculinity and native sciences)⁹⁵ and its others, ensuring that existing categories of gender and identity remain and, retaining this international legal system. I pause here so that we can take a moment to consider what constitutes the image of global leadership. *Who* do you see when you hear war, development and nationalism?

III. QUEERING AS A METHOD AND APPROACH

HOW WE SEE WHAT INTERNATIONAL LAW WANTS US TO SEE

In the last section, I bring to sight *who* international is. Let us now consider queering as an approach in which we depart from the mainstream and *our* reading generates a *sight* and a *site*. Try this with me as you read my (and critical international law's) texts. Queering reveals to us that "while male and female bodies have been overwhelmingly understood in international law as naturally different, these very bodies have also been displaced onto a First World–Third World divide, which operates to reinforce a civilisational difference and the cultural superiority of the West".⁹⁶ This form of gendering and othering occur through the first world interlocutor who *tells* us what the other is like by producing knowledge on them⁹⁷ in order to make them accessible, subordinate and intelligible to the west.⁹⁸ When *we*, the other (and others) adopt this knowledge frame,⁹⁹ we invariably reify this ideal and devalue ourselves. Who we *think* we want to be is ironically a product of the erasure of *our* epistemology and a universalisation of somebody else'. This knowledge is continually constructed against definitions and assumptions about native colonial masculinity,

⁹¹ *Id.*

⁹² Roy, *supra* note 81.

⁹³ For instance, the current ruling party's manifesto is rife with India's low budget space programme, aggressive militarisation, securitising its borders and massive budgetary allocation to defence.

⁹⁴ Arun S., *WTO: India resolute on food security*, THE HINDU (Dec. 13, 2017), <https://www.thehindu.com/business/wto-india-resolute-on-food-security/article21615762.ece> (last visited Jun. 14, 2021).

⁹⁵ Modernity is frequently associated with scientific achievements and developments; Roy, *supra* note 81.

⁹⁶ Kapoor, *supra* note 11.

⁹⁷ Gayatri Chakravorty Spivak, "Draupadi" by Mahasveta Devi, 8(2) CRITICAL INQUIRY 381 (1981) [hereinafter Spivak].

⁹⁸ MICHEL FOUCAULT, THE HISTORY OF SEXUALITY (Robert Hurley trans., Pantheon Books 1978–86).

⁹⁹ FANON, *supra* note 72; Bhabha, *supra* note 72.

femininity, culture and historical difference¹⁰⁰ – and this is a site of contamination and erasure of our pasts and selves. We find ourselves oscillating between two competing forms of masculinity - ‘desirable’ western liberalism and fetishised oriental nationalism. And queering insists that there are other ways to be.

What, then, do we do with the fact that international law claims to only have a string of fathers and father figures¹⁰¹ who have obliterated from sight all other forms of knowledge, knowledge – making and presence? What are the ethical and social implications of bringing this to ‘mainstream’ gaze. Most significantly – we are no longer bound to implicate ourselves in the falsity of a ‘rational’, ‘objective’ system. The system is a provincial male figure that generates feelings of desire, anxiety, rejection and rage. And in queering international law, we create space to openly air these feelings. So, if the bodies of others are constantly regulated, disempowered and disciplined to ensure stability of a distinctly male system, we start at a place of acknowledgment. We may find international law odd, distant, pointless and uncomfortable. And this is because it is not *us*, does not *look* like us and rarely has us in mind when setting its ideals. But we are all equally implicated in reproducing the heteronormative and continuously erasing other forms of sexual governance. The dominant narrative of gender in international law is based on the understanding of preformed, stable categories - the idea that sex is a biological and natural category and gender, a social construction that can be altered and manipulated and transposed onto sex.¹⁰² In saying this again and again (in laws and elsewhere) we affirm that sex and sexuality are somehow rooted in a binary biology and heterosexual normativity is the *most* desired space.¹⁰³

This is usually good news for international law in that it offers us a very limited set of deceptively emancipatory options – remain a non-subject/object or enter into subject-hood by conforming to the categories of identity created by the state.¹⁰⁴ What this means is gender advocacy is pinned down to sex/sexuality as the primary site of subordination of non-male non heteronormative bodies.¹⁰⁵ And the very fact that our textual options are either gender, LGBTQIA or negative

¹⁰⁰ On the production of colonial masculinity: see, e.g., P K Vijayan, *Outline for an Exploration of Hindutva Masculinities*, in *TRANSLATING DESIRE: THE POLITICS OF GENDER AND CULTURE IN INDIA* 82 (Brinda Bose ed., Katha 2002); MRINALINI SINHA, *COLONIAL MASCULINITY: THE ‘MANLY ENGLISHMAN’ AND THE ‘EFFEMINATE BENGALI’ IN THE LATE NINETEENTH CENTURY* (Manchester University Press 1995); GYAN PRAKASH, *ANOTHER REASON: SCIENCE AND THE IMAGINATION OF MODERN INDIA* (Princeton University Press 1999).

¹⁰¹ Vattel, Vitoria, Oppenheim, *etc.*

¹⁰² Kapur, *supra* note 11; Connell & Messerschmidt, *supra* note 47.

¹⁰³ *Id.*

¹⁰⁴ This is identical to the legitimacy granted to non-European States re their conformation to European sovereignty for entry into international law.

¹⁰⁵ Kapur, *supra* note 11; JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (Routledge 1990).

euphemism tells us how little we know of anything else! Human rights advocacy and UN institutions,¹⁰⁶ have taken to the use of ‘gender’ and ‘sexual orientation’ as a matter of performativity. And in some instances, the incredulity of the male state is genuine in these performances – they are truly surprised at the others’ existence (and insistence). So, when the state appears to care about the violation of such rights of women¹⁰⁷ and others, it does so by ensuring that the normative categories and practices of gender and sexuality largely remain unchanged. These inequalities are either outside the remit of what international law chooses to address as a subject matter or included only if they reproduce cultural, gender and subordination stereotypes.¹⁰⁸ We see *what* it is, *who* it isn’t and how its dominant language creates definitive interstitial and intertextual images. Do you see what it *wants* you to see - the ‘global gay’ and the agency-less global south subjects, particularly women?

LEGITIMACY AND DEGREES OF DIVERGENCE: BETWEEN SEX, SEXUALITY AND MEN

I began this piece by saying that if European, Christian and male are to be taken as performance markers of gender and identity then their individual variance and relevance become structural mechanisms that order legal, social and political discourses within a state. Let us now throw heterosexual into this insidious mix and see what happens. The other is a figure who’s distance from white maleness is inversely proportional to its legitimacy within the international legal system. So, what do we understand by the term distance from maleness? Some version of normative divergence that questions the binaries, refuses to conform, challenges the structures and offers themselves as individual sites of non-male law production. Thus, the post-colonial male remains subordinate to the white male in this overarching scheme of identity but, produces native masculinity and hegemony within his own structure and location. Similarly, the woman is a subordinate subject with liminal rights, formed in response to the central figure of the white heterosexual male.¹⁰⁹ Then, comes the queer transgender body¹¹⁰ that fails to reproduce the visible

¹⁰⁶ See, e.g., United Nations High Commissioner for Refugees, *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Response* 11-12 (Guidelines, May 2003) <http://www.unhcr.org/protect/PROTECTION/3f696bcc4.pdf> (last visited June 14, 2021).

¹⁰⁷ Charlesworth, Chinkin & Wright, *supra* note 40, at 644.

¹⁰⁸ Karen Engle, *International Human Rights and Feminisms: When Discourses Keep Meeting*, in INTERNATIONAL LAW: MODERN FEMINIST APPROACHES 47, 52-4 (Doris Buss and Ambreena Manji eds., Hart 2005); Vasuki Nesiah, *Discussion Lines on Gender and Transitional Justice: An Introductory Essay Reflecting on the ICTJ Bellagio Workshop on Gender and Transitional Justice*, 15 COLUMBIA JOURNAL OF GENDER AND LAW 799 (2006); Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUMAN RIGHTS J. 1 (2002).

¹⁰⁹ *Id.*; Otto, *supra* note 7.

¹¹⁰ How the trans body/identity reproduces heteronormative sights and sites of desire is not within the scope of this paper.

binaries and metrics of normative heterosexuality and thus, is still at the periphery of recognition as a legitimate human, legal subject by the state (and the cis, straight men).¹¹¹

This narrative of divergence or its variables are neither linear nor simple. And the scope of this queering is limited to their production in relation to international law (and state.) Even though binaries and heteronormativity remain the dominant qualifiers of legal admittance and endowment of rights, the modern state with its complex masculinities creates diffused gender categories where a loose sense of non-binary gender identities and sexualities are allowed to articulate rights of person-hood. The practice of these identities, however, is a complex process where on one hand, distance from maleness is inversely proportional to legitimacy. And on the other hand, the legitimacy is created *through* this distance. So, what we *see* are pride parades that celebrate inclusiveness, an emblematic representation of the neo-liberal woman that celebrates liberation, opportunity and progress. And somehow, nothing has really shifted or changed in a tangible way – there has been no movement of the privilege of men. Now, the modern, hegemonic, imperial state now speaks an *inclusive language* where it is the guarantor of rights for a wider array of prefixed identities as long as they do not disrupt the normative spectrum. The homosexual may seek the right to equality and the right to marry and, the state may grant them so, reproducing *once again* the heteronormative notion of marriage and family¹¹² – simply with more participants. As to why these structures are desirable, even among the others - social inheritance aside, they are deeply connected to the benefits associated to them¹¹³ through state sanctioned legality and endorsement.¹¹⁴

Interestingly, there are other ways of *seeing* this inclusive and diffused paradigm of sex and sexuality – this ‘gay rights as human rights movement’.¹¹⁵ Queering reveals to us yet another site of the genealogical maleness of the state in this process.¹¹⁶ So, while rise of the global LGBTQIA movement rests on universalising potential of human rights for equality and access, this is completely dependent on the essentialisation of the identities in international law of men who have

¹¹¹ Neela Ghoshal, *Transgender, Third Gender, No Gender: Part II*, HUMAN RIGHTS WATCH (Sept. 8, 2020), <https://www.hrw.org/news/2020/09/08/transgender-third-gender-no-gender-part-ii> (last visited June 14, 2021). Statistics of recognition of third gender globally.

¹¹² Both are rooted in patriarchal heteronormativity and Christianity.

¹¹³ Oishik Sircar, *New Queer Politics in the New India: Notes on Failure and Stuckness in a Negative Moment*, 11(1) UNBOUND 1 (2017).

¹¹⁴ RAHUL RAO, *A TALE OF TWO ATONEMENTS IN QUEERING INTERNATIONAL LAW* (Routledge 2017).

¹¹⁵ See, e.g., AMNESTY INTERNATIONAL, *BREAKING THE SILENCE: HUMAN RIGHTS VIOLATIONS BASED ON SEXUAL ORIENTATION* (Amnesty International USA 1994).

¹¹⁶ See generally, EVE KOSOFKY SEDGEWICK, *EPISTEMOLOGY OF THE CLOSET* (University of California Press 1990) [hereinafter Sedgwick]. See also SARA AHMED, *QUEER PHENOMENOLOGY: ORIENTATIONS, OBJECTS, OTHERS* (Duke University Press 2006).

sex with men¹¹⁷ (or women who have sex with women). If we make a distinction between *identity* and *behavior* by advocating for MSM as a non-identarian category that is related to same-sex behaviour or practices – we can *see* how international law would rather assimilate the ‘gay’ than give up on its notion of ‘men’. These sexuality dependent identities, then, are a product of modern western conception of sexuality and sexual identity - once again imposed as universal categories of non-binary identities, thus replacing other forms of sexual practice that are not rooted to a sense of identity.¹¹⁸ So, if we put them on our *distance from maleness scale*, same-sex practitioners become individuals in need of liberation in order to discover their ‘true’ identity as the ‘universal’ or ‘global gay’. It is no surprise then, that the leading jurisprudence on LGBTQIA discourse emerges from the European Court of Human Rights¹¹⁹ followed by other western liberal democracies as a form of reach, often against the now dialogically placed native masculinity of the other. The global gay is the other of the global heterosexual and it is also exclusionary because it subsumes all other forms of being that do not correspond to this vision of the global gay.¹²⁰ And now, we *see* the binary¹²¹ once again where both the global gay and the global heterosexual are formulated in relation to the formative maleness of the state.¹²²

In yet another site, comes to sight something equally extrapolating. Let us go back, for a moment to the MSM category - men who have sex with men but do not identify as the global gay. Here, MSM takes the constituent terms ‘men’ and ‘sex’ as stable and self-evident, once again reinforcing binaries of sex as penetration and male as biologically understood, thus unable (or possibly unwilling) to escape constructs of the male state.¹²³ Indeed, given that ‘men with men’ implies sameness, ‘men who have sex with men’ represents a version of anglicisation of the homosexual - one that excludes, at the most obvious, women.¹²⁴ Much like the state’s sanctioned legality and legitimacy marriage and family, anglicised homosexuality brings with it the stigma of opposing all forms of the heterosexual normative.¹²⁵ And in trying to avoid this stigma, MSM falls prey to the

¹¹⁷ Hereinafter referred to as MSMs.

¹¹⁸ Joseph Massad, *Re-Orienting Desire: The Gay International and the Arab World*, 14 *Public Culture* 361 (2002) [hereinafter Massad 2002]. See also JOSEPH A MASSAD, *DESIRING ARABS* (University of Chicago Press 2007) [hereinafter MASSAD 2007].

¹¹⁹ PAUL JOHNSON, *HOMOSEXUALITY AND THE EUROPEAN COURT OF HUMAN RIGHTS* (Routledge 2013).

¹²⁰ Massad 2002, *supra* note 118; MASSAD, *supra* note 118; Tom Boellstorff, *But Do Not Identify As Gay: A Proleptic Genealogy of the MSM Category*, 26 *CULTURAL ANTHROPOLOGY* 287, 288 (2011). See also Wayne Morgan, *Queering International Human Rights Law*, in *LAW AND SEXUALITY: THE GLOBAL ARENA* 208 (Carl Stychin & Didi Herman eds., University of Minnesota Press 2001).

¹²¹ Hassan El Menyawi, *Activism from the Closet: Gay Rights Strategising in Egypt*, 7 *MELB. J. INT’L L.* 28 (2006); JASBIR K. PUAR, *TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES* ch. 2 (Duke University Press 2007).

¹²² *Id.*

¹²³ Massad 2002, *supra* note 118.

¹²⁴ Otto, *supra* note 7.

¹²⁵ Massad 2002, *supra* note 118.

other categorical impositions that emerge from this prevailing sense of European, Christian maleness despite trying its best to be non-identarian. In other words, in an effort to distance itself from the use of 'gay' which has decidedly white connotations¹²⁶ and to circumvent its binary placement against the heterosexual discourse, MSM finds itself adopting *other* binaries of international law and human rights activism. Gender, once again, becomes the vehicle for reintroducing notions of primitiveness and backwardness¹²⁷ while consistently entrenching and formally invisibilising the figure of the normative ideal in systemic ways. Incidentally, the scale of distance from European, Christian maleness is equally applicable in contemporary women's rights discourses in international law which symptomatically represent the concerns of privileged women, who are often (though not exclusively) white, Christian, Western, middle-class and heterosexual.¹²⁸

Ironically, while the identity, sexuality and practices of the colonised other and identities were decimated and discarded as primitive, uncivilised and un-Christian,¹²⁹ the post-colonial state reinvigorates these same binaries through these complex native masculinities. The colonial settler performed legislative eradication of social and sexual norms that did not conform to the ethos of the European, Christian male state.¹³⁰ Embedded in this inheritance of loss (of identity and plurality), the post-colonial state often finds itself advocating for a tradition that is devoid of locus, history and content. The standard post-colonial state defense against the contemporary categories of sexual minorities is rooted in arguments of homosexuality being 'un-African' or 'un-Asian' while routinely relying upon European colonial statutes and demonstrating an amnesia of this heritage. The rise of global ethno-chauvinist nationalism (often deeply embedded in religious sovereignty) projects homosexuality and sexual divergence from heteronormativity as western, bourgeois imposition which 'corrupts' the indigenous fabric of the nation state.¹³¹ Illustratively, Kenya, India and Singapore without any historical transaction of culture in precolonial times, maintain 19th century colonial penal codes with India only recently abolishing the legal apparition of "carnal

¹²⁶ *Id.*

¹²⁷ Rajeswari Sunder Rajan, *Women's Human Rights in the Third World*, in *SEX RIGHTS: THE OXFORD AMNESTY LECTURES 2002* 119, 119-125 (Nicholas Bamforth ed., Oxford University Press 2005); Vasuki Nesiah, *The Ground Beneath Her Feet: "Third World" Feminisms*, 4(3) *JOURNAL OF INTERNATIONAL WOMEN'S STUDIES* 30 (2003).

¹²⁸ See generally Norma Alarcón, *The Theoretical Subject(s) of This Bridge Called My Back and Anglo-American Feminism*, in *FEMINIST THEORY READER: LOCAL AND GLOBAL PERSPECTIVES* 404 (Carole R McCann & Seung-Kyung Kim eds., Routledge 2003).

¹²⁹ ERIC HEINZE, *SEXUAL ORIENTATION: A HUMAN RIGHT* 37-39, 42-44 (1995).

¹³⁰ *Id.*

¹³¹ *Id.* at 4-5.

knowledge against the order of nature”¹³² – vocabulary that is simply a Victorian readings of the Old Testament.¹³³

In our last (for this paper) illustration of queering, let us *see* through a lens of premodern capitalism and relocate the argument to a framework of family units vs individual choices. Let us engage with the work of John D’Emilio and assume that the template to test against is arranged marriages and defined gender roles and, identities associated with individual lifestyle choices are new to societies.¹³⁴ D’Emilio argues that a gay identity as a lifestyle choice, only emerged in the West during the periods of 19th and 20th century industrialisation and urbanisation, when the family as an economic unit was slowly replaced by the individual, allowing them the capacity of personal choices about social arrangements.¹³⁵ Concepts of homosexuality, transgenderism or transsexualism do not emerge against a heterosexual constant, but instead, are simultaneous exhibition of individual lifestyle choices breaking away from the family.¹³⁶ Thus, within the framework of individuals making autonomous choices, the heterosexual is just as novel as the homosexual, transgender, transsexual or any other identity that is individual centric. But this formulation glosses over the heteronormative gender binaries and sexual preferences *within* the family unit itself. And the family (in that iteration) has always been legally sanctioned by the state. Thus, relocating these binaries in capitalism do not do away with their legal normativity and continuity within all iterations of international law – from the English state to the modern, neoliberal state.

IV. CONCLUSION: THE ANXIETY OF QUEERING FOR ‘US’¹³⁷ AND ‘THEM’

I began by admitting to anxieties that are concomitant with those who are reading against the mainstream. And this anxiety is dialogically produced in response to the deeper, structural anxieties in mainstream international law itself. But before I come to ‘us’, let me speak of mainstream international law and its anxious state¹³⁸ – the spectre of the European, Christian male, hidden in legal forms and production of identities. So, what do anxious states do? They disperse all countervailing *sights* and *sites* of resistance onto the axes of legality and illegality, where the former

¹³² See, *e.g.*, Unnatural Offences, 2 Laws of Kenya § 162 (1985); Unnatural Offences, 9 Statutes of the Republic Of Singapore § 377 (1986).

¹³³ Genesis 18:16-19:29; JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY 94-95 (1980).

¹³⁴ JOHN D’EMILIO, CAPITALISM AND GAY IDENTITY, IN MAKING TROUBLE: ESSAYS ON GAY HISTORY, POLITICS, AND THE UNIVERSITY 3 (1992).

¹³⁵ *Id.*

¹³⁶ MICHEL FOUCAULT, HISTORY OF SEXUALITY (1976).

¹³⁷ Us here stands for anyone reading against the mainstream and distantly located on the scale of distance from maleness. Like everything else, it is a dynamic and flexible state.

¹³⁸ By state, here, I refer to both statehood and the condition of international law.

is the state and what it deems recognizable and, the latter are international law's ancillaries. And the most important task becomes the concealing of this interstitial (yet manifest) maleness. The praxis of preserving/integrating maleness through laws is observable as religion,¹³⁹ ideology or both – for instance sodomy laws have been historically used for political purposes.¹⁴⁰ This is continually demonstrated through enactment of legislations which are also contingent on the political intrigue within ruling regimes and their claims to power.¹⁴¹ The political climate of a regime is often couched in rhetoric of religion, secularism as relationally produced from religion,¹⁴² homophobia and other sentiments that allow power through appeasing normative values and institutions nationally and internationally. Normative values, while mobile, usually fall within state endorsed binaries and heteronormative axes.

For instance, the framework of traditional family values as a domestic strategy to approve or reject international legislations, is used in contradistinction in the interaction between the domestic and international legal systems (if they are seen at all as distinct).¹⁴³ State sanctioned constructs of family are used repeatedly to create a false dichotomy and bring to light two very interesting, contradictory and yet identical strains of state/international legal practice. In one, autocratic regimes strengthen their domestic authority by promoting nationalist campaigns where non heterosexual orientations are products of ultra-liberal western ideas and decadence. In another, western states resurrect the 'ancient belief' of the 'uncivilised' other and 'allow' such states to decline rights for contemporary iterations of sexual minorities¹⁴⁴ citing grounds of sovereign equality and cultural relativism. But what this really hides is an anxious co-construction of complex and competing masculinities where the power to grant legality and legitimacy wrests within one or the other form of a masculine state. It is a repeated resurrection of normative male image in inter-textual and sub-textual ways. By shifting our gaze to *these* binaries – western states vs non-western states and, sexual minorities vs non-western states – the spectrum of recognition on the scale of distance from the normative maleness is made incumbent (and invisible).

¹³⁹ As against a liberal construct of secular, which in turn is defined against a Christian understanding of religion itself – read in a manner understood by Saba Mahmood in her work.

¹⁴⁰ In 1307, King Philip IV of France brought sodomy charges against the Order of the Knights Templar to dissolved it since his debt was accruing with the Knights. In England, Henry VIII promulgated the Buggery Act in 1533 and then used it to accuse Roman Catholic monks of sodomy and confiscate their monastic lands. He also disposed of political opponents by executing them on charges of sodomy.

¹⁴¹ Ugandan Anti-Homosexuality Act had much to do with President Yoweri Museveni and his fluctuating popularity.

¹⁴² SABA MAHMOOD, *RELIGIOUS DIFFERENCE IN A SECULAR AGE: A MINORITY REPORT* (Princeton University Press 2015).

¹⁴³ Dominic McGoldrick, *The Development and Status of Sexual Orientation Discrimination under International Human Rights Law*, 16(4) HUMAN RIGHTS LAW REVIEW 613 (2016).

¹⁴⁴ Eric Heinze, *Sexual Orientation and International Law: A Study in the Manufacture of Cross-Cultural "Sensitivity"*, 22 MICH. J. INT'L L. 283 (2001).

This persistent flattening of narratives and identities is something queering, feminist interrogation and post-colonial/decolonial thinking warns us against – again and again. The purported controversy between ‘normative universality’ and ‘cultural relativism’ is commonly and mistakenly represented as a confrontation between western and non-western cultures and practices.¹⁴⁵ However, multiple strands of contestation within each juridical state gets subsumed by this binary representation. Objections and argumentations of all kinds occur within western and non-western states.¹⁴⁶ But international law uses its matrix of binaries to hide from plain sight its conceptual maleness. This is not very different from how contestation for resources often get categorised through a state vs private investor dispute lens, making invisible the multiple civil society elements and indigenous movements who are stakeholders in this complex process.¹⁴⁷ Through this, I allude to a common and complex anxiety where the contestation is not at the site of cultural differences between western and non-western approaches but, as one created at the behest and as an extension of the European, Christian male state. This recapitulation of international law and/as statehood produces sexual oppression and sexual emancipation at the same site.¹⁴⁸ It is of utmost concern, then, the way in which the law gets projected as the singular point “...that is at the root of gender and sexuality-based marginalization, and one that is the most potent response to it”.¹⁴⁹ It is this sight of anxiety that international law looks to hide from our gaze.

Anxiety, for ‘us’, then, becomes a form of resistance to the masculine state’s continued hegemony –in questioning the image in these structures as well as using the law instrumentally to demand inclusion either as a tactic¹⁵⁰ or to assimilate. In *seeing* international law for who it is, we are simultaneously made aware of who *we* are and *what* we cannot be. This is, then, equally an account of anxiety of marginalisation, elimination and systemic erasure from this system. (International) law writes its own transgressions¹⁵¹ and produces a desire in the other to discard, adapt or embrace its normative maleness. Having realised that (or in the path to its realisation) we are anxious to understand ourselves relationally to this ever- expanding system. But most importantly, this is an

¹⁴⁵ HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT ch. 10 (2nd ed. 2000).

¹⁴⁶ Cf. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (White, J.) (claiming that Western prohibitions of homosexuality have “ancient roots”). Cf. also *Romer v. Evans*, 517 U.S. 620 (1996) (striking down an amendment to a state constitution prohibiting the extension of legal protections to individuals based on sexual orientation).

¹⁴⁷ Ntina Tzouvala, *On Legal Sublimations: The Corporation in International Law a Review of Veiled Power: International Law and the Private Corporation, 1886-1981, by Doreen Lustig*, New York, NY: Oxford University Press, 2020, THE NEW RAMBLER (Mar. 5, 2021), <https://newramblerreview.com/book-reviews/law/on-legal-sublimations-the-corporation-in-international-law> (last visited June 14, 2021).

¹⁴⁸ Oishik Sircar, *Desire Against Desire*, <https://www.tarshi.net/inplainspeak/issue-in-focus-desire-against-desire-2/> (last visited June 14, 2021).

¹⁴⁹ *Id.*

¹⁵⁰ I use this in the sense used by Rob Knox in Robert Knox, *Strategy and Tactics*, 21 FINNISH YEARBOOK OF INTERNATIONAL LAW 193 (2012).

¹⁵¹ Spivak, *supra* note 97.

anxiety in our reading where we pause at site, wondering if we have arrived at yet another ‘dead end’. Queering as a method or an approach is a form of deconstructive critique. One which seems to signal to an ‘outside of international law’ epistemic void.¹⁵² We have been here before, anxiously looking ahead to a sense of ‘nothingness’ and reluctantly looking back at what is conceptually an exclusionary system. Some of us turn back, once again looking for reformist possibilities¹⁵³ while others sit at the borders, refusing to be ordered, contemplating ways in which we can truly overcome the fear of epistemic voids and decolonise our own gaze. But queering is not a polemic – there is an everyday-ness and progressive politics to what this means in terms of tangible next steps. Once we bring things to *sight*, we ought to disperse its *sites* of power as well. And so, the project of universalising cannot be left to Europe alone¹⁵⁴ while we try to provincialise it in as many ways. Try this with me then – imagine the figure of international law as anything but male.

¹⁵² See generally, Kapur, *supra* note 11; Saba Mahmood, *supra* note 32; Sedgwick, *supra* note 116.

¹⁵³ A segment of TWAIL reformists believe that international law, as a system, is salvageable.

¹⁵⁴ Priyamvada Gopal reflects on this as part of her discussion on her work. See GOPAL, *supra* note 8.