

## Going Global: An International Human Rights Approach to Russian LGBTQ+ Law and Practices

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*The current treatment of LGBTQ+ people in Russia is characterized by a discriminatory withholding of rights, political and societal isolation, and endangerment. While this situation is well-documented, the legal analyses of it have been more limited. Those that have been undertaken in the past decade have focused almost exclusively on the regional European Court of Human Rights as the vehicle to address Russian discrimination against its sexual and gender minorities. The scholarship has long ignored an international human rights approach, however, which, through the treaty bodies of the nine core international human rights treaties, has developed a robust set of recommendations on Russia's treatment of its LGBTQ+ population that condemns anti-LGBTQ+ Russian laws and practices. While this Note focuses on international human rights law in relation to Russia as an informative case study, it hopes to open new terrain on understanding and addressing the mistreatment of LGBTQ+ persons at the domestic level in other countries by analyzing international human rights law, an approach that has long been ignored in advancing LGBTQ+ rights.*

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## I. INTRODUCTION

Being the administrator for an online community for LGBTQ+ people would hardly seem to be a deviant activity, let alone a criminal one. Yet in November 2019, Yulia Tsvetkova, an administrator of two of these online LGBTQ+ communities, was found guilty of violating Russia's law against "propaganda of non-traditional sexual relations among minors."<sup>1</sup> This law aims to prevent children having any access to information on LGBTQ+ identification. Tsvetkova's two online communities were both exclusively for those eighteen and older, yet she was fined 50,000 rubles for violating Russia's gay propaganda law.<sup>2</sup> Russian authorities also shut down her amateur youth play, "Blue and Pink," which focused on encouraging anti-bullying and anti-discrimination, also on the grounds that it was gay propaganda.<sup>3</sup> As exemplified by Tsvetkova's experiences, the Russian authorities have cut off access not only to LGBTQ+ resources, but even to attempts to obtain humane treatment for sexual minorities. Tsvetkova's story is only one of dozens of examples of those prosecuted under Russia's so-called "gay propaganda" law, and the effects have been deleterious to Russia's LGBTQ+ community.<sup>4</sup>

But the gay propaganda law, while emblematic of the treatment of sexual and gender minorities in Russia, is only the tip of the iceberg of Russian discrimination against LGBTQ+ people. Foreign supporters of gay rights that try to advocate for those rights while in Russia are impeded, banned, or deported.<sup>5</sup> For example, music icons Lady Gaga and Madonna faced fines and legal proceedings triggered by their vocal support of LGBTQ+ rights in Russia.<sup>6</sup> Anti-LGBTQ+ violence in Russia is on the rise,<sup>7</sup> including brutal murders of some suspected of being LGBTQ.<sup>8</sup> Russian authorities often fail to properly investigate hate crimes against

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1. *Russia: Feminist Activist Fined for "Gay Propaganda" and Facing Criminal "Pornography" Charges*, AMNESTY INT'L (Dec. 11, 2019, 4:01 PM), <https://tinyurl.com/ybdw68ex>.

2. *Id.*

3. *Id.*; see also Dorian Batycka, *Russian Authorities Cancel Theatre Festival Under "Gay Propaganda" Law*, HYPERALLERGIC (Mar. 19, 2019), <https://tinyurl.com/yecpopwg> (reporting on the cancellation of Tsvetkova's youth festival with the same purpose).

4. See generally Michael Garcia Bochenek & Kyle Knight, *No Support: Russia's "Gay Propaganda" Law Imperils LGBT Youth*, HUM. RTS. WATCH (Dec. 11, 2018), <https://tinyurl.com/y9omjtkp>.

5. *The Facts on LGBT Rights in Russia*, COUNCIL FOR GLOB. EQUAL., <https://tinyurl.com/y9w2l2e4>.

6. See Kirit Radia, *Lady Gaga, Madonna Face Punishment in Russia*, ABC NEWS (Aug. 4, 2013), <https://tinyurl.com/yzxclmb>.

7. *Facts on LGBT Rights in Russia*, *supra* note 5.

8. See, e.g., Joseph McCormack, *Russia: Tortured and Killed Gay Man Was "Raped with Beer Bottles,"* PINK NEWS (May 12, 2013), <https://tinyurl.com/yh8996nc> ("A gay man from the southern Russian city of Volgograd who was tortured to death in an apparent hate crime, was sexually assaulted with beer bottles, and had his skull 'smashed with a stone', authorities said on Sunday.").

LGBTQ+ people.<sup>9</sup> Individual rights of LGBTQ+ persons have been restricted in Russia in key sectors such as health, education, and freedom of expression.<sup>10</sup>

The situation for LGBTQ+ rights in Russia is dismal. Legal analyses of the situation have focused on summarizing current Russian law and looking to the European Court of Human Rights for a potential solution.<sup>11</sup> Far fewer have focused on the nine core international human rights treaties in relation to Russia's anti-LBTQ practices. Those analyses that do exist are primarily limited to the rights of children, both under the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights.<sup>12</sup> Almost all of these studies also focus exclusively on Russia's gay propaganda law rather than its poor policies towards LGBTQ+ people in general.<sup>13</sup> This Note, however, aims to fill that gap by reviewing the underappreciated international human rights treaties' treaty bodies' recommendations to Russia through their Views and Concluding Observations. The results of these recommendations are potentially far-reaching; the treaty bodies' recommendations are expansive in condemning Russia's anti-LGBTQ+ laws and practices, rely on a variety of legal theories to justify their conclusions, and involve an international dimension that could be used in tandem with European and Russian litigation initiatives. Already some positive effects are starting to be seen in Russia's treatment of its sexual and

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9. *Russian Authorities Ban Putin "Gay Clown" Meme but Fail to Investigate Homophobic Killings*, AMNESTY INT'L (Apr. 6, 2017, 5:59 PM), <https://tinyurl.com/yz62yevc>.

10. *See generally* EQUAL RTS. TRUST, EQUALITY AND NON-DISCRIMINATION IN RUSSIA: BEST PRACTICES FOR SERVICE PROVIDERS 15-50, <https://tinyurl.com/y7gbslan> (last visited May 10, 2020).

11. *See, e.g.*, Paul Johnson, "Homosexual Propaganda" Laws in the Russian Federation: Are They in Violation of the European Convention on Human Rights?, 3 *RUSS. L.J.* 37, 38 (2015) (arguing that Russia's gay propaganda law violates the European Convention on Human Rights and the European Court of Human Rights should use this opportunity to expand LGBTQ+ rights); Lisa McIntosh Sundstrom & Valerie Sperling, *Seeking Better Judgment: LGBT Discrimination Cases in Russia and at the European Court of Human Rights*, 24 *INT'L J. HUM. RTS.* 750, 751 (2019) (finding that countries with informal discriminatory norms like Russia are the least likely to implement rulings favorable to LGBTQ+ persons from the European Court of Human Rights); Stephan Polsdofer, Note, *Pride and Prejudiced: Russia's Anti-Gay Propaganda Law Violates the European Convention on Human Rights*, 29 *AM. U. INT'L L. REV.* 1069, 1082 (2014) (arguing that Russia's gay propaganda law violates the European Convention on Human Rights); Jesse W. Stricklan, Note, *Testing Constitutional Pluralism in Strasbourg: Responding to Russia's "Gay Propaganda" Law*, 37 *MICH. J. INT'L L.* 191, 192-93 (2015) (describing Russia's gay propaganda law as a major test for the European Court of Human Rights); *see also* Lien Verpoest, *The End of Rhetoric: LGBT Policies in Russia and the European Union*, 68 *STUDIA DIPLOMATICA* 3, 16 (2017) (finding the polarization of Russia and Western Europe as a substantial element in Russian LGBTQ+ rights).

12. *See* Ryan Thoreson, *From Child Protection to Children's Rights: Rethinking Homosexual Propaganda Bans in Human Rights Law*, 124 *YALE L.J.* 1327, 1343-44 (2015) (arguing that children's rights should be a primary focus of discussions on Russia's gay propaganda law); Caroline H. Voyles & Mariana Chilton, *Respect, Protect, and Fulfill or Reject, Neglect, and Regress? Children's Rights in the Time of the Russian "Gay Propaganda Law"*, *HEALTH & HUM. RTS. J.* (Oct. 1, 2019), <https://tinyurl.com/yd78vxyo> (concluding that Russia's gay propaganda law violates both the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights).

13. *See supra* notes 11-12.

gender minorities, which is a positive sign for future advancements. Furthermore, this approach can be replicated in approaches to protect LGBTQ+ rights in other countries, allowing this Note to serve as an important cases study for the neglected area of international human rights law and LGBTQ+ rights in individual countries.

To lay the groundwork for our discussion of human rights law and Russia, Part II will first discuss Russia's treatment of LGBTQ+ people, focusing on the gay propaganda law, discriminatory restrictions on individual rights, and state violence as well as state acquiescence to violence by private actors. Part III will discuss the recent European Court of Human Rights' responses to Russia's anti-LGBTQ+ practices. Part IV will then review all recommendations from the international human rights treaty bodies to Russia regarding LGBTQ+ persons, looking first at existing Views and then their Concluding Observations before discussing the overlooked benefits of international human rights law in effecting change in Russia. Finally, Part V will conclude and look to the future, noting that the wealth of recommendations from the international treaty bodies has been overlooked for far too long in analyzing countries' domestic practices towards LGBTQ+ persons.

## II. THE STATE OF LGBTQ+ RIGHTS IN RUSSIA

The landscape of LGBTQ+ rights in Russia is hardly encouraging. A recent ranking of pro-LGBTQ+ rights by country in Europe by the International Lesbian, Gay, Bisexual, Trans, and Intersex Association (ILGA) placed Russia forty-sixth out of forty-nine states.<sup>14</sup> To briefly cover the most pressing themes in Russia's anti-LGBTQ+ practices, this Part will address Russia's infamous "gay propaganda law," Russian *de jure* and *de facto* restrictions on rights for LGBTQ+ persons, and state and non-state violence against LGBTQ+ people.

### A. "Gay Propaganda" Law

Anti-LGBTQ+ discrimination in Russia is hardly new, but social hostility against LGBTQ+ persons has soared in Russia since the introduction of a "gay propaganda" law in 2013.<sup>15</sup> This law prohibits

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14. *Country Ranking*, RAINBOW EUR., <https://rainbow-europe.org/country-ranking> (last visited May 9, 2020) (demonstrating that only Armenia, Turkey, and Azerbaijan were ranked lower).

15. See Bochenek & Knight, *supra* note 4. This law (and Russian treatment of LGBTQ+ persons in general) was heavily scrutinized internationally in the lead-up to the 2014 Winter Olympics in Sochi. Uri Friedman, *How Sochi Became the Gay Olympics*, ATLANTIC (Jan. 28, 2014), <https://tinyurl.com/y7rr2k3u>. But despite this international outcry marring the Sochi Olympics as

providing “propaganda” of “nontraditional sexual relations” to minors.<sup>16</sup> It is aimed at punishing LGBTQ+ persons and their supporters,<sup>17</sup> but also at limiting any contact of Russian minors with scientific information on sexual orientation or gender identity so that their only understanding of LGBTQ+ status is as “a deviation or disease that needs to be treated.”<sup>18</sup>

The government has broadly considered LGBTQ+ propaganda anything that would “directly or indirectly approve of persons who are in nontraditional sexual relationships.”<sup>19</sup> The law’s language has been widely criticized for being so vague that practically “anyone could be accused and jailed.”<sup>20</sup> Its application has been interpreted extremely broadly, with Russian authorities, for example, fining sixteen-year-old Maxim Neverov 50,000 rubles, the equivalent of \$750—which exceeds the average monthly salary in Russia<sup>21</sup>—just for posting images of shirtless men on social media.<sup>22</sup> Similarly, children’s drawings in Yekaterinburg that showed same-sex couples for the International Day for Tolerance were investigated for promoting non-traditional sex among minors.<sup>23</sup> Major LGBTQ+ websites have also been blocked in Russia under the propaganda law, including Gay.ru, Lesbi.ru, and Parni Plus, the largest website on LGBTQ+ health in Russia, which, among other things, raises awareness about the HIV epidemic in Russia.<sup>24</sup> Even benign references to characters being LGBTQ+

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Vladimir Putin’s moment of glory, it failed to effect any real change and international awareness and activism have dwindled since the Olympics. See Graeme Reid, *The Olympics Have Left Sochi, But Don’t Forget LGBT Russians*, HUM. RTS. WATCH (Feb. 8, 2018 4:06 PM), <https://tinyurl.com/y7k689v3>.

16. Federal’nyi Zakon RF Kodeks Rossiiskoi Federatsii ob Administrativnykh Pravonarusheniakh [Code of the Russian Federation on Administrative Offenses of the Russian Federation], art. 6.21, Dec. 30, 2001 [as amended Feb. 12, 2015]; see also U.S. STATE DEP’T, 2018 HUMAN RIGHTS REPORT: RUSSIA 18 (2019), <https://tinyurl.com/y9khugpv> [hereinafter U.S. State Dep’t Human Rights Report].

17. U.S. State Dep’t Human Rights Report, *supra* note 16, at 18.

18. RUSSIAN LGBT NETWORK, MONITORING OF DISCRIMINATION AND VIOLENCE BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY IN RUSSIA IN 2016-2017, at 5 (2018), <https://old.lgbtnet.org/sites/default/files/discrimination.pdf>.

19. U.S. State Dep’t Human Rights Report, *supra* note 16, at 50.

20. Jamie Manson, *The Orthodox Church’s Role In Russia’s Anti-Gay Laws*, NAT’L CATH. REP. (Aug. 14, 2013), <https://tinyurl.com/y8mq5d45>.

21. *Half of Russians Say They’ll Never Live to See a Decent Salary – Survey*, MOSCOW TIMES (Apr. 10, 2019), <https://tinyurl.com/ya8hc6n8> (noting that the average monthly salary in Russia is 43,030 rubles).

22. HUM. RTS. WATCH, WORLD REPORT 2019, at 483 (2019), <https://tinyurl.com/yfefe9x>; Daria Litvinova, *16-Year-Old Fined Under Russia’s “Gay Propaganda” Law Files Appeal*, HUFFPOST (Aug. 20, 2018, 4:17 PM), <https://tinyurl.com/y8evyysy>; U.S. State Dep’t Human Rights Report, *supra* note 16, at 18.

23. INT’L LESBIAN, GAY, BISEXUAL, TRANS & INTERSEX ASS’N, ANNUAL REVIEW OF THE HUMAN RIGHTS SITUATION OF LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX PEOPLE 82 (2019), [https://www.ilga-europe.org/sites/default/files/2019/full\\_annual\\_review.pdf](https://www.ilga-europe.org/sites/default/files/2019/full_annual_review.pdf) [hereinafter ILGA Report].

24. HUM. RTS. WATCH, *supra* note 22, at 483; ILGA Report, *supra* note 23, at 83.

in movies result in them receiving more restrictive ratings (sixteen or eighteen years old and up).<sup>25</sup>

The propaganda law sets the scene for Russian LGBTQ+ legislation and perspectives overall, which have encouraged anti-LGBTQ+ actions inside the country. It is well documented that “[t]he Kremlin and its allies are pushing a socially conservative, hands-off, and often church-influenced approach to sexual and reproductive health.”<sup>26</sup> President Vladimir Putin’s administration has frequently juxtaposed “Holy Russia” to “sodomitic America” and “Gayropa,”<sup>27</sup> and it instituted increasingly anti-LGBTQ+ policies prior to the 2018 election.<sup>28</sup> Patriarch Kirill, the head of the Russian Orthodox Church, has emphasized family values and moral education at the expense of sexual education.<sup>29</sup> He has described the recognition of same-sex unions in the West as a “harbinger of impending doom,” describing homosexuality as a “very dangerous apocalyptic symptom” and stressing that “we must do everything in our powers to ensure that sin is never sanctioned in Russia by state law.”<sup>30</sup> Indeed, “[a] burgeoning alliance between Russian President Vladimir Putin and the church in recent years has fueled an environment where sexual education in schools is forbidden . . . and gay rights are state-sanctioned.”<sup>31</sup>

This has furthered anti-LGBTQ+ sentiment overall in Russian society. In a 2018 poll, two-thirds of Russians thought that there was a worldwide gay conspiracy to subvert “traditional” Russian values.<sup>32</sup> A 2015 poll found that over half of Russian citizens thought LGBTQ+ persons should be

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25. See, e.g., Seth Kelley, *Russia Gives Adult Rating to ‘Power Rangers’ Reboot With LGBT Character*, VARIETY (Mar. 24, 2017, 1:05 PM), <https://tinyurl.com/y9b9cxqh>; *Russia Gives Beauty and the Beast a 16+ Rating*, BBC NEWS (Mar. 7, 2017), <https://www.bbc.com/news/entertainment-arts-39194557>.

26. Sophia Jones, *How Social Conservatism Fueled Russia’s HIV Epidemic*, POLITICO (Feb. 25, 2018), <https://tinyurl.com/y8nf327q>.

27. Andrew Kornbluth, *Russian Homophobia Is a Convenient Diversion*, MOSCOW TIMES (July 22, 2015), <https://tinyurl.com/ybgmf63>. The Putin administration has also perpetuated the “rotten West” narrative that has existed since Soviet times. Christian Caryl, *If You Want to See Russian Information Warfare at Its Worst, Visit These Countries*, WASH. POST (Apr. 5, 2017, 3:29 PM), <https://tinyurl.com/ljrzpyx>.

28. See Daria Litvinova, *Arrested and Harrassed, Russia’s LGBT+ Community Fears Crackdown Worsening*, REUTERS (Sept. 27, 2018, 4:04 AM), <https://tinyurl.com/yd92pf7d>.

29. Jones, *supra* note 26.

30. Manson, *supra* note 20; see also “Recognizing Same-Sex Unions Brings Us Closer to the Apocalypse”—Head of Russian Orthodox Church, RT (July 22, 2013, 7:55 AM), <https://tinyurl.com/yd7wh555>.

31. Jones, *supra* note 26.

32. Marc Bennetts, “Alone and in Fear”: Ordeal of Married Gay Couple Forced to Flee Russia, GUARDIAN (Sept. 5, 2018, 3:39 AM), <https://tinyurl.com/ya89rcmj>. As one example, the Russian public has referred to surrogacy as “wombs for rent” and “selling babies to gays” (translated). Мария Осипова, *Матка напрокат: в Брюсселе для однополых пар открылась ярмарка младенцев*, ZVEZDA (Oct. 6, 2019, 7:25 PM), [https://tvzvezda.ru/news/vstrane\\_i\\_mire/content/20191061659-zWkIp.html](https://tvzvezda.ru/news/vstrane_i_mire/content/20191061659-zWkIp.html).

“liquidated” or “isolated from society.”<sup>33</sup> This sets the scene for broader infringements on the rights of Russia’s sexual and gender minorities.

### B. *Restrictions on Rights*

In Russia, there are both *de jure* and *de facto* discriminatory restrictions on the rights of LGBTQ+ persons in the areas of freedom of assembly, employment, healthcare, and family. Despite a Russian Supreme Court ruling that LGBTQ+ persons have the right to assemble peacefully, Russian authorities have continued to cite the anti-LGBTQ+ propaganda law to both deny LGBTQ+ activists and supporters the right to assemble and to interrupt such public demonstrations.<sup>34</sup> For example, Moscow authorities denied permits for an LGBTQ+ pride parade for the thirteenth consecutive year in 2019.<sup>35</sup> Local authorities purposefully make it difficult to register LGBTQ+ events in Russia, and police have arrested attendees at events such as the 2019 Pride Parade in St. Petersburg.<sup>36</sup> When these events have taken place, they are frequently boycotted by counter-protests, which are often supported by the police in limiting or stopping the pro-LGBTQ+ gathering.<sup>37</sup> Those that have attended in protest of authorization being denied have been arrested and fined.<sup>38</sup>

LGBTQ+ persons in Russia have also been denied an equal right to employment in practice. They have been rejected from jobs or forced to resign due to their sexual orientation or gender identity.<sup>39</sup> Especially alarming is the number of hiring procedures that refer to the applicant’s sexual orientation or gender identity.<sup>40</sup> A study by the British LGBTQ+ rights organization Stonewall found that the majority of LGBTQ+ persons in Russia hide their sexual orientation and gender identity in the workplace, with 37% of interviewees describing difficulties during interviews due to

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33. Peter Hobson, *Most Russians Want Homosexuals “Liquidated” or Ostracized – Poll*, MOSCOW TIMES (Oct. 11, 2015), <https://tinyurl.com/y7rrrxxs>.

34. U.S. State Dep’t Human Rights Report, *supra* note 16, at 29.

35. *Id.* at 30.

36. ILGA Report, *supra* note 23, at 82-83.

37. *See, e.g., id.* at 83; HUM. RTS. WATCH, LICENSE TO HARM: VIOLENCE AND HARASSMENT AGAINST LGBT PEOPLE AND ACTIVISTS IN RUSSIA (2014), <https://tinyurl.com/okko4uv>.

38. Litvinova, *supra* note 28 (“[O]ver 20 LGBT activists been fined 450,000 Russian rubles (US\$6,800) for protesting at the annual St. Petersburg pride parade in August after authorities refused to authorise the rally.”); *Police Detain Two Dozen Gay Rights Activists in Russia*, NBC NEWS (Aug. 6, 2018, 4:23 PM), <https://tinyurl.com/y7m68ddf> (“Russian police detained around 25 gay rights activists who took part in an unsanctioned rally in St. Petersburg on Saturday.”).

39. KSENIYA KAMARINA & DANIIL ZHAIVORONOK, MONITORING DISCRIMINATION AGAINST LGBTQ+ PEOPLE IN RUSSIA 10-11 (2020), <https://tinyurl.com/yb8xuxbo>.

40. *See id.* at 10-11 (citing examples of survey respondents being forced to hide their sexual orientation during the employment search process to be hired).

their LGBTQ+ status.<sup>41</sup> According to a 2016 study, 653 LGBTQ+ persons in Russia faced labor discrimination due to their sexual orientation or gender identity, and 521 were fired for this reason.<sup>42</sup> Discrimination against LGBTQ+ persons as teachers is especially strong, driven by the ethos of the propaganda law that all LGBTQ+ contact with minors should be eliminated.<sup>43</sup> Schools have leaned on the lawfully disqualifying ground of committing “immoral misconduct, incompatible with the continuation of work” to dismiss professionals in education.<sup>44</sup> Teachers have even been fired for social media posts suspected of being sympathetic to LGBTQ+ rights or for behavior deemed to be outside Russian social mores.<sup>45</sup>

Anti-LGBTQ+ discrimination also exists in the healthcare sector. According to a Russian LGBT Network survey, 294 LGBTQ+ individuals had their access to healthcare services impeded due to their sexual orientation or gender identity.<sup>46</sup> The rates of discrimination in healthcare were far higher for transgender men and women than cisgender LGBTQ+ individuals.<sup>47</sup> Discrimination against LGBTQ+ persons in healthcare is partially driven by the prevailing attitudes towards non-traditional sexuality in Russian society at large and even in higher education, which addresses non-traditional sexual orientations as an “abnormal[ity],” leading to prejudice by Russian doctors in providing healthcare.<sup>48</sup> Especially concerning is the fact that men who have sex with men (MSM) have an especially high HIV infection rate in Russia, but are pressured to not go to a doctor.<sup>49</sup> If someone is diagnosed as positive for HIV, he is asked how they contracted the virus, and “[i]f he admits to having contracted it through sex with a man, his case is registered under what is known as a Code 103 – information that is accessible by the police and the ministry of internal affairs.”<sup>50</sup>

There are also restrictions on family rights for LGBTQ+ couples. One same-sex couple was married abroad and had their passports stamped under Russian procedures to recognize marriages registered abroad, but they were charged with “intentional damage to passports” under Article 19.16 of the

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41. STONEWALL, STONEWALL GLOBAL WORKPLACE BRIEFINGS 2018: RUSSIA 2 (2018), <https://tinyurl.com/yc4hx3e2>.

42. See RUSSIAN LGBT NETWORK, *supra* note 18, at 20.

43. See *id.* at 18.

44. See *id.*

45. See *Russian Music Teacher Fired After Homophobe Crusader Complains About Her Piercings*, MOSCOW TIMES (Dec. 22, 2016), <https://tinyurl.com/yggn6v3l>.

46. Kamarina & Zhaivoronok, *supra* note 39, at 11.

47. *Id.* at 11-12.

48. See RUSSIAN LGBT NETWORK, *supra* note 18, at 21-22.

49. Matt Cain, *How Homophobia Feeds Russia's HIV Epidemic*, GUARDIAN (Dec. 2, 2017, 7:05 PM), <https://www.theguardian.com/society/2017/dec/03/homophobia-feeds-russia-hiv-epidemic>.

50. *Id.*

Russian Administrative Code, with their passports declared invalid.<sup>51</sup> The couple, now facing death threats in Russia, was forced to flee to the Netherlands, where they were granted asylum.<sup>52</sup> Under the logic that LGBTQ+ persons cannot provide the same level of love or care as traditional families, and that they could impose their sexual orientation or gender identity on their children, there have been cases of anti-LGBTQ+ activists and Russian authorities interfering with LGBTQ+ persons' parental rights as well.<sup>53</sup> Russian-American journalist Masha Gessen described how the Russian government threatened to take children away from LGBTQ+ parents, and those parents' own fear about potentially losing their children, describing it as an instrument of terror by the Russian government.<sup>54</sup> For example, in February 2018, a Yekaterinburg court found a woman unfit to foster the two children she and her husband had fostered for years because she portrayed a "style of male behavior" that violated Russian society's "traditions and mentality."<sup>55</sup> While LGBTQ+ families are not banned by Russian law, the broad scope of the propaganda law has pressured most LGBTQ+ families to hide their status.<sup>56</sup>

### C. *State and Non-State Violence*

Anti-LGBTQ+ physical, sexual, and mental violence have been troublingly common in Russian society. In a 2020 survey of 6,757 Russian LGBTQ+ persons by the Russian LGBT Network, 11.6% had been subjected to physical violence due to their gender identity or sexual orientation, 4% had been subjected to sexual violence, and 56.2% had been subjected to mental violence.<sup>57</sup> Transgender men and women were at the greatest risk for all three types of violence.<sup>58</sup> And this violence came from both strangers and those they knew: the source of violence for LGBTQ+ persons was most likely to be strangers, acquaintances, or family members.<sup>59</sup>

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51. ILGA Report, *supra* note 23, at 82.

52. Litvinova, *supra* note 28.

53. See RUSSIAN LGBT NETWORK, *supra* note 18, at 23.

54. Masha Gessen, *Taking Children from Their Parents Is a Form of State Terror*, NEW YORKER (May 9, 2018), <https://tinyurl.com/y9m8t9tp>; John Riley, *Russia Threatens to Arrest Gay Men Fathering Children Via Surrogacy*, METRO WKLY. (Oct. 6, 2020), <https://tinyurl.com/yjwekr3y>.

55. HUM. RTS. WATCH, *supra* note 22, at 483.

56. See RUSSIAN LGBT NETWORK, *supra* note 18, at 23-24.

57. Kamarina & Zhaivoronok, *supra* note 39, at 8. Mental, or psychological violence, is defined to include both direct insults based on sexual orientation or gender identity as well as veiled aggression or disdain. RUSSIAN LGBT NETWORK, *supra* note 18, at 16.

58. Kamarina & Zhaivoronok, *supra* note 39, at 8-9 (with 21% of transgender men and 27% of transgender women experiencing physical violence, 79% and 80% suffering mental violence, and 5.3% and 9% facing sexual violence, respectively).

59. *Id.* at 10 (compared to colleagues or members of homophobic and/or extremist groups).

Children were especially at risk.<sup>60</sup> Teenagers are in a dangerous situation due to a lack of leverage to protect themselves against their parents' attitudes towards sexual orientation and gender identity as well as a general governmental, institutional, and societal failure to address bullying at schools.<sup>61</sup>

Anti-LGBTQ+ violence has taken the form of both state sponsored violence and private vigilantism. In 2018, Amnesty International found that "state-sponsored discrimination and persecution of LGBTQ+ people continued unabated and the homophobic 'propaganda law' was actively enforced."<sup>62</sup> According to a survey by the Russian LGBT Network, 152 LGBTQ+ individuals were unlawfully detained due to their sexual orientation or gender orientation.<sup>63</sup> For example, in Pyatigorsk, Russian police threatened a student activist after he complained about Russian authorities denying permission to hold a pro-LGBTQ+ demonstration; they tried to coerce him into revealing the names of other LGBTQ+ activists and threatened to "out" him to his family.<sup>64</sup> In addition to discrimination, LGBTQ+ individuals and their supporters have also reportedly faced violence at the hands of Russian state actors, especially in the region of

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60. *Id.* at 9 (with 14% reporting having suffered physical violence due to their gender identity or sexual orientation).

61. See Russian LGBT Network, *supra* note 18, at 30-31. According to a 2016 survey, 13.5% of LGBTQ+ persons under the age of eighteen had experienced physical violence, 58% psychological violence, and 2.5% sexual violence. *Id.* at 31.

62. AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 2017/18: THE STATE OF THE WORLD'S HUMAN RIGHTS 312 (2018), <https://tinyurl.com/y966c9w9>.

63. Kamarina & Zhaivoronok, *supra* note 39, at 11.

64. U.S. State Dep't Human Rights Report, *supra* note 16, at 51.

Chechnya.<sup>65</sup> There have also been reports of Russian authorities explicitly targeting pro-LGBTQ+ NGOs and activists.<sup>66</sup>

In addition to state persecution, the passage of the 2013 propaganda law coincided with an increase in vigilante violence against LGBTQ+ persons in Russia.<sup>67</sup> Even while the propaganda bill was being signed, a “kissing rally” across from Red Square was attacked by Orthodox Christian activists and pro-Kremlin youth groups.<sup>68</sup> Indeed, the number of anti-LGBTQ+ hate crimes in Russia has doubled since 2013.<sup>69</sup> According to a Russian LGBT Network survey, 738 LGBTQ+ individuals suffered property damage due to their sexual orientation or gender identity.<sup>70</sup> Between 2016 and 2017, the Russian LGBT Network recorded eleven murders on the grounds of sexual orientation.<sup>71</sup> Examples of this vigilante “justice” include a homophobic social media campaign to “hunt gays” and public attacks

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65. *Id.* at 50. The situation in Chechnya is perhaps the most well-known crisis facing Russia’s LGBTQ+ population. Local officials in Chechnya have perpetrated violence against those perceived to be LGBTQ. U.S. State Dep’t Human Rights Report, *supra* note 16, at 2. Starting in 2017, Chechnyan officials have arrested LGBTQ+ individuals, placed them in special prisons, and forced them to disclose the names of other LGBTQ+ persons in Chechnya. Russian LGBT Network, *supra* note 18, at 10. According to Amnesty International’s findings, over 100 men who were believed to be gay had been abducted and tortured in Chechnya in 2017, and some were even killed. AMNESTY INT’L, *supra* note 62, at 312. One investigative report is replete with a laundry list of tortures inflicted upon suspected LGBTQ+ persons: “electrocution, solitary-confinement cells, beatings, dunking in a vat of cold water, starvation.” Masha Gessen, *The Year Russian L.G.B.T. Persecution Defied Belief*, NEW YORKER (Dec. 29, 2017), <https://tinyurl.com/y8qlxyrk>. There is strong evidence that this wave of discrimination is being perpetrated by the Chechnyan authorities. AMNESTY INT’L, *supra* note 62, at 312. Criminal cases have not been successfully initiated against the Chechnyan officials in Russia. Russian LGBT Network, *supra* note 18, at 11. The Russian Justice Minister, in response to reports of the persecution, stated that “[we] failed to confirm not only the existence of facts of violations of these rights, we were unable to even find members of the LGBT (lesbian, gay, bisexual and transgender) community in Chechnya.” HUM. RTS. WATCH, *supra* note 22, at 481. The prevalence of anti-LGBTQ+ violence in Chechnya has led to this being the region where LGBTQ+ individuals are most likely to conceal their sexual orientation and gender identity throughout all of Russia. *See* Kamarina & Zhaivoronok, *supra* note 39, at 16 (although only two out of 151 survey responses were from Chechnya, a similar or worse pattern likely holds in Chechnya given the persecution against LGBTQ+ persons in that region); Patrick Reeve, James Longman & John Kapetaneas, “*Any Day You Can Be Taken: Inside What It’s Like to Be Gay in Chechnya*,” ABC NEWS (Oct. 25, 2019, 5:46 AM), <https://tinyurl.com/y8pl84e4> (describing reasons why gay men in Chechnya must conceal their sexual orientation). The rates of physical, mental, and sexual violence against LGBTQ+ persons in Chechnya are also higher than those in Russia overall. *See also id.* at 8, 16-17 (“[In Chechnya,] 17.8% of LGBTQ+ have experienced physical violence, 59% mental violence and 8% sexual violence.” In comparison, in all of Russia, “11.6% were victims of physical violence one or more times, 4% experienced sexual violence, and more than half of the respondents (56.2%) experienced mental violence.”).

66. U.S. State Dep’t Human Rights Report, *supra* note 16, at 32.

67. *See* Bochenek & Knight, *supra* note 4.

68. Nataliya Vasilyeva & Mansur Mirovalev, *Russia’s Lower House Passes Anti-Gay Bill as Protesters Beaten, Arrested*, WASH. POST (June 11, 2013), <https://tinyurl.com/yz4tqod2>.

69. Oliver Carroll, *The Dark Reality Behind Russia’s Promise of an LGBT-Friendly World Cup*, INDEPENDENT (May 21, 2018, 8:15 PM), <https://tinyurl.com/y7v37jdj>; Daria Litvinova, *LGBT Hate Crimes Double in Russia After Ban on “Gay Propaganda”*, REUTERS (Nov. 21, 2017, 1:01 PM), <https://tinyurl.com/yhga54bl>.

70. Kamarina & Zhaivoronok, *supra* note 39, at 111.

71. Russian LGBT Network, *supra* note 18, at 13.

against LGBTQ+ activists and those that appear to identify as LGBTQ.<sup>72</sup> In one case, a twenty-nine-year-old man was beaten to death just blocks from the Kremlin “for not dressing right.”<sup>73</sup> In another, a hooded mob trashed an LGBTQ+ party and left four people hospitalized.<sup>74</sup>

A common tactic for attacking LGBTQ+ persons in Russia is “figurehead dating,” where the aggressors “create a fake account on a site, meet their victims, and invite them to their place on a date. When the unsuspecting man comes to the place, an organized group of aggressive men is already waiting there to humiliate, beat up, and blackmail him.”<sup>75</sup> The Russian LGBT Network documented fifteen such cases of this figurehead dating, with the exact same scenario, on the Russian dating website [date.bluesystem.org](http://date.bluesystem.org) alone.<sup>76</sup> Anti-LGBTQ+ discrimination is influenced by dual motives: the ease of targeting an easily blackmailable group that cannot rely on the police and the supposed “honor” of fighting non-traditional sexual practices.<sup>77</sup>

In addition to express state actor discrimination and violence, the Russian state has also effectively endorsed societal anti-LGBTQ+ discrimination and violence.<sup>78</sup> The majority of those that reported cases of discrimination or violence had their cases denied or not investigated, or the victim was required to make extraneous additional efforts.<sup>79</sup> For example, Vlad Pogorelov, a Russian LGBTQ+ teenager, was lured into a meeting with homophobic persons that had posed as LGBTQ+ teenagers on an online dating platform; once there, he was robbed and beaten.<sup>80</sup> When he filed a report with the Russian police, they closed the investigation after a month, stating that the attack was of “low significance” and that they were

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72. ILGA Report, *supra* note 23, at 82; *see also* Russian Music Teacher Fired After Homophobe Crusader Complains About Her Piercings, *supra* note 45 (describing one of the victims of Timur Bulatov, St. Petersburg’s infamous “gay-teacher hunter”).

73. Bennetts, *supra* note 32.

74. *Russia’s LGBT Youth Victimized by “Gay Propaganda” Law*, MOSCOW TIMES (Sept. 14, 2015), <https://tinyurl.com/yzvnt2wd>.

75. Russian LGBT Network, *supra* note 18, at 11; *see also* Oliver Carroll, *Gay Hunters: How Criminal Gangs Lure Men on Dating Apps Before Extorting Cash and Beating Them*, INDEPENDENT (Apr. 14, 2019, 1:23 PM), <https://tinyurl.com/y2y6dk8v> (“Handsome young men entrap unwitting victims on dating apps and other gay sites. They lure victims to an apartment, where several other gang members are waiting. The assailants film their victim, extort money and threaten them with outing or worse. Usually, the victims pay up for a quiet life. On the occasions that they don’t, things can end brutally.”); ILGA Report, *supra* note 23, at 82 (“[H]omophobic and criminal groups continued to lure gay men to ‘setup dates,’ then robbing and physically assaulting them.”); Cavan Sieczkowski, *Russian Neo-Nazis Allegedly Lure, Torture Gay Teens With Online Dating Scam*, HUFFPOST (July 26, 2013, 1:14 PM), [https://www.huffpost.com/entry/russian-nazi-torture-gay-teens\\_n\\_3658636](https://www.huffpost.com/entry/russian-nazi-torture-gay-teens_n_3658636).

76. Russian LGBT Network, *supra* note 18, at 11.

77. *See id.* at 12.

78. *See* U.S. State Dep’t Human Rights Report, *supra* note 16, at 51.

79. Kamarina & Zhaivoronok, *supra* note 39, at 15.

80. U.S. State Dep’t Human Rights Report, *supra* note 16, at 51.

unable to protect LGBTQ+ persons.<sup>81</sup> In another case, a blogger from Tomsk, Alexander Sidorov, picketed in the city of Makhachkala with a poster stating that “to hate gays is an antiscientific misconception.”<sup>82</sup> The day after, masked men approached and beat up Sidorov; the police merely watched, refused to accept his criminal complaints, and some even said they would also like to attack Sidorov or even kill him.<sup>83</sup>

Even before the 2018 World Cup, when the eyes of the world were on Russia, “far-right and ultra-nationalist gangs . . . threatened to bash and stab LGBTQ+ football fans. The authorities . . . [took] no discernible action against the perpetrators of these criminal threats.”<sup>84</sup> In another case, the pro-LGBTQ+ rights group Coming Out brought several actions against perpetrators of figurehead dating, but only one person was sentenced, and in that case the motive of hatred was not even investigated.<sup>85</sup> In fact, the Russian government does not collect statistics on hate crimes and discrimination against LGBTQ+ persons as a general rule.<sup>86</sup> In the vast majority of crimes against LGBTQ+ persons that have been reported in recent years, the Russian police and courts treat these incidents merely as “ordinary crimes,” resulting in lower penalties for the perpetrators.<sup>87</sup> As one Russian LGBTQ+ teenager surmised, Russian law “literally makes homophobes have free rein in our country.”<sup>88</sup>

The prevalence of discrimination against LGBTQ+ persons in Russia has led most Russian LGBTQ+ individuals to distrust state authorities. In a survey by the Russian LGBT Network, 73.3% of LGBTQ+ respondents reported that they did not trust the police and 65.2% did not trust the courts.<sup>89</sup> Sociologist Alexander Kondakov concluded that the number of anti-LGBTQ+ cases reported is far less than the true extent of homophobic crimes in Russia: “In reality, most victims of violent crimes in these situations never go to the police, and they’re even more reluctant about pressing charges, fearing publicity and bullying.”<sup>90</sup> As Yulianna Prosvirina, a self-titled drag king, put it, LGBTQ+ people “are treated as subhuman [in Russia], with no civil or human rights.”<sup>91</sup>

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81. *Id.*

82. Russian LGBT Network, *supra* note 18, at 13.

83. *Id.*

84. Peter Tatchell, *World Cup Fever, Gay Rights Abuse and War Crimes – It’s an Ugly Mix*, GUARDIAN (June 13, 2018, 1:50 PM), <https://tinyurl.com/yby3b3z4>.

85. ILGA Report, *supra* note 23, at 82.

86. *Id.*

87. Mikhail Danilovich, “*He Wasn’t Worthy of Being a Man*”: *How Gay People Are Murdered in Russia, While the Justice System Remains Silent About Homophobia*, MEDUZA (Kevin Rothrock trans., Nov. 2, 2017, 7:07 AM), <https://meduza.io/en/feature/2017/11/02/he-wasn-t-worthy-of-being-a-man>.

88. See Bochenek & Knight, *supra* note 4.

89. Kamarina & Zhaivoronok, *supra* note 39, at 14.

90. Danilovich, *supra* note 87.

91. *Russia’s LGBT Youth Victimized by “Gay Propaganda” Law*, *supra* note 74.

## III. EUROPEAN COURT OF HUMAN RIGHTS

Russia's poor LGBTQ+ practices and legislation have been repeatedly challenged in the European Court of Human Rights (ECtHR). This dimension of supranational judicial enforcement against Russia for anti-LGBTQ+ laws has been addressed extensively in scholarly literature. Before the propaganda law was even brought before the ECtHR, one scholar argued that it violated the European Convention on Human Rights (ECHR).<sup>92</sup> Another found similarly, but thought that when the propaganda law cases came before the ECtHR, it would be an opportunity to expand the ECtHR's jurisprudence in this area to better protect LGBTQ+ persons.<sup>93</sup> A third scholar instead saw these cases as a major test for the ECtHR.<sup>94</sup> More recently, scholars have found that although Russian LGBTQ+ activists are likely to succeed at the ECtHR, countries with informal discriminatory norms like Russia are the least likely to implement rulings favorable to LGBTQ+ persons.<sup>95</sup> Another scholar went a step further and looked at the increasing politicization of LGBTQ+ rights between Russia and Europe, finding that element to be significant in the outcome of Russian LGBTQ+ policies.<sup>96</sup>

The ECtHR has most recently engaged with Russian anti-LGBTQ+ practices in three different cases. In the case of *Bayev v. Russia*, the ECtHR addressed Russia's gay propaganda law. The applicants alleged that the ban on "propaganda of non-traditional sexual relations aimed at minors" discriminatorily violated their right to freedom of expression.<sup>97</sup> In response, the Russian government "alleged that an open manifestation of homosexuality was an affront to the mores prevailing among the religious and even non-religious majority of Russians and was generally seen as an obstacle to instilling traditional family values."<sup>98</sup> The court, finding violations of the Articles 10 (freedom of expression) and 14 (prohibition of discrimination) of the ECHR, scathingly rejected the legality of the propaganda law.<sup>99</sup> It found that that the propaganda law does

not serve to advance the legitimate aim of the protection of morals, and that such measures are likely to be counterproductive in achieving the declared legitimate aims of the protection of health and the protection of rights of others . . . Above all, by adopting

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92. See generally Polsdofer, *supra* note 11.

93. See Johnson, *supra* note 11.

94. See Stricklan, *supra* note 11, at 193.

95. See generally Sundstrom & Sperling, *supra* note 11.

96. Verpoest, *supra* note 11, at 16.

97. *Bayev v. Russia*, App. No. 67667/09, ¶ 3 (Nov. 13, 2017), <https://tinyurl.com/ye7k2g3m>.

98. *Id.* ¶ 65.

99. *Id.* ¶¶ 83, 92.

such laws the authorities reinforce stigma and prejudice and encourage homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society.<sup>100</sup>

The following year, the ECtHR was presented with the issue of Russia restricting LGBTQ+ persons' right to assembly in *Alekseyev v. Russia*. The applicants alleged that there was a "ban on holding lesbian, gay, bisexual and transgender (LGBT) public events imposed by the domestic authorities and of a lack of effective remedies in that respect. They also alleged that the authorities treated in a discriminatory manner their requests to be permitted to hold these events."<sup>101</sup> The court found violations of Article 11 (right to freedom of assembly), Article 13 (right to an effective remedy), and Article 14 (right not to be discriminated against) of the ECHR,<sup>102</sup> concluding that "the ban on holding LGBT public assemblies imposed by the domestic authorities did not correspond to a pressing social need and was thus not necessary in a democratic society."<sup>103</sup>

Finally, and most recently, in the 2019 case of *Zhdanov v. Russia* the applicants alleged that Russia's failure "to register associations set up to promote and protect the rights of lesbian, gay, bisexual and transgender (LGBT) people in Russia had violated their right to freedom of association and had amounted to discrimination on grounds of sexual orientation" as well as a violation of their right of access to the courts.<sup>104</sup> The ECtHR relied on similar provisions as in the prior two cases, concluding that there were violations of Article 6 (right to a fair trial), Article 11 (right to freedom of assembly), and Article 14 (right not to be discriminated against) of the ECHR.<sup>105</sup> On the issue of registering organizations, the ECtHR concluded that "[g]iven that the applicant organisations' aim of promoting LGBT rights was a decisive factor leading to the decision to refuse them registration, they suffered a difference in treatment on grounds of sexual orientation."<sup>106</sup> So overall, in recent ECtHR jurisprudence, the cases of *Bayev* and *Alekseyev* explicitly reject two of the most prominent discriminatory practices of the Russian government against LGBTQ+ persons, the propaganda law and restrictions on the right to assemble peacefully, while *Zhdanov* establishes that LGBTQ+ organizations can be established and LGBTQ+ persons have the right to a fair trial.

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100. *Id.* ¶ 83.

101. *Alekseyev v. Russia*, App. No. 14988/09, ¶ 3 (Nov. 27, 2018), <https://tinyurl.com/yhrlodc2>.

102. *Id.* ¶ 22.

103. *Id.* ¶ 21.

104. *Zhdanov v. Russia*, App. No. 12200/08, ¶ 3 (July 16, 2019), <https://tinyurl.com/yebc2nwm>.

105. *Id.* ¶¶ 102, 165, 172.

106. *Id.* ¶ 181.

One of the most significant benefits of the ECtHR as a supranational body is that its decisions are binding on member states under Article 46.<sup>107</sup> These obligations include not only compensation for the individual victim, but also “measures of a general character” to avoid similar violations in the future.<sup>108</sup> Human Rights Watch, for one, concluded that due to this the *Bayev* decision should neatly end the gay propaganda law.<sup>109</sup> Not so. Critically, on July 14, 2015, the Russian Constitutional Court, the primary enforcer of ECtHR decisions in Russia,<sup>110</sup> stipulated that the Constitutional Court had priority over the ECtHR, and that if the Russian Constitution and a decision by the ECtHR’s were incompatible, the ECtHR’s decision could not be enforced.<sup>111</sup> This was followed by Russia passing a law on December 14, 2015, which established that the Russian Constitution takes precedence over decisions from the ECtHR, granting the Russian Constitutional Court the ability to effectively overrule ECtHR decisions by declaring them “impossible to implement.”<sup>112</sup> By early 2016, the Constitutional Court had written its first opinion overturning a ECtHR decision.<sup>113</sup> Others were to follow, such as in 2017, when Russia ignored a significant ECtHR ruling that Russia owed 1.9 billion Euros to the former owners of the oil company

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107. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 46(1), Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. No. 5 (noting that members undertake to “abide by the final judgments of the Court in any case to which they are parties”).

108. Maria Issaeva, Irina Sergeeva & Maria Suchkova, *Enforcement of Judgments of the European Court of Human Rights in Russia*, 8 INT’L J. HUM. RTS. 67, 68 (2011).

109. Graeme Reid, *European Court Condemns Russia’s Gay Propaganda Law*, HUM. RTS. WATCH (June 22, 2017, 12:00 AM), <https://tinyurl.com/yf3jeasr>.

110. Sergey Marochkin, *ECtHR and the Russian Constitutional Court: Duet or Duel?*, in RUSSIA AND THE EUROPEAN COURT OF HUMAN RIGHTS: THE STRASBOURG EFFECT 93, 97-98 (Lauri Mälksoo & Wolfgang Benedek eds., 2017) (noting that it “is easier and habitual for Russian courts and law-enforcement agencies to refer to Russian CC decisions, rather than to decisions of the ECtHR”).

111. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 14 Iyul’a 2015 g. [Ruling of the Russian Federation Constitutional Court of July 14, 2015], ROSSIISKAIA GAZETA [ROS. GAZ.] June 27, 2015 ¶¶ 2.2, 4 (noting that the Constitutional Court “therefore is not just to follow a ECtHR decision if implementing it is contrary to constitutional values”). Although the Russian Constitution was often seen as preeminent in Russia over treaties prior to 2015, the Constitutional Court generally implemented ECtHR decisions and declared contradictory legislation and practices unconstitutional. Marochkin, *supra* note 110, at 107-08, 111.

112. Federal’nyi Konstitutsionnyi Zakon RF o Vnesenii Izmeneniy v Federal’nyi Konstitutsionnyi Zakon “o Konstitutsionnom Sude Rossiyskoy Federatsii” [Federal Constitutional Law on the Introduction of Amendments to the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”], Dec. 14, 2015; *see also* *Putin Enables Russia to Overturn European Court of Human Rights Decisions*, MOSCOW TIMES (Dec. 15, 2015), <https://tinyurl.com/yc92lguq>; *Russia Passes Law to Overrule European Human Rights Court*, BBC NEWS (Dec. 4, 2015), <https://tinyurl.com/yae5thbu>. In post-2015 Russia, there has been a conflict between Russian legal scholars, analysts, and judges, who favor keeping Russia in the European legal field, and politicians, who favor upholding national sovereignty over complying with ECtHR decisions. Marochkin, *supra* note 110, at 123.

113. *See* Lauri Mälksoo, *Russia’s Constitutional Court Defies the European Court of Human Rights: Constitutional Court of the Russian Federation Judgment of 14 July 2015*, No 21 П/2015, 12 EUR. CONST. L. REV. 377, 377 (2016); *see also* Natalia Chaeva, *The Russian Constitutional Court and its Actual Control over the ECtHR Judgement in Anbugov and Gladkov*, EJIL: TALK! (Apr. 26, 2016), <https://tinyurl.com/ygzsg9f>.

Yukos.<sup>114</sup> As noted by human rights lawyer Kirill Koroteev, the ECtHR now lacks the teeth to help victims of human rights abuses in Russia.<sup>115</sup> Instead, it is within the Russian Constitutional Court's power, not the ECtHR's, to decide whether to implement ECtHR decisions or not.<sup>116</sup>

While the Constitutional Court has only used its new powers in the two above instances,<sup>117</sup> enforcement of ECtHR decisions in Russia overall has also fallen short, demonstrating a greater opposition to ECtHR decisions than just the explicit mechanism of the Constitutional Court. The ECtHR decisions have so far not caused Russia to modify either its laws or its practices against LGBTQ+ persons.<sup>118</sup> The gay propaganda law and other forms of anti-LGBTQ+ discrimination explicitly condemned by the ECtHR are still practiced.<sup>119</sup> Yet challenges to Russia's LGBTQ+ practices have not stopped being filed in Russian courts or in the ECtHR.<sup>120</sup> Although the bulwark of "traditional norms" in Russia is strong,<sup>121</sup> there is at least some hope that the repeated European legal condemnation of Russian anti-LGBTQ+ practices may influence positive change in the future, even if the ECtHR's decisions are not legally enforceable in Russia.

Another significant risk for putting LGBTQ+ issues in Russia in a European context is that Russia has been trying to distance itself from Europe.<sup>122</sup> Russian Presidents Dmitrij Medvedev and Vladimir Putin have floated the possibility of withdrawing from the Council of Europe and the ECtHR on several occasions.<sup>123</sup> The Council of Europe's body of constitutional law experts, the Venice Commission, determined on June 13, 2016, that Russia's law placing the Constitution absolutely over the ECtHR was incompatible with its international obligations as a member of the Council of Europe.<sup>124</sup> Nils Muižnieks, the former Commissioner for Human

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114. Mikhail Bushuev & Elena Barysheva, *Russia in the Council of Europe: What Does It Mean for Human Rights?*, DW (June 26, 2019), <https://tinyurl.com/y3mfhf2f>; see also Iryna Marchuk, *Flexing Muscles (Yet Again): The Russian Constitutional Court's Defiance of the Authority of the ECtHR in the Yukos Case*, EJIL: TALK! (Feb. 13, 2017), <https://tinyurl.com/yeongebe>.

115. Bushuev & Barysheva, *supra* note 114; Kirill Koroteev, *Moscow – Baku – Tashkent?*, 25 EUR. HUM. RTS. ADVOC. CTR. BULL. 10 (2016).

116. See Raffaella Kunz, *Judging International Judgments Anew? The Human Rights Courts Before Domestic Courts*, 30 EUR. J. INT'L L. 1129, 1149-50 (2019).

117. *Id.* at 1150-51.

118. Sundstrom & Sperling, *supra* note 11, at 765; RUSSIA: "Gay Propaganda" Law Remains in Place, But Complaints Against It Continue, CHILD RTS. INT'L NETWORK, <https://home.crin.org/latest/russia-gay-propaganda-law> (last visited May 9, 2019).

119. See "Gay Propaganda" Law Remains in Place, *supra* note 118.

120. See *id.*

121. See generally Cai Wilkinson, *Putting "Traditional Values" Into Practice: The Rise and Contestation of Anti-Homopropaganda Laws in Russia*, 13 J. HUM. RTS. 363 (2014).

122. Verpoest, *supra* note 11, at 16.

123. Marochkin, *supra* note 110, at 112. Indeed, the possibility of an exit option may not be that remote. See Kunz, *supra* note 116, at 1130.

124. Venice Commission, Opinion No. 832/2015, On the Amendments to the Federal Constitutional Law on the Constitutional Court, CDL-AD(2016)016 ¶ 45 (May 25, 2016).

Rights for the Council of Europe, similarly described Russia's position on the implementation of ECtHR decisions as problematic for the efficacy of the Council of Europe system.<sup>125</sup> These examples highlight a tumultuous relationship between the Council of Europe and Russia, which had its voting rights suspended for five years following its annexation of Crimea from Ukraine.<sup>126</sup> In addition, Russia's stance on LGBTQ+ rights is a prime example of that country setting itself up in contrast to Western values, as important Russian figures, such as Patriarch Kirill, have repeatedly stressed.<sup>127</sup> Therefore, one should question how valuable the criticism of Russian practices against LGBTQ+ persons is if it is couched in the European context alone.

#### IV. THE INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

In comparison to the ECtHR's interaction with Russia's treatment of LGBTQ+ persons, there has been practically no scholarship on Russia's anti-LGBTQ+ practices under international human rights law. One of the few works to address this topic concluded that Russia's gay propaganda law violates both the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights.<sup>128</sup> Another scholar, while discussing the Human Rights Committee's jurisprudence against Russia's gay propaganda law, argued for including children's rights in the discussion, but limited his argument to children's rights rather than international human rights in general.<sup>129</sup> But despite this limited scholarly attention, there is actually a wealth of information on how the international human rights instruments will judge Russia's LGBTQ+ practices by the instruments' own monitoring bodies that has been long overlooked.

There are nine international human rights instruments, plus nine optional protocols.<sup>130</sup> Russia is a signatory of seven of the nine treaties: the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social, and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention against

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125. Nils Muižnieks, *Non-Implementation of the Court's Judgments: Our Shared Responsibility*, COUNCIL OF EUR. COMM'R FOR HUM. RTS. (Aug. 23, 2016), <https://tinyurl.com/yc7n6ztl>.

126. See Jean-Luc Mounier, *Russia's Undiplomatic Return to the Council of Europe*, FRANCE 24 (June 28, 2019, 7:27 PM), <https://preview.tinyurl.com/y394bcjv>.

127. Manson, *supra* note 20.

128. Voyles & Chilton, *supra* note 12.

129. Thoreson, *supra* note 12, at 1335-42.

130. U.N. Hum. Rts. Off. of the High Comm'r, *The Core International Human Rights Instruments*, <https://ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last visited May 9, 2020).

Torture and Other Cruel, Inhuman, or Degrading Treatment of Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD).<sup>131</sup> Once a state accepts a core international human rights treaty, it must implement the rights established in that treaty.<sup>132</sup> The treaty bodies of all nine human rights conventions primarily propagate law through three mechanisms: Views, Concluding Observations, and General Comments.<sup>133</sup> Views are the case decisions promulgated by a treaty body in response to individual complaints.<sup>134</sup> Concluding Observations are general reports on the state of a country's compliance with the human rights treaty, based on their periodic reports as well as those reports submitted by other non-state actors.<sup>135</sup> General Comments are a mechanism to clarify the scope and meaning of a treaty's provisions, distilling the treaty body's Views and Concluding Observations to make its perspectives on major issues more accessible.<sup>136</sup> As both the Views and Concluding Observations address specific countries, this Part will focus on those two mechanisms to analyze how LGBTQ+ rights in Russia in particular have been interpreted by international human rights treaty bodies. While none of the treaties explicitly carve out rights for LGBTQ+ persons, as will be explored below, numerous rights have been identified by the treaty bodies to protect LGBTQ+ persons.

#### A. Views

A 2019 report by ILGA charted all of the international human rights treaty bodies' case law relating to LGBTQ+ rights. The report records twenty-one cases that have been decided by the treaty bodies on LGBTQ+

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131. U.N. Hum. Rts. Off. of the High Comm'r, Status of Ratification Interactive Dashboard, <https://indicators.ohchr.org> (last visited May 9, 2020).

132. U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, *Human Rights Monitoring, Fact-Finding, and Investigation by the United Nations*, in MANUAL ON HUMAN RIGHTS MONITORING, at 5, U.N. Doc. HR/P/PT/7/Rev.1 (2011) [hereinafter U.N. Manual on Hum. Rts. Monitoring].

133. See INT'L SERV. FOR HUM. RTS., A SIMPLE GUIDE TO THE U.N. TREATY BODIES 14-36 (2015), <https://tinyurl.com/y8ux6dyq>; KSENIYA KIRICHENKO, INT'L LESBIAN, GAY, BISEXUAL, TRANS & INTERSEX ASS'N, UNITED NATIONS TREATY BODIES' JURISPRUDENCE ON SEXUAL ORIENTATION, GENDER IDENTITY, GENDER EXPRESSION AND SEX CHARACTERISTICS 25-26 (2019), <https://tinyurl.com/y9fv9kq6>.

134. Helen Keller & Leena Grover, *General Comments of the Human Rights Committee and Their Legitimacy*, in U.N. HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 116, 116-17 (Helen Keller & Geir Ulfstein eds., 2012); U.N. Manual on Hum. Rts. Monitoring, *supra* note 132, at 6.

135. Keller & Grover, *supra* note 134, at 116; U.N. Manual on Hum. Rts. Monitoring, *supra* note 132, at 5.

136. See Keller & Grover, *supra* note 134, at 117; *Human Rights Committee*, INT'L JUST. RES. CTR., [https://ijrcenter.org/un-treaty-bodies/human-rights-committee/#General\\_Comments](https://ijrcenter.org/un-treaty-bodies/human-rights-committee/#General_Comments) (last visited May 9, 2019). This system is akin to how Restatements in the United States are based on previous jurisprudence.

rights.<sup>137</sup> Of these twenty-one cases, three are against Russia;<sup>138</sup> a fourth case against Russia that was pending at the time of publication of the ILGA report has also since been decided. There are thus four cases that have been decided up to this time by the human rights treaty bodies, one by CEDAW and three by the Human Rights Committee (“HRC”), the treaty body for the ICCPR.

The CEDAW has addressed LGBTQ+ rights in Russia in one case. In *O.N. v. Russian Federation*, a Russian lesbian couple had been attacked from behind while they were leaving a St. Petersburg subway station and had homophobic slurs yelled at them.<sup>139</sup> The investigator repeatedly refused to open or continue the investigation into the attack, despite the supervising prosecutor ordering the investigation on several occasions.<sup>140</sup> The prosecutor refused to classify the crime as a hate crime perpetrated with a homophobic motive, and the Russian courts upheld this decision.<sup>141</sup> The authors claimed violations of their rights under Articles 1 (right to freedom of discrimination against women), 2 (right to state condemnation of discrimination against women), and 5 (right to freedom from sex prejudice and stereotypes and promotion of social and cultural understanding) due to the Russian government’s failure to effectively investigate an offense perpetrated against them by private persons due to their sexual orientation.<sup>142</sup> The CEDAW concluded that

the present case shows a failure by the State party in its duty to uphold women’s rights, particularly in the context of violence and discrimination against women on the basis of their sexual orientation and to eliminate the barriers that the authors faced in seeking justice in their case, in particular negative stereotypes against lesbians, and to ensure that law enforcement officials strictly apply the legislation prohibiting gender-based discrimination against women.<sup>143</sup>

Thus, the Russian government had violated parts of all three CEDAW Articles.<sup>144</sup> The CEDAW recommended that in the future Russia thoroughly investigate all gender-based violence that is believed to have been motivated

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137. See Kirichenko, *supra* note 133, at 41-69.

138. See *id.*

139. Comm. on the Elimination of Discrimination Against Women, Views Adopted by the Committee under Article 7 (3) of the Optional Protocol, Concerning Communication No. 119/2017, U.N. Doc. CEDAW/C/75/D/119/2017, ¶¶ 2.1-2.2 (Feb. 24, 2020).

140. *Id.* ¶¶ 2.4-2.11.

141. *Id.* ¶ 2.12.

142. *Id.* ¶ 3.1.

143. *Id.* ¶ 7.10.

144. *Id.* ¶ 8.

by hatred towards lesbians and to provide lesbians with prompt access to justice.<sup>145</sup>

The HRC has addressed LGBTQ+ rights in Russia in three cases: *Fedotova*, *Nepomnyaschiy*, and *Alekseyev*. In *Fedotova v. Russian Federation*, a lesbian woman who was an LGBT activist tried to hold a peaceful pride assembly in Moscow and Ryazan, but the event was banned.<sup>146</sup> Instead, she displayed posters near a secondary school building in Ryazan that had written on them “Homosexuality is normal” and “I am proud of my homosexuality.”<sup>147</sup> The author was arrested by the Ryazan authorities and charged and fined under the regional law against homosexual propaganda,<sup>148</sup> which is very similar to the one now in effect across Russia. The decision was upheld on appeal, and she petitioned the HRC.<sup>149</sup> The HRC concluded that it is a violation of the right to freedom of expression under Article 19 of the ICCPR to convict “for expressing [one’s] sexual identity and seeking understanding for it, even if . . . [one] intended to engage children in the discussion of issues related to homosexuality.”<sup>150</sup>

The decision in *Fedotova* was expanded upon in *Nepomnyaschiy v. Russian Federation*. In that case, the author also held up a poster advocating for tolerance of LGBTQ+ persons, this time near a children’s library in Arkhangelsk; the poster read, “Homosexuality is a healthy form of sexuality. This should be known by children and adults!”<sup>151</sup> Like *Fedotova*, *Nepomnyaschiy* was arrested and then fined under the local Arkhangelsk law against gay propaganda.<sup>152</sup> The HRC concluded that while a ban on “sexually explicit obscenities” might be lawful, a “blanket restriction on legitimate expression of sexual orientation,” as was the case here, or in *Fedotova*, is unlawful under Article 19.<sup>153</sup> The HRC also directly condemned the gay propaganda law, concluding that a law “prohibiting ‘propaganda of homosexuality,’ as opposed to heterosexuality or sexuality in general, expressly draws a distinction based on sexual orientation and gender identity and thus constitutes a differentiation on grounds prohibited under Article 26,” which requires equal protection.<sup>154</sup>

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145. *Id.* ¶ 9(b)(iii)-(iv).

146. Hum. Rts. Comm., Communication No. 1932/2010, U.N. Doc. CCPR/C/106/D/1932/2010, ¶ 2.1 (Oct. 31, 2012) [hereinafter *Fedotova*].

147. *Id.* ¶ 2.2.

148. *Id.* ¶ 2.3.

149. *Id.* ¶¶ 2.6-2.7.

150. *Id.* ¶ 10.8.

151. Hum. Rts. Comm., Views Adopted by the Committee under Article 5(4) of the Optional Protocol, Concerning Communication No. 2318/2013, U.N. Doc. CCPR/C/123/D/2318/2013, ¶ 2.2 (Aug. 23, 2018) [hereinafter *Nepomnyaschiy*].

152. *Id.* ¶ 2.3.

153. *Id.* ¶ 7.8.

154. *Id.* ¶ 7.4.

The case of *Alekseyev v. Russian Federation* instead focused on the right of assembly. In *Alekseyev*, the author was a gay man who tried to organize several gay pride parades in Moscow; all were banned by the Russian authorities.<sup>155</sup> He also tried to organize a small, under thirty person picket in front of the Iranian embassy to protest the execution of homosexuals and minors in Iran; permission for this public gathering was also denied.<sup>156</sup> The HRC rejected the Russian government's logic that the prohibition of public demonstrations might provoke a negative reaction; prohibiting the "advocacy of respect for the human rights of persons belonging to sexual minorities" on this basis was unlawful under Article 21, which guarantees the right to peaceful assembly.<sup>157</sup>

### B. Concluding Observations

Of the human rights treaty bodies, five have issued Concluding Observations that relate to Russia's treatment of LGBTQ+ persons and rights: the CEDAW, CAT, CRC, HRC, and CESC. While the Articles of each of the five underlying treaties are distinct, the treaty bodies largely came to similar conclusions about the problems of Russia's treatment of its LGBTQ+ population. This section will address the areas of Russian law in the same order as Part II: the propaganda law; individual rights; and state and non-state violence.

Three of the treaty bodies unequivocally stated the need to terminate Russia's gay propaganda law. The CAT most recently called for repealing the law prohibiting "propaganda of non-traditional sexual relations."<sup>158</sup> The CRC and the HRC have similarly called for Russia to repeal its propaganda law.<sup>159</sup> In the alternative or in addition, three of the treaty bodies advocated for Russia adopting comprehensive anti-discrimination legislation. The CEDAW urged Russia to adopt comprehensive anti-discrimination legislation to protect LGBTI women.<sup>160</sup> The CESC and HRC also

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155. Hum. Rts. Comm., Communication No. 1873/2009, U.N. Doc. CCPR/C/109/D/1873/2009, ¶ 2.1 (Dec. 2, 2013).

156. *Id.* ¶¶ 2.2-2.3.

157. *Id.* ¶ 9.6.

158. Comm. Against Torture, Concluding Observations on the Sixth Periodic Report of the Russian Federation, U.N. Doc. CAT/C/RUS/CO/6, ¶ 33 (Aug. 28, 2018) [hereinafter CAT Concluding Observations].

159. Comm. on the Rts. of the Child, Concluding Observations on the Combined Fourth and Fifth Periodic Reports of the Russian Federation, U.N. Doc. CRC/C/RUS/CO/4-5, ¶ 25 (Feb. 25, 2014) [hereinafter CRC Concluding Observations]; Hum. Rts. Comm., Concluding Observations on the Seventh Periodic Report of the Russian Federation, U.N. Doc. CCPR/C/RUS/CO/7, ¶ 10 (Apr. 28, 2015) [hereinafter HRC Concluding Observations 2015].

160. Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Eighth Periodic Report of the Russian Federation, U.N. Doc. CEDAW/C/RUS/CO/8, ¶ 42

encouraged Russia to adopt comprehensive anti-discrimination legislation that prohibits all discrimination on the basis of sexual orientation.<sup>161</sup>

In the realm of individual rights, four treaty bodies advocated for providing equal rights for LGBTQ+ persons in one or multiple areas. In the broadest recommendation on individual rights, the CESCR recommended that Russia keep records on anti-LGBT discrimination in employment, health care, and education.<sup>162</sup> The CEDAW recommended ensuring that LGBTI women “do not face discrimination in their professional life.”<sup>163</sup> The CESCR and CRC both recommended that Russia ensure that LGBTI children and children of LGBTI parents are protected from discrimination on the basis of sexual orientation and gender identity.<sup>164</sup> Relatedly, the CESCR recommended that Russia grant equal rights to same-sex couples.<sup>165</sup> Finally, the HRC recommended that Russia guarantee, in practice as well as in law, the right for LGBT persons to assemble and express themselves freely,<sup>166</sup> echoing its decisions in *Fedotova* and *Nepomnyaschij*.

The CAT and HRC both recommended that Russia strengthen its protection of LGBT persons by properly investigating, prosecuting, and punishing those who commit violence against LGBT persons.<sup>167</sup> The HRC went a step further by also recommending that the Russian state send a clear statement that it “does not tolerate any form of social stigmatization of homosexuality, bisexuality, or transsexuality, or hate speech, discrimination, or violence against persons based on their sexual orientation or gender identity.”<sup>168</sup> Another approach was to recommend improved sensitivity training for law enforcement officials. The CAT recommended providing

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(Nov. 20, 2015) [hereinafter CEDAW Concluding Observations 2015]; Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Committee on the Elimination of Discrimination against Women, U.N. Doc. CEDAW/C/USR/CO/7, ¶ 41 (Aug. 16, 2010) [hereinafter CEDAW Concluding Observations 2010]. The CEDAW specifically referred to LGBTI instead of LGBTQ+, as CEDAW covers the rights of women and those who identify as women. Note that all of the human rights bodies do not refer to LGBTQ+ to refer to sexual and gender minorities, but typically refer to them as LGBT or LGBTI instead.

161. Comm. on Econ., Soc. & Cultural Rts., Concluding Observations on the Sixth Periodic Report of the Russian Federation, U.N. Doc. E/C.12/RUS/CO/6, ¶ 23 (Oct. 16, 2017) [hereinafter CESCR Concluding Observations]; Hum. Rts. Comm., Concluding Observations of the Human Rights Committee, U.N. Doc. CCPR/C/RUS/CO/6, ¶ 27 (Nov. 24, 2009) [hereinafter HRC Concluding Observations 2009].

162. Comm. on Econ., Soc. & Cultural Rts., U.N. Doc. E/C.12/RUS/CO/5, ¶ 36 (June 1, 2011).

163. CEDAW Concluding Observations 2015, *supra* note 160, ¶ 42.

164. CESCR Concluding Observations, *supra* note 161, ¶ 57(b); CRC Concluding Observations, *supra* note 159, ¶ 25. Note that, as above, LGBTI is the term used by the CESCR and CRC.

165. CESCR Concluding Observations, *supra* note 161, ¶ 23.

166. HRC Concluding Observations 2015, *supra* note 159, ¶ 10; HRC Concluding Observations 2009, *supra* note 161, ¶ 27. The HRC refers to LGBT compared to LGBTI or LGBTQ+ in these Concluding Observations.

167. CAT Concluding Observations, *supra* note 158, ¶ 33; HRC Concluding Observations 2015, *supra* note 159, ¶ 10.

168. HRC Concluding Observations 2015, *supra* note 159, ¶ 10.

sensitivity “training to law enforcement officials and the judiciary on detecting and combating hate-motivated crimes.”<sup>169</sup> The CEDAW similarly recommending providing “training to the police and law enforcement officials.”<sup>170</sup> The CEDAW and HRC also looked at Russian society at large, recommending that Russia launch an “awareness raising campaign” aimed at the sensitizing the general public to LGBTQ+ issues and encouraging tolerance of different sexual orientations and gender identities.<sup>171</sup> The CESCR more broadly recommended that Russia take all necessary steps to combat societal discrimination against LGBT persons.<sup>172</sup>

### C. *Benefits of the Treaty Bodies’ Approach*

Although the international human rights treaty bodies’ jurisprudence has been underappreciated as a vehicle for furthering LGBTQ+ rights, there are three primary benefits to this jurisprudence on Russia’s treatment of LGBTQ+ persons. First, the treaty bodies are explicit in their conclusions and have more flexibility in making them. Second, the treaty bodies establish different underlying legal bases for their pro-LGBTQ+ conclusions. Third, there are benefits to employing strategic litigation at the international level to leverage international pressure and condemnation for anti-LGBTQ+ practices in Russia in addition to solely regional condemnation from the ECtHR.

There is little doubt from the jurisprudence that many of Russia’s anti-LGBTQ+ laws and practices are anathema to international human rights law. The CAT, CRC, and HRC explicitly condemned the propaganda law.<sup>173</sup> The CAT and HRC called for proper investigations into anti-LGBTQ+ crimes.<sup>174</sup> This does not necessarily differ from the approach of the ECtHR, which also explicitly condemned the propaganda law in *Bayev*, although it did limit its holding to the case at hand in *Alekseyev*.<sup>175</sup> There is also future treaty body jurisprudence against Russia in the offing; there are a number of pending cases against Russia waiting to be decided upon by the human rights treaty bodies on a variety of issues, including poor investigation of

169. CAT Concluding Observations, *supra* note 158, ¶ 33.

170. CEDAW Concluding Observations 2015, *supra* note 160, ¶ 42; CEDAW Concluding Observations 2010, *supra* note 160, ¶ 41.

171. CEDAW Concluding Observations 2015, *supra* note 160, ¶ 42; CEDAW Concluding Observations 2010, *supra* note 160, ¶ 41; HRC Concluding Observations 2009, *supra* note 161, ¶ 27.

172. CESCR Concluding Observations, *supra* note 161, ¶ 23.

173. *Fedotova*, *supra* note 150, ¶ 10.8; *Nepomnyaschiy*, *supra* note 151, ¶ 7.4; CAT Concluding Observations, *supra* note 158, ¶ 33; CRC Concluding Observations, *supra* note 159, ¶ 25; HRC Concluding Observations 2015, *supra* note 159, ¶ 10.

174. CAT Concluding Observations, *supra* note 158, ¶ 33; HRC Concluding Observations 2015, *supra* note 159, ¶ 10.

175. *Bayev v. Russia*, App. No. 67667/09, ¶ 92 (Nov. 13, 2017), <https://tinyurl.com/ye7k2g3m>; *Alekseyev v. Russia*, App. No. 14988/09, ¶ 21 (Nov. 27, 2018), <https://tinyurl.com/yhrlode2>.

LGBTQ+ hate crimes, hate speech, the propaganda law, and the right to assembly.<sup>176</sup>

The Concluding Observations mechanism also provides greater flexibility to the treaty bodies in addressing Russian laws and practices against LGBTQ+ persons. Through Concluding Observations, the treaty bodies can address all aspects of Russian society, whether they are brought before them in private communications or not. This allows the treaty bodies to address aspects that are never brought before them for Views, but it also allows them to address questions while not bound by the facts of a given case like most traditional courts. This allows the treaty bodies more overall flexibility to address the most concerning aspects of Russian treatment of LGBTQ+ persons.

Additionally, the different treaty bodies relied on multifarious sources of law for their decisions. As a preliminary matter, each of the five treaty bodies is based on a different area of law (elimination of discrimination against women; torture; rights of children; civil and political rights; economic, cultural and social rights) even if they all fall under the umbrella of human rights law. But beyond these differences, each of the five also relied on different provisions under each of their corresponding treaties. The CEDAW did not link any of its Concluding Observations to specific Articles of the CEDAW, although in *O.N.* it based its decision on Articles 1, 2, and 5, relating to the condemnation of discrimination against women and combatting social and cultural patterns that perpetuate sex stereotypes and prejudice.<sup>177</sup> The CAT's jurisprudence was based on Article 16, which prohibits cruel, inhuman, and degrading treatment.<sup>178</sup> Meanwhile, the CRC relied on its equal protection obligation in Article 2.<sup>179</sup> The CESCR similarly relied on its own equal protection obligation in Article 2, but it also couched some of its recommendations on LGBTQ+ rights under Article 13, the right

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176. See Kirichenko, *supra* note 133, at 53-61. Those cases are as follows: Krikkerik v. Russian Federation, Human Rights Committee, Communication No. 2992/2017 (on the failure of Russian authorities to investigate anti-LGBT attacks); Kirichenko v. Russian Federation, Committee on the Elimination of Discrimination against Women, Communication No. 98/2016 (on hate speech by a public official against LGBT persons and failure to investigate); Savolainen . . . v. Russian Federation, Committee on the Elimination of Discrimination against Women, Communication No. 119/2017 (on the failure of Russian authorities to designate an attack on a lesbian couple as a hate crime); Savolainen v. Russian Federation, Human Rights Committee, Communication No. 2830/2016 (on the denial of a pro-LGBT picket license due to the location being near a children's theater, which would violate the Russian gay propaganda law); . . . v. Russian Federation, Human Rights Committee, Communication No. 2943/2017 (on the denial of permission to hold rallies on LGBT issues); . . . v. Russian Federation, Human Rights Committee, Communication No. 2953/2017 (on the denial of permission to hold rallies on LGBT issues); . . . v. Russian Federation, Human Rights Committee, Communication No. 2954/2017 (on the denial of permission to hold rallies on LGBT issues).

177. See *supra* notes 139-145, 160, 163 and accompanying text.

178. See *supra* notes 167, 169 and accompanying text.

179. See *supra* note 164 and accompanying text.

to education.<sup>180</sup> Finally, the HRC took by far the broadest approach, couching its recommendations under seven different Articles: Article 2 on equal rights; Article 7 on torture and cruel, inhuman, or degrading treatment; Article 9 on the liberty and security of the person; Article 17 on privacy; Article 19 on freedom of expression; Article 21 on the right of assembly; and Article 26 on equal protection.<sup>181</sup>

This combination of approaches makes for a more convincing argument, as even if one ground could be undermined, it is much more difficult to reject the logic of all the underlying bases of the treaty bodies' decisions. Indeed, these multiple grounds for protecting LGBTQ+ rights far exceed those that were relied upon by the ECtHR in *Bayev, Alekseyev*, and *Zhdanov*, where the ECtHR relied only on the principles of anti-discrimination, freedom of expression, freedom of assembly, and the right to a fair trial.<sup>182</sup>

In comparison to the ECtHR, the use of the international human rights treaties has the benefit of conveying not just European judgment, but also international condemnation and pressure to conform. The treaty bodies' pronouncements are not enforceable; they are just recommendations.<sup>183</sup> However, while the ECtHR's decisions are technically binding on Russia, the 2015 Russian law raising the Russian Constitution above the ECtHR effectively nullifies this. Therefore, the ECtHR and the treaty bodies have, in practice, the same power, that of nonbinding persuasion. The effectiveness of the treaty bodies' pronouncements depends in large part on the willingness of states to respect their decisions.<sup>184</sup> Currently, Russia has shown that it is reluctant to follow rulings from supranational bodies with which it does not agree.

Yet although Russia agreed to both the European and international human rights frameworks, the European human rights framework's efficacy against Russia is currently at least partially undermined by Russia's juxtaposition of itself as distinct from Western Europe. That argument is much harder to make against the pronouncements of the international human rights treaty bodies, as they are representatives of the entire United Nations, in effect the entire world. This is represented in the membership of the treaty bodies as well. For example, the HRC, as of 2020, is composed of members from Paraguay, Tunisia, Latvia, Guyana, Egypt, Japan, South Africa, Mauritania, Canada, Uganda, Greece, Chile, Slovenia, Portugal,

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180. *See supra* notes 161-162, 164-165, 172 and accompanying text.

181. *See supra* notes 146-157, 167-168, 171 and accompanying text.

182. *See supra* Part III.

183. *See U.N. Human Rights Treaty Bodies*, INT'L JUST. RES. CTR., <https://ijrcenter.org/un-treaty-bodies> (last visited June 6, 2020).

184. *See U.N. HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY* 5 (Helen Keller & Geir Ulfstein eds., 2012).

Israel, France, Germany, and Albania.<sup>185</sup> Describing all of these countries as “Western” would be ludicrous, undermining the strategic benefit of Russia opposing these truly global recommendations compared to those from the ECtHR.

There is no reason why international human rights law cannot be used in combination with European and even local Russian litigation. Yet international human rights law has been largely ignored in the academic literature, missing a critical tool for increasing LGBTQ+ rights. Gaining both European and international recognition for the lack of protection of LGBTQ+ persons in Russia is of significant benefit for strategic litigation to gradually change Russian laws and practices against LGBTQ+ persons.<sup>186</sup> Strategic litigation has already gained substantial benefits for LGBTQ+ persons in other countries around the world, such as the courts in India, South Africa, and Ecuador decriminalizing consensual same-sex relations.<sup>187</sup>

In fact, there are starting to be a few cracks in the Russian anti-LGBTQ+ legal façade as well. In June 2018, the Kuibyshevsky Court of St. Petersburg dismissed a case against LGBTQ+ activists marching during a parade, ruling that the rainbow flag is not a banned symbol in Russia.<sup>188</sup> In April 2018, an appellate court overturned the decision to block pro-LGBTQ+ website Parni Plus under the propaganda law.<sup>189</sup> An appellate court also overturned the case against sixteen-year-old Maxim Neverov for posting pictures of shirtless men on social media,<sup>190</sup> possibly due to feeling that the Russian government went too far in prosecuting a child for a fairly innocuous act.<sup>191</sup> Although these rulings are not explicit adoptions of the treaty bodies’ recommendations, they do fall much closer to them than earlier court decisions in Russia.

There have even been some changes in Russian legislation. In its 2017 report, the CESCR recommended that Russia adopt a quicker, more accessible procedure for legal gender recognition.<sup>192</sup> In early 2018, Russia’s Ministry of Health adopted a new regulation that removed the surgery requirement for a legal change of gender.<sup>193</sup> A legal gender change still requires a diagnosis of “transsexualism” by a medical board, but the criteria are clearer than they were before and there is no longer a mandatory waiting

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185. U.N. Hum. Rts. Off. of the High Comm’r, Information on Human Rights Committee members from 1977 to 2022, <https://tinyurl.com/ybhvgqzt> (last visited May 9, 2020).

186. See Kirichenko, *supra* note 133, at 12-20.

187. *Id.* at 13.

188. ILGA Report, *supra* note 23, at 83.

189. *Id.*

190. *Id.*

191. Voyles & Chilton, *supra* note 12.

192. CESCR Concluding Observation, *supra* note 161, ¶ 23.

193. *The Russian Ministry of Health Approved the Legal Gender Recognition Procedure*, TRANSGENDER LEGAL DEF. PROJECT (Jan. 24, 2018), <https://tinyurl.com/yfmlf3go>.

period prior to undergoing a psychological evaluation.<sup>194</sup> While this is a small step, it is a significant one for the Russian transgender community, and this example demonstrates that positive change for LGBTQ+ persons is starting to happen in Russia in line with international human rights recommendations.

## V. CONCLUSION

The laws and practices in Russia towards LGBTQ+ persons are still in a dire state, and many governmental and societal ills against non-traditional sexual orientations and gender identities remain. However, while the focus of most scholars has been on Russian law itself or the ECtHR framework's influence on Russia, the international human rights framework has been largely neglected. As discussed in Part IV, the Views and Concluding Observations of the CAT, CEDAW, CESCR, CRC, and HRC have addressed many of the most pressing issues of the treatment of LGBTQ+ persons in Russia. At least on a small scale, some positive changes are starting to manifest themselves in Russia that are in line with those recommendations. In combination with other supranational rulings such as those of the ECtHR, greater condemnation of injustices against LGBTQ+ persons by the international human rights treaty bodies can effect change.

The international human rights framework and the treaty bodies have been ignored for far too long when addressing domestic practices towards LGBTQ+ individuals. This Note has sought to introduce international human rights law as a vehicle for addressing national discrimination on the basis of sexual orientation and gender identity. While this current study is on Russia, this should not be the end of this approach, but a model that can be replicated for other countries. The treaty bodies have issued dozens of statements in their Views, General Comments, and Concluding Observations on the proper treatment of sexual orientation and gender identity under international human rights law in many countries. Moving forward, scholars, practitioners, and policymakers must actively consider the international legal framework and its influence on domestic policies towards LGBTQ+ persons and advocacy for them.

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194. *Id.*

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