# SOGI….So What? Sexual Orientation, Gender Identity and Human Rights Discourse at the United Nations

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*This paper presents a critical appraisal of the "term of inclusion" by which issues related to sexual and gender diversity are being incorporated into international human rights discourse at the United Nations (UN): the category "sexual orientation and gender identity" or SOGI. The analysis maps the evolution of SOGI in the UN context and highlights three potential risks of a human rights discourse built on SOGI in the international context: 1) the marginalization of trans people, gender expression and intersex people in rights discourse; 2) the entrenchment of Western-based identity categories that lack applicability across contexts; and 3) the simple addition of SOGI to existing human rights discourses, resulting in fragmented and unpredictable norms related to sexual and gender diversity. The paper concludes that in the same moment that we celebrate the progress made by SOGI in advancing human rights related to sexual and gender diversity, we must continue to engage the potential risks and unintended consequences of relying on SOGI to ground international human rights discourse.*

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*Cet article présente une évaluation critique de la catégorie « orientation sexuelle et identité sexuelle » (OSIS), terme d'inclusion par lequel les questions liées à la diversité sexuelle et de genre sont incorporées dans le discours international sur les droits de la personne aux Nations Unies (ONU). L'analyse retrace l'évolution de la catégorie OSIS dans le contexte de l'ONU et met en évidence trois risques potentiels d'un discours sur les droits de la personne construit sur cette catégorie dans le contexte international : 1) la marginalisation des personnes transgenres, intersexuées et d'expression de genre différent dans le discours sur les droits; 2) l'ancrage de catégories d'identité reposant sur une vision occidentale qui ne sont pas applicables à tous les contextes; et 3) le simple ajout de la catégorie OSIS aux discours existants sur les droits de la personne, lequel donne lieu à des normes fragmentées et imprévisibles en matière de diversité sexuelle et de genre. L'auteur conclut qu'au moment même où nous nous réjouissons du progrès réalisé grâce à la catégorie OSIS pour faire avancer les droits de la personne liés à la diversité sexuelle et de genre, nous devons continuer de tenir compte des risques potentiels et des conséquences involontaires d'avoir recours à cette catégorie pour asseoir le discours international sur les droits de la personne.*

# I. Introduction

Over the last two decades, local and national struggles about sexual and gender diversity have increasingly extended to international arenas. As a result, the United Nations (UN) is now the forum for a rising tide of claims-making and norms-development explicitly connecting issues of sexual and gender diversity with international human rights law and policy.[2] From the ground-breaking 1994 decision of the UN Human Rights Committee in *Toonen v Australia*,[3] concluding that Tasmanian laws criminalizing consensual sexual relations between men breached the right to privacy enshrined in the *International Covenant on Civil and Political Rights* (*ICCPR*),[4] to the 2011 tabling of the first ever UN report by the High Commissioner for Human Rights documenting global practices of discrimination and violence against people based on sexual orientation and gender identity,[5] issues of sexual and gender diversity have clearly come to occupy a prominent, though contentious place on the UN agenda.[6] The international community is in the midst of an historical moment: the globalization of human rights related to sexual and gender diversity.[7] For the first time, gay, lesbian, bisexual and transgender

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[2] These debates are equally alive in other international organizations. For example, the Organization of American States has been active in identifying and condemning human rights violations based on sexual orientation and gender identity. See e.g. OAS, Committee on Political and Juridical Affairs, *Draft Resolution: Human Rights, Sexual Orientation and Gender Identity*, CP/CAJP-2951/11 rev. 4 corr. 1 (2008), online: OAS Committee on Juridical and Political Affairs <http://www.oas.org/consejo/cajp/human%20rights.asp#Human%20Rights,%20Sexual%20Orientation,%20and%20Gender%20Identity>; the Council of Europe, online: <http://www.coe.int/t/dg4/lgbt/>; and the Inter-American Commission on Human Rights, online: <http://www.oas.org/en/iachr/lgtbi/>. The African Commission on Human and People's Rights is also engaged on this topic, see e.g. Sibongile Ndashe, "Seeking the Protection of LGBTI Rights at the African Commission on Human and Peoples' Rights" (2011) 15 Feminist Africa 17, online: <agi.ac.za/sites/agi.ac.za/files/2_case_study_sibongile_ndashe.pdf>.

[3] Human Rights Committee, *Toonen v Australia, Communication No 488/1992*, UNCCPROR, 50th Sess, UN Doc CCPR/C/50/D/488/1992, (1994), online: Office of the High Commissioner for Human Rights <http://www1.chr.up.ac.za/undp/other/docs/caselaw15.pdf > [Human Rights Committee, *Toonen*].

[4] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) [*ICCPR*].

[5] Report of the UN High Commissioner for Human Rights, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on their Sexual Orientation and Gender Identity*, UNGAOR, 2011, UN Doc A/HRC/19/41, online: Office of the High Commissioner for Human Rights <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-41_en.pdf> [ High Commissioner's Report].

[6] See generally Doris Buss & Didi Herman, *Globalizing Family Values: The Christian Right in International Politics* (Minneapolis: University of Minnesota Press, 2003).

[7] This topic has attracted increasing popular and scholarly attention in the past decade. See Kelly Kollman & Matthew Waites, "The Global Politics of Lesbian, Gay, Bisexual and Transgender Human Rights: An Introduction" (2009) 15 Contemporary Politics 1; Michael O'Flaherty & John Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles" (2008) 8 Hum Rts L Rev 207; Carl F Stychin, "Same-Sex Sexualities and the Globalization of Human Rights Discourse" (2004) 49 McGill LJ 951; Ignacio Saiz, "Bracketing Sexuality: Human Rights and Sexual Orientation – A Decade of Development and Denial at the UN" (2004) 7:2 Health & Hum Rts 48; Neville Hoad, "Arrested Development or the Queerness of Savages: Resisting Evolutionary Narratives of

and queer (GLBTQ) people are actors in and subjects of international law and policy, while same-sex conduct and non-conforming gender expression are relevant topics in the UN sphere.

That GLBTQ people are visible, and issues related to sexual and gender diversity are topics worthy of attention in the UN marks a major shift away from the willful blindness about these issues that has characterized most of UN history.[8] Yet, the raw fact of inclusion is not the end of the story. While there can be little doubt that issues of sexual and gender diversity have arrived on the international scene, rather less clear are the fundamental mechanisms, assumptions and understandings upon which sexual and gender diversity is being incorporated into the discourses of international human rights law and policy.

In her work on the ongoing exclusion of Third World women from much Western feminist theorizing, Uma Narayan argues that even where discourses and analyses appear to include the perspectives of a historically excluded group or community, the "terms in which such analyses are carried out might still be embedded in theoretical frameworks and conceptual assumptions that have problematic implications."[9] Drawing on Narayan's insights to query the inclusion of sexuality in health and human rights frameworks, Alice Miller and Carole Vance emphasize the "need to examine the terms of inclusion in order to do accountable and self-reflective work" and for understanding and critiquing outcomes generated at the international level.[10] Without careful attention to the terms of inclusion through which international human rights discourse meets issues of sexual and gender diversity, there remains "the possibility of generating ineffective responses to denials and violations of rights in the context of sexuality, or even worse, harmful interventions, practices, and programs."[11]

This contribution seeks to build upon and extend the insights of Narayan, Miller and Vance to critically appraise the "term of inclusion" by which sexual and gender diversity is being incorporated into the discourses of international

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Difference" (2000) 3 Postcolonial Studies 133; Rosalind Petchesky, "Sexual Rights: Inventing a Concept, Mapping an International Practice" in Richard Parker, Peter Aggleton & Regina Maria Barbosa, eds, F*raming the Sexual Subject: The Politics of Gender, Sexuality and Power* (Berkeley: University of California Press, 2000) 81; Kevin Douglas Grant, "The Global Battle for Gay Rights" *Salon* (3 October 2011), online: Salon <http://www.salon.com/2011/10/03/global_gay_rights_struggle>.

[8] Joke Swiebel, "Lesbian, Gay, Bisexual and Transgender Human Rights: The Search for an International Strategy" (2009) 15 Contemporary Politics 19 (seeking to explain why the international GLBTQ movement has had more success lobbying for human rights and civil liberties at the European Union than the UN, and noting at 19-20 that as late as 2009 the UN was successfully denying that LGBT issues are UN issues).

[9] Uma Narayan, *Dislocating Cultures: Identities, Traditions, and Third World Feminism* (New York: Routledge, 1997) at 45 [emphasis in original removed].

[10] Alice M Miller & Carole S Vance, "Sexuality, Human Rights and Health" (2004) 7:2 Health & Hum Rts 5 at 5-6, citing Uma Narayan, *Dislocating Cultures: Identities, Traditions, and Third World Feminisms* (New York and London: Routledge, 1997) at 45.

[11] Miller, *supra* note 10 at 6.

human rights: the category "sexual orientation and gender identity," or SOGI, as it is commonly known in acronym-happy UN parlance.[12] Drawing on the growing body of commentary and critique on the international movement for rights related to sexual and gender diversity,[13] I seek to complicate the "inclusion = progress" narrative by raising some critical questions about the possible risks and unintended consequences of relying on SOGI to ground the inclusion of sexual and gender diversity in international human rights discourses. Who risks exclusion when SOGI is the primary mode of inclusion and why? What assumptions about sexual and gender diversity inhere in the use of SOGI? How does SOGI shape ongoing struggles about whether and how to include sexual and gender diversity into human rights?

Motivated by these broad questions, the analysis proceeds in three parts. Part I begins with a necessarily partial account of the historically shifting relationship between sexual and gender diversity and international human rights at the UN, providing context for the emergence of SOGI as the touchstone of inclusion through which sexual and gender diversity is incorporated into human rights discourse. Part II identifies three critiques of SOGI as the "term of inclusion" in the international arena, focusing on ways in which the deployment of SOGI in existing human rights discourses risks excluding individuals, groups and communities from human rights protections and entitlements. Finally, in Part III I conclude that human rights discourse must continue to engage the potential risks and unintended consequences of relying on SOGI to ground international human rights discourse.

The starting point for this analysis is an understanding of human rights as "necessary but insufficient."[14] That is, while I acknowledge "the problematic status of rights-based discourse, and the historical baggage of racism and liberal individualism it carries,"[15] I find that:

> [a] focus on rights – as necessary but insufficient and as linked to a politics of social justice – offers, at the moment, the best available conceptual architecture for furthering the struggle to build a world in which sexual [and gender] diversity and freedoms can be protected and expanded.[16]

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[12] Ali Miller, "Fighting Over the Figure of Gender" (2011) 31 Pace L Rev 837 at 843-44 [Miller, "Figure of Gender"], notes "[a]dvocates and scholars both bemoan the extent to which movements around gender and sexuality have become more known by their acronyms than their politics and principles" at 844.

[13] See e.g. Mindy Jane Roseman & Alice M Miller, "Normalizing Sex and its Discontents: Establishing Sexual Rights in International Law" (2011) 34 Harv J L & Gender 313; Petchesky, *supra* note 7; Saiz, *supra* note 7; Geeta Rao Gupta, "Strengthening Alliances for Sexual Health and Rights" (1997) 2:3 Health & Hum Rts 55; Alice Miller, "Sexual Rights, Conceptual Advances: Tensions in Debate" (Work presented at the Sexual, Reproductive and Human Rights Seminar, Lima, Peru, November 2001), online: Choike <http://www.choike.org/documentos/alice_miller.pdf>.

[14] Sonia Corrêa, Rosalind Petchesky & Richard Parker, *Sexuality, Health and Human Rights* (New York: Routledge, 2008) at 10.

[15] *Ibid*.

[16] *Ibid*. But see "What's Wrong with Rights?" in Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Brooklyn, NY: South End Press, 2011) for compelling arguments troubling

Accordingly, in the same moment that I celebrate the remarkable gains achieved by the movement for sexual and gender diversity at the UN, part of improving the "conceptual architecture" of this discourse is to consider its possible limits and unintended consequences. This is the intention of the analysis here.[17] Recognizing human rights "as a discursive process…one that distinct social groups, operating out of particular situations and constraints, are constantly reinventing," I interrogate the discourse of sexual and gender diversity at the UN with an eye to revealing some of its inherent risks of exclusion, because doing so stands to contribute to the formulation of a more inclusive, complete discourse in the future.[18]

A word about language is warranted at the outset. In this analysis I use the phrase "sexual and gender diversity"[19] as an umbrella term intended to include the full spectrum of highly subjective, culturally specific, socially and historically-constituted acts and identities related to sex (including intersex status) and gender,[20] and sexual orientation, gender identity and gender expression.[21] While "sexual and gender diversity" is intended to capture a wide range of people and communities, like SOGI, LGBTQ and other

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the general reliance of sexual and gender minority communities on human rights frameworks. Spade considers how the overwhelming focus of the GLBTQ movement in the United States on the passage of anti-discrimination and hate crime legislation actually has minimal impact on the lives of those in the GLBTQ community, especially the transgender community.

17 In elaborating critiques of the sexual and gender rights agenda, I do not want to be misunderstood as proposing an extreme critique of human rights or of the UN advocates who have worked tirelessly to advance issues of sexual and gender diversity in the UN forum.

18 Corrêa, Petchesky & Parker, *supra* note 14 at 162.

19 See e.g. Ai Chaobang, *The Struggle to Establish Sexual Diversity on the United Nations Agenda* (M Sc Thesis, United Nations University, Sustainability, Development, & Peace, 2013) [unpublished], online: ILGA <ilga.org/ilga/static/uploads/files/2013/7/12/12095908.pdf>. Chaobang explains his use of the term sexual diversity as referring to "the variation between all human beings whereby every person is sexually unique and whereby any notion of sexual 'normality' is at best empirically meaningless, at worst normatively repressive" at 6.

20 *Ibid* at 5. Chaobang offers the following definitions:

> Sex refers to biological differences between humans by which they are categorized into male, female or combinations of both or neither – primarily differences in chromosomes or reproductive anatomy. Gender, by contrast, is a system of differentiated norms, expectations, assumptions, roles and treatments of people (e.g. "masculine", "feminine") that is socially constructed and associated to a person's sex, but without any objectively demonstrable basis inherent to it.

21 *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity* (March 2007) online: <http://www.yogyakartaprinciples.org> at 8 [Yogyakarta Principles], created by an international group of experts on sexual and gender rights, and discussed further below, provides useful explanations of these latter terms in the Preamble:

> Understanding "sexual orientation" to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender;
>
> Understanding "gender identity" to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

descriptors prominent in discourses about sex, gender, sexual orientation and gender identity and expression, this terminology probably fails to do justice to the true variety of identities and experiences around the world.[22]

## II. Mapping SOGI at the United Nations

### A. The UN Human Rights System

In a world where same-sex intimacy is illegal in many countries and punishable by death in ten of them, it is evident that people cannot always rely on national governments and domestic legal and policy mechanisms to guarantee, enforce, and fulfill their basic human rights.[23] Human rights violations based on actual or perceived sexual orientation or gender identity or expression are prevalent, if not endemic, in virtually every country in the world and include physical, sexual and verbal abuse, criminal prosecution, denial of asylum, imprisonment and discrimination in employment, child custody, housing, access to health care and relationship recognition.[24] Because of inconsistent or non-existent domestic prohibitions against these kinds of human rights violations, increasing numbers of rights-based arguments concerned with sexual practices, identities and relationships are being contested in international arenas including the UN.[25]

The decision to focus this analysis on the UN stems from recognition that the UN human rights system is one of the foremost international venues for the creation of international norms and discourses and is thus a crucial forum to debate issues at the intersection of sexual and gender diversity and international

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[22] See e.g. "Organization Proposes Replacing the 'Limiting' Term LGBT with 'More Inclusive' GSD" *PinkNews* (25 February 2013), online: PinkNews <http://www.pinknews.co.uk/2013/02/25/organisation-proposes-replacing-the-limiting-term-lgbt-with-more-inclusive-gsd>, noting the limits of the LGBT acronym and proposing to mainstream the more inclusive "gender and sexual diversities".

[23] Homosexuality and/or same-sex behavior is punishable by death in Iran, Mauritania, Pakistan, Saudi Arabia, Sudan, the United Arab Emirates, Yemen and certain regions of Nigeria, Somalia and Chechnya. In other countries, same-sex behavior is strictly criminalized and punishable by terms of imprisonment. See e.g. Tim Padgett, "The Most Homophobic Place on Earth?" *Time* (12 April 2006), online: Time <http://www.time.com/time/world/article/0,8599,1182991,00.html> (Jamaica); Elias Biryabarema, "Uganda's anti-gay bill returns to parliament" *Reuters* (8 February 2012), online: Reuters <http://af.reuters.com/article/topNews/idAFJOE81701A20120208> (Uganda).

[24] See High Commissioner's Report, *supra* note 5. See also Amnesty International, *Sexual Orientation and Gender Identity*, online: Amnesty International <http://www.amnesty.org/en/sexual-orientation-and-gender-identity>; International Gay and Lesbian Human Rights Commission (IGLHRC), *Our Issues*, online: IGLHRC <http://www.iglhrc.org/cgi-bin/iowa/content/globalissues/index.html>.

[25] Diane Richardson, *Rethinking Sexuality* (London: Sage Publications, 2000) at 114. See also Margaret E Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca and London: Cornell University Press, 1998) at 12-13, describing a "boomerang pattern" of transnational organizing, linking a rise in transnational organizing and lobbying international organizations and the blocking of access to domestic governments. When domestic avenues are not available, this "boomerang" can contribute to domestic changes that would not be possible through national politics alone.

law and policy.[26] Rosalind Petchesky concludes that the UN discourse on sexual and gender diversity "may be the most ambiguous and frustrating and simultaneously the most promising, showing how institutions are never monolithic but always terrains of political contestation."[27] Indeed, the coexistence of staunchly conservative political forces opposing the inclusion of sexual and gender diversity in the UN agenda, like the Vatican and the Organization of Islamic Cooperation (OIC), with progressive calls from some states parties and non-governmental organizations (NGOs) for an alternative discourse focused on sexual and gender rights as human rights makes the UN a particularly rich and diverse discourse to study.[28] Finally, the focus on UN discourse is important because the force of UN norms is significant under the Charter of the United Nations[29] and multilateral human rights treaties.[30]

While issues related to sexual and gender diversity are relevant to numerous UN policy agendas, many of the most significant debates and outcomes on the subject have taken place within the machinery of the UN human rights system.[31] The International Human Rights Project at the UN is founded on the 1948 *Universal Declaration of Human Rights* (*UDHR*), promulgated by the Commission on Human Rights[32] in response to the "disregard and contempt for human rights [that] resulted in barbarous acts which…outraged the conscience of mankind"[33] during World War II. While it "largely ignored issues of gender, let alone sexuality,"[34] the *UDHR* established the broad intention of the UN and its member states to protect and promote human rights on an international scale.

In the ensuing decades, one of the key vehicles through which the human rights agenda has evolved is the creation of targeted agreements intended

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[26] Francoise Girard, "Negotiating Sexual Rights and Sexual Orientation at the UN" in Richard Parker, Rosalind Petchesky & Robert Sember, eds, *Sex Politics: Reports from the Frontlines* (Sexuality Policy Watch, 2007) 311 at 312 and 342, online: <http://www.sxpolitics.org/frontlines/book/pdf/capitulo9_united_nations.pdf>. As noted, *supra* note 2, important work on sexual and gender diversity and human rights is being done by other international and regional bodies and organizations.

[27] Rosalind Petchesky, "Sexual Rights Policies across Countries and Cultures: Conceptual Frameworks and Minefields" in Richard Parker, Rosalind Petchesky & Robert Sember, eds, *SexPolitics: Reports from the Frontlines* (New York: Sexuality Policy Watch, 2007) online: <www.sxpolitics.org/frontlines/book/pdf/sexpolitics.pdf> 9 at 19.

[28] *Ibid* at 20.

[29] *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 [*UN Charter*].

[30] Olivia Ball & Paul Gready, *The No-Nonsense Guide to Human Rights* (Oxford: Oxford New Internationalist, 2006) at 92.

[31] For example, sex and gender have been conceptualized as important aspects of the UN agenda on development. See e.g. Andrea Cornwall & Suzie Jolly, "Sexuality and the Development Industry" (2009) 52 Development 5.

[32] The Commission was replaced by the Human Rights Council in 2005. See "UN creates new human rights body" *BBC News* (15 March 2006) online: BBC News <http://news.bbc.co.uk/2/hi/europe/4810538.stm>.

[33] *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) 71 at Preamble [*UDHR*].

[34] Dennis Altman, *Global Sex* (Chicago: University of Chicago Press, 2001) at 122.

to provide specific human rights protections to groups and communities made vulnerable because of some shared characteristic or social location. This strategy has resulted in a vast collection of targeted international human rights documents including the *Convention Relating to the Status of Refugees*,[35] the *Convention on the Elimination of All Forms of Discrimination against Women* (*CEDAW*),[36] the *Convention on the Rights of the Child* (*CRC*)[37] and, more recently, the *Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities* (*CRPD*).[38] Jack Donnelly describes this path of human rights development as "a process of slowly, with immense difficulty, expanding the recognized subjects of human rights, group by despised group."[39] Contemporary struggles over human rights related to sexual and gender diversity must then be understood not as novel intervention in the human rights field, but the latest in a long line of calls for formal recognition by a "despised group" consisting of those whose identities, expressions and conduct do not conform with the dominant, heteronormative norms of sexuality and gender.[40]

## B. The Emergence of SOGI at the UN

The UN has been a site of struggle about sexuality and gender since its inception, particularly around human rights treaties that address the role of family, questions of marriage and equality, and non-discrimination between the sexes.[41] These early debates were framed uniformly in the context of heterosexual marriage and reproduction. However, since the 1990's debates about sexuality and gender have intensified and their terms have recently shifted. Today, in nearly every body of the UN human rights system, there are substantive advocacy discussions and disputes related to sexuality and gender that are no longer shrouded in the language of marriage and family, and no

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[35] *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, (entered into force 22 April 1954).

[36] *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 193 [*CEDAW*].

[37] *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 [*CRC*].

[38] *Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, 13 December 2006, 2515 UNTS 3.

[39] Jack Donnelly, "Non-Discrimination and Sexual Orientation: Making a Place for Sexual Minorities in the Global Human Rights Regime" in Peter Baehr et al, eds, *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights* (Amsterdam: Royal Netherlands Academy of Arts and Sciences, 1999) 93 at 95.

[40] Heteronormativity is the collection of norms and assumptions based in heterosexuality that prescribe specific, complementary roles for men and women based on the presumed alignment between biological sex, social gender, sexual orientation and gender identity and expression. On heteronormativity, see generally Michael Warner, ed, *Fear of a Queer Planet: Queer Politics and Social Theory* (Minneapolis, MN: University of Minnesota Press, 1993).

[41] See e.g. *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) at art 10 [*ICESCR*].

longer limited to heterosexual identities, behaviours and relationships.[42]

Prior to 1993, the words "sexuality" or "sexual" had never appeared in an intergovernmental document at the international level, except for the *Convention on the Rights of the Child* [*CRC*],[43] which included provisions related to protection from sexual exploitation and sexual abuse.[44] However, during the early 1990s, human rights NGOs, including Amnesty International, were increasingly acknowledging the realities of human rights violations based on sexual and gender diversity and incorporating these issues into their mandates.[45] Soon thereafter in 1993, the Vienna Declaration and Program of Action emerging from the World Conference on Human Rights (the Vienna Conference) explicitly "initiated 'the sexual' into human rights language"[46] through references to "the importance of working toward the elimination of violence against women…[and] the elimination of all forms of sexual harassment."[47] The Vienna Conference also marked the first time that gay and lesbian NGOs were formally accredited to a UN conference, and a number of UN member states spoke in favour of rights related to sexual orientation in the context of the conference.[48] Nevertheless, when Canada proposed adding sexual orientation to a list of prohibited grounds of discrimination included in the draft of the Program of Action, it met deep opposition.[49] Eventually, the entire provision was changed to prohibit discrimination in general terms, without any list of prohibited grounds.[50]

Sexuality and gender made more significant appearances a year later at the 1994 UN Conference on Population and Development (the Cairo Conference). The resulting Platform for Action acknowledged both that reproductive health

[42] Kollman & Waites, *supra* note 7 at 8 notes "only since the early 1990s have rights related to sexuality, sexual orientation and gender identity become sustained themes in academic literature."

[43] Petchesky, *supra* note 7 at 82. Well before the uptake of sexual rights in the UN context, the first successful human rights cases based on questions of sexual orientation were taken under the *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, 213 UNTS 221, Eur TS 5 at art 8, which guarantees respect for privacy and family life. See e.g. *Dudgeon v United Kingdom* (1982), 4 EHRR 149 which held that legislation passed in the nineteenth century to criminalize male homosexual acts in England, Wales and Ireland - in 1980, still in force in Northern Ireland - violated the Article 8 right to a private life in the European Convention on Human Rights. This case was significant as the first successful case before the ECHR on the criminalization of male homosexuality.

[44] *CRC*, *supra* note 38 at arts 19 and 34.

[45] Laurence R Helfer & Alice M Miller, "Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence" (1996) 9 Harv Hum Rts J 61 at 90.

[46] Petchesky, *supra* note 7 at 84.

[47] *Vienna Declaration and Program of Action*, UNGAOR, UN Doc A/CONF.157/23, (1983) at para 38, online: Office of the United Nations High Commissioner for Human Rights, < http://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.157/23> [*Vienna Declaration*].

[48] Douglas Sanders, "Human Rights and Sexual Orientation in International Law" (2002) 25 Int'l J Pub Admin 13 at 25 [Sanders, "Human Rights"]. See also Wayne Morgan & Kristen Walker, "Tolerance and Homosex: A Policy of Control and Containment" (1995) 20 Melbourne UL Rev 202 at 214-15.

[49] Douglas Sanders, "Getting Lesbian and Gay Issues on the International Human Rights Agenda" (1996) 18 Hum Rts Q 67 at 69.

[50] Sanders, "Human Rights", *supra* note 48 at 26.

"implies that people are able to have a satisfying and safe sex life,"[51] and the existence of and need to protect a "diversity of family forms."[52] Accordingly, the Cairo Platform "does not limit the principle of self-determination in sexual life to heterosexuals or married people."[53] Ignacio Saiz marks Cairo as the first time that "sexuality, previously on the UN agenda only as something to be circumscribed and regulated in the interest of public health, order or morality, was…implicitly recognized as a fundamental and positive aspect of human development."[54] Yet this was not a positive development for all UN member states; the reference to a diversity of family forms in the Cairo Platform was understood by some, including the observer state the Vatican, as amounting to "an endorsement of homosexuality."[55] The Vatican issued a number of reservations to the Cairo Platform and submitted a formal statement emphasizing the importance of defining "marriage as an equal partnership between husband and wife."[56]

Also in 1994, same-sex conduct formally debuted in the UN treaty body system with the decision of the UN Human Rights Committee (the

[51] UN, *Report of the International Conference on Population and Development, Cairo, 5-13 September 1994*, (New York: UN, 1994) at paras 7.2 and 5.1, online: United Nations Population Information Network <http://www.un.org/popin/icpd/conference/offeng/poa.html> [*Cairo Platform*].

[52] *Ibid*.

[53] Elizabeth Kukura, "Sexual Orientation and Non-Discrimination" (2005) 17 Peace Review 181 at 183; see also Petchesky, *supra* note 7 at 84.

[54] Saiz, *supra* note 7 at 50.

[55] Susan A Cohen & Corey L Richards, "The Cairo Consensus: Population, Development and Women" (1994) 26 Family Planning Perspectives 272 at 273.

[56] *Cairo Platform*, *supra* note 51. Other member states issuing reservations on similar grounds included Egypt, emphasizing that "all the questions dealt with by the Programme of Action in this regard relate to harmonious relations between couples united by the bond of marriage in the context of the concept of the family as the primary cell of society" at para 25; Iran, taking reservations to all "expressions that could be interpreted as applying to sexual relations outside the framework of marriage… [which are] totally unacceptable" at para 2; and Guatemala, stating, "although the family may exist in various forms, under no circumstances can its essential nature, which is the union between a man and a woman from which love and life stem, be changed" at para 7.

Committee) [57] in *Toonen v Australia*.[58] The Committee found[59] that Tasmanian laws criminalizing sexual relations between men breached the right to privacy enshrined in the *ICCPR* and should be repealed.[60] The Committee further noted its view that the prohibited ground of "sex" in the non-discrimination clause of the *ICCPR* should be interpreted to include sexual orientation.[61] *Toonen* was a landmark moment for the UN, representing "the first juridical recognition of gay rights on a universal level" and affirming sexual orientation and same-sex behaviour as international human rights issues.[62] In the nearly two decades since *Toonen*, the Human Rights Committee has continued to adjudicate human rights issues related to sexual and gender diversity, expanding beyond privacy to ground human rights protections; for instance, on the Article 26 non-discrimination provision of the *ICCPR* in cases including *Young v Australia*[63] in 2003 and *X v Colombia* in 2007.[64]

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[57] The Human Rights Committee is the treaty body that oversees the implementation of the *ICCPR*, *supra* note 4. Under the *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, online: Office of the High Commissioner for Human rights <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/v999.pdf >, the Committee may "receive and consider communications from individuals subject to its jurisdiction [i.e.: from those states that are Party to the Optional Protocol] who claim to be victims of violations of any of the rights set forth in the Covenant".

[58] Human Rights Committee, *Toonen*, *supra* note 3. Though *Toonen* marks the breaking of new ground for claims related to same-sex sexualities at the UN, 12 years prior to *Toonen* the Human Rights Committee addressed sexual expression in Human Rights Committee, *Hertzberg et al v Finland, Communication No 61/1979*, UNCCPROR, 15th Sess, UN Doc CCPR/C/15/D/61/1979, (1982), online: High Commissioner for Human Rights <http://www.unhchr.ch/tbs/doc.nsf/0/23a5d17c91636ac3c1256ab50030c76b?Opendocument>. The issue in *Hertzberg* was whether the Finnish government, by censoring a number of radio broadcasts and a television series that discussed discrimination on the basis of sexual orientation, had violated rights to freedom of expression and information guaranteed in Article 19 of the *ICCPR*. The Committee found no violation of the rights under Article 19, concluding at paras 10.3-10.4 that "public morals differ widely" necessitating a "margin of discretion" be afforded to the Finnish national authorities to decide "that radio and TV are not the appropriate forums to discuss issues related to homosexuality, as far as a programme could be judged as encouraging homosexual behaviour… In particular, harmful effects on minors cannot be excluded."

[59] Human Rights Committee, *Toonen*, *supra* note 3 at para 8.2 stated it was "undisputed that adult consensual sexual activity in private is covered by the concept of 'privacy', and that Mr. Toonen is actually and currently affected by the continued existence of the Tasmanian laws" despite their general lack of enforcement.

[60] *ICCPR*, *supra* note 4.

[61] Human Rights Committee, *Toonen*, *supra* note 3 at para 11, 8.7. In addition to privacy, Mr. Toonen argued that the criminal provisions infringed the non-discrimination provisions in Article 26 of the *ICCPR*. The Committee, having found a violation of privacy, deemed it unnecessary to comment on the merits of the non-discrimination argument.

[62] Sarah Joseph, "Gay Rights Under the *ICCPR*: Commentary on *Toonen v Australia*" (1994) 13 University of Tasmania Law Review 392 at 410. See also Saiz, *supra* note 7 noting a number of other developments at the UN in 1994 that "signaled a shift in the approach to human rights and sexuality at the United Nations" including the appointment of the first UN Special Rapporteur on Violence against Women at 50.

[63] Human Rights Committee, *Young v Australia, Communication No 941/2000*, UNCCPROR, 78th Sess, UN Doc CCPR/C/78/D/941/2000, (2003), online: High Commissioner for Human rights <http://www.un.org/ga/search/view_doc.asp?symbol=CCPR/C/78/D/941/2000>. In *Young*, the Committee concluded that Mr. Young was subject to discrimination on the basis of sexual orientation in contravention of Art. 26 of the *ICCPR* by virtue of the government's decision to deny him access to the pension of his deceased same-sex partner.

[64] Human Rights Committee, *X v Colombia, Communication No 1361/2005*, UNCCPROR, 89th Sess, UN

The debate at the 1995 World Conference on Women (the Beijing Conference) marked "the first substantive discussion of sexual orientation in a UN forum"[65] and conservative backlash had a significant voice. The Beijing Platform of Action confirmed various forms of the family exist and as in Cairo, this acknowledgment was opposed by some member states as a threat to the heterosexual, reproductive family unit.[66] The most controversial debate was over several references in the original Beijing Platform to "sexual orientation" as a ground upon which women experience discrimination and disadvantage.[67] Although the references were ultimately removed under pressure from the Vatican, the OIC and right-wing religious organizations,[68] some member states issued reservations indicating an intention to interpret the non-discrimination provisions of the Platform as including a prohibition on discrimination based on sexual orientation.[69] The Vatican further objected to any interpretation of the word "gender", used throughout the Beijing Platform, as based on "world views which assert that sexual identity can be adapted indefinitely to suit new and different purposes."[70]

Conservative forces continued to resist the inclusion of sexuality and gender in human rights debates at the Cairo +5 Conference in 1999, and the

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Doc CCPR/C/89/D/1361/2005, (2007), online: High Commissioner for Human Rights, <http://www.un.org/ga/search/view_doc.asp?symbol=CCPR/C/89/D/1361/2005>. In *X v Colombia*, the Committee found, on grounds similar to those in *Young*, that the government of Colombia discriminated against X when it denied a pension transfer from a same-sex partner on the basis of sexual orientation and advised the government to reconsider his request.

65 Kukura, *supra* note 53 at 183.

66 UN, *Report of the 4th World Conference on Women, Beijing, 4-15 September 1995* (New York: UN, 1995) at para 29, online: WomenWatch <http://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf> [*Beijing Platform*]. States that opposed the recognition of various family forms at Beijing included the Vatican, at para 160, which stressed "that the family is the basic unit of society and is based on marriage as an equal partnership between husband and wife, to which the transmission of life is entrusted," and Malaysia at para 166, which stated "the interpretation of the term 'family,' and the terms 'individual and couples' throughout the document refer to the traditional family formed out of a marriage or a registered union between a man and a woman and comprising children and extended family members".

67 *Ibid*. Original references were included, *inter alia*, in the language of the *Beijing Platform*, which stated: "[t]he Platform for Action recognizes that women face barriers to full equality and advancement because of such factors as their race, age, language, ethnicity, culture, religion or disability, because they are indigenous women or because of other status" at para 46. Sexual orientation was originally an enumerated ground thanks to significant lesbian advocacy efforts, see Helfer & Miller, *supra* note 45 at 89.

68 Sonia Corrêa & Richard Parker, "Sexuality, Human Rights and Demographic Thinking: Connections and Disjunctions in a Changing World" (2004) 1 Sex Res and Soc Pol'y 15 at 16.

69 See *Beijing Platform*, *supra* note 66, the statements of Israel, committing to interpreting the words "other status" to include sexual orientation, and South Africa: "[t]he South African delegation interprets paragraph 96, which reads, 'The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence,' to include the right to be free from coercion, discrimination and violence based on sexual orientation" at para 46.

70 *Ibid* at 162. See also Dianne Otto, "Lesbians? Not in My Country: Sexual Orientation at the Beijing World Conference on Women" (1995) 20 Alt LJ 288 at 289, describing the position of the Vatican as rooted in the concern that "the concept of gender implied that sex was socially constructed and, therefore, that more than two sexes were possible (including homosexuals, bisexuals and transsexuals)."

Beijing +5 Conference in 2000, where they successfully frustrated every attempt to include the term "sexual orientation" in a working document, referring to homosexuality as a disease and declaring issues of sexual diversity to be "a regionally specific problem that exclusively affects the European Union."[71] At the ten-year follow-up meetings to Cairo and Beijing, advocates "were able to do no more than hold the line on the modest language won in the 1990s – and this defence was in itself an achievement"[72] given the global hyper-conservativism that followed 9/11.

In the post-*Toonen* era, human rights "infringements and abuses related to sexual identity and conduct have gained relevance in the debates and procedures of treaty bodies that monitor the implementation of human rights conventions on civil, political, social and economic rights, on women and children, and on torture, and special rapporteurs on human rights have increasingly reported on perpetrations related to sexuality."[73] For example, in 2000, the former Commission on Human Rights (now the Human Rights Council) issued a resolution on extrajudicial, summary, or arbitrary execution that explicitly mentioned sexual orientation as a prohibited ground for the first time.[74] In 2004, the Special Rapporteur on the Right to Health recognized sexual rights as human rights in his annual report to the UN Commission on Human Rights, concluding "[s]exual rights include the right of all persons to express their sexual orientation…without fear of persecution, denial of liberty or social interference."[75] In 2010, the Committee on the Elimination of All Forms of Discrimination Against Women formally recognized bisexual and lesbian women for the first time and stipulated gender identity as a prohibited ground of discrimination under its mandate.[76]

It is through the mechanism of treaty interpretation that the some of the "strongest existing explicit protections against discrimination on the basis

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[71] Corrêa & Parker, *supra* note 68 at 16.

[72] Corrêa, Petchesky & Parker, *supra* note 14 at 171.

[73] *Ibid* at 29.

[74] Girard, *supra* note 26 at 342. See Commission on Human Rights, *Extra Judicial, Summary or Arbitrary Executions*, ESC Res 2000/31, UNESCOR, 56th Sess, UN Doc E/CN.4/RES/2000/31, (2000).

[75] "The right of everyone to the enjoyment of the highest attainable standard of physical and mental health" *Report of the UN Special Rapporteur on the Right to Health*, UNOHCHROR, 2004, UN Doc E/CN.4/2004/49 at para 54, online: High Commissioner for Human Rights <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/109/33/PDF/G0410933.pdf?OpenElement>.

[76] See e.g. *Concluding observations of the Committee on the Elimination of Discrimination against Women : Uzbekistan*, UN*CEDAW*OR, 45th Sess, UN Doc *CEDAW*/C/UZB/CO/4, (2010) at para 4, which noted the very limited information and statistics available on vulnerable groups of women, including elderly women, women with disabilities and women discriminated against on the basis of their sexuality. See also *Concluding observations of the Committee on the Elimination of Discrimination against Women: The Netherlands*, UN*CEDAW*OR, 45th Sess, UN Doc *CEDAW*/C/NLD/CO/5, (2010), which expressed concern about specific health problems experienced by transgender women in the Netherlands, in particular the compulsory sterilization they must undergo to get birth certificates changed, and the non-reimbursement by health insurance of surgical breast implants at paras 25, 46-47.

of sexual orientation"[77] have been achieved at the UN. Yet without definite reference points or dedicated guarantees, human rights claims related to sexual and gender diversity remain subject to the discretionary interpretations of the human rights treaty bodies. This reality led to a concentration of efforts to introduce a formal UN document on human rights related to sexual orientation and same-sex behavior in the early 2000's.

At the 2003 Commission on Human Rights, Brazil unilaterally[78] proposed a resolution entitled *Human Rights and Sexual Orientation* that sought to affirm the applicability of existing principles of non-discrimination to discrimination based on sexual orientation.[79] The resolution called on member states "to promote and protect the human rights of all persons regardless of their sexual orientation"[80] and requested "the High Commissioner for Human Rights to pay due attention to violations of human rights on the grounds of sexual orientation."[81] The Brazil resolution met harsh opposition from UN member states including the United States, the Vatican and the OIC, which argued "sexual orientation was not a proper subject for consideration by a human rights body."[82] The Commission repeatedly postponed the vote on adoption of the draft resolution and absent any sign of the requisite consensus, Brazil abandoned its efforts in 2005.[83]

Just one year later, at the 2006 Human Rights Council, 54 member states issued a Joint Statement on Human Rights Violations based on Sexual Orientation and Gender Identity.[84] The statement requested the President of the Council provide an opportunity for discussing human rights violations based on sexual orientation and gender identity, marking the first time the

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[77] Kukura, *supra* note 53 at 183. There have, of course, been moments where the system has taken a conservative stance to treaty interpretation on sexual and gender diversity. See e.g. Human Rights Committee, *Joslin et al v New Zealand, Communication No 902/1999*, UNCCPROR, 75th Sess, UN Doc CCPR/C/75/D/902/1999, (2002), online: High Commission for Human Rights, <http://www.ccprcentre.org/doc/2013/05/CCPR_C_75_D_902_1999.pdf > where two lesbian couples claimed that a New Zealand law prohibiting same-sex marriage violated their rights to marriage and non-discrimination under Articles 23 and 26 of the *ICCPR*. The Human Rights Committee concluded at paras 8.2-8.3 that because Article 23 enshrined "the right of men and women of marriageable age to marry" the "mere refusal to provide for marriage between homosexual couples" was not discriminatory. The Committee rejected arguments on the discriminatory nature of the Article 23 definition of marriage.

[78] Girard, *supra* note 26, noting that Brazil took "civil society organizations and governments by surprise" in proposing its resolution because it had not consulted with other potentially supportive governments beforehand, and had not invited civil society organizations to support or consult on its proposed resolution at 341.

[79] *Human Rights and Sexual Orientation: Draft Resolution*, UNESCOR, 59th Sess, UN Doc E/CN.4/2003/L.92, (2003) [*Brazil Resolution*].

[80] *Ibid*.

[81] *Ibid*.

[82] Action Canada for Population and Development, *An NGO Guide to Human Rights and Sexual Orientation at the UN Commission on Human Rights* (Ottawa: Action Canada for Population and Development, 2003)

[83] O'Flaherty & Fisher, *supra* note 7 at 230; Saiz, *supra* note 7 at 57.

[84] Wegger Christian Strømmen, *Joint statement on Human Rights violations based on sexual orientation and gender identity*, UNHRC, 3d Sess (2006), online: Arc International <http://arc-international.net/global-advocacy/sogi-statements/2006-joint-statement>.

term "gender identity" was explicitly included in any UN statement.[85] The momentum generated by the 2006 Joint Statement culminated in the 2008 adoption by the UN General Assembly of the 13-point Statement on Human Rights, Sexual Orientation and Gender Identity.[86] Supported by 66 member states (of the 192-member General Assembly),[87] the nonbinding statement sponsored by France and the Netherlands and read in the General Assembly by Argentina, condemned human rights violations based on sexual orientation and gender identity and reaffirmed the universality of human rights and the "principle of non-discrimination which requires that human rights apply equally to every human being regardless of sexual orientation or gender identity."[88] At the same UN meeting where the Statement was introduced, High Commissioner for Human Rights Navi Pillay stated that laws criminalizing same-sex behaviour "are increasingly becoming recognized as anachronistic and as inconsistent both with international law and with traditional values of dignity, inclusion and respect for all."[89] The 2008 Statement marked the first time that a statement on sexual orientation and gender identity was read in the General Assembly.[90]

Like those before it, this milestone was not without opposition.[91] The

[85] O'Flaherty & Fisher, *supra* note 7 at 230.

[86] Full text of the statements available, online: ISSUU <http://issuu.com/i.l.m./docs/gl-rights>. See also United Nations, Press Release, GA/10801, "General Assembly Adopts 52 Resolutions, 6 Decisions Recommended by Third Committee on Wide Range of Human Rights, Social and Humanitarian Issues" (18 December 2008) online: UN News and Media Division <http://www.un.org/News/Press/docs/2008/ga10801.doc.htm>; Secrétariat d'État chargé des Affaires étrangères, "Statement on Human Rights, Sexual Orientation and Gender Identity" (Presented in the sidelines of the UN General Assembly, 18 December 2008), online: RefWorld <http://www.refworld.org/docid/49997ae312.html> [2008 UN Statement]. The Declaration was sponsored by France and the Netherlands, with broad support from Europe and Latin America. France originally wanted to seek an official UN Resolution but lacking the requisite support, opted to proceed by way of Declaration. All of the European Union member states endorsed the declaration, as well as Canada, Australia and Japan.

[87] *Ibid*. Interestingly, the signatories to the 2008 UN Statement included two states – Mauritius and Sao Tome and Principe – that criminalize same-sex sexual acts. See Daniel Ottosson, *State-sponsored Homophobia: A World Survey of Laws Prohibiting Same Sex Activity Between Consenting Adults*, online: The International Lesbian, Gay, Bisexual, Trans and Intersex Association <http://www.ilga.org/statehomophobia/ILGA_State_Sponsored_Homophobia_2009.pdf >.

[88] See 2008 UN Statement, *supra* note 86. Specifically, the statement condemned "the use of the death penalty on this ground [sexual orientation and gender identity], extrajudicial, summary or arbitrary executions, the practice of torture and other cruel, inhuman and degrading treatment or punishment, arbitrary arrest or detention and deprivation of economic, social and cultural rights, including the right to health" at paras 1-3 and 5-6.

[89] "Laws against gay sex are like apartheid says UN human rights chief", *PinkNews* (5 January 2009) online: PinkNews <http://www.pinknews.co.uk/2009/01/05/laws-against-gay-sex-are-like-apartheid-says-un-human-rights-chief/>.

[90] See e.g. Neil MacFarquhar, "In a First, Gay Rights Are Pressed at the UN", *New York Times* (18 December 2008) online: New York Times <http://www.nytimes.com/2008/12/19/world/19nations.html?_r=1/>.

[91] The US originally opposed the 2008 UN Statement, *supra* note 86, citing concerns that "favoring gay rights in a UN document might be interpreted as an attempt by the U.S. federal government to override individual states' rights on issues like gay marriage." The Obama administration changed the US position in February 2009, signing on to the Declaration. See Sue Pleming, "In turnaround, U.S. signs U.N. gay rights document", *Reuters* (18 March 2009) online: Reuters <http://www.reuters.com/article/2009/03/18/us-

Vatican issued a statement supporting the condemnation of violence against homosexual persons but arguing, "if [the terms sexual orientation and gender identity] had to be taken into consideration in the proclaiming and implementing of fundamental rights, these would create serious uncertainty in the law as well as undermine the ability of States to enter into and enforce new and existing human rights conventions and standards."[92] The OIC went further, releasing a formal counter-statement supported by 57 member states and read by Syria in the General Assembly. Acknowledging support for human rights in general, the statement argued that the 2008 Statement attempts to create "new rights or new standards by misinterpreting international treaties"[93] and "delves into matters which is the domestic jurisdiction of states [*sic*]."[94] The counter statement alleged that connecting "so-called notions of sexual orientation and gender identity"[95] with established international human rights norms risks normalizing "many deplorable acts, including pedophilia."[96]

During this period there was a concentration of NGO efforts connecting international human rights and sexual and gender diversity.[97] For example, in 2006, the International Conference on LGBT Human Rights adopted the Declaration of Montréal on Lesbian, Gay, Bisexual and Transgender Human Rights (the Montréal Declaration).[98] The Montréal Declaration aimed to identify and address UN shortcomings in the application of the principles of the *UDHR* to GLBTQ people around the world.[99] Designed as an advocacy instrument for use in diverse local settings, the Montréal Declaration set out "the main demands of the international LGBT movement in the broadest

rights-gay-usa-idUSTRE52H5CK20090318>.

[92] Statement of the Holy See Delegation at the 63rd Session of the General Assembly of the United Nations on the Declaration on Human Rights, Sexual Orientation and Gender Identity (18 December 2008) online: The Vatican <http://www.vatican.va/roman_curia/secretariat_state/2008/documents/rc_seg-st_20081218_statement-sexual-orientation_en.html>. See also "Vatican criticised for opposing gay decriminalization" *The Irish Times* (12 December 2008) online: Irish Times <http://www.irishtimes.com>.

[93] Organization of Islamic Conference-sponsored Delegation, "Joint Statement, Issued by the Syrian Delegation" (Read in the UN General Assembly by Syria, 19 December 2008) 2 at 3online: <http://issuu.com/i.l.m./docs/gl-rights> [Syrian Statement]. See also William R Slomanson, "UN Round of the Gay Rights Debate" *Los Angeles & San Francisco Daily Journal Legal Newspaper* (24 February 2009) at 4 online: UN Development Programme <http://content.undp.org/go/cms-service/stream/asset/?asset_id=2205311>, which identified the "choose-your-battle" argument of the OIS [impugning the UN for focusing on sexuality while ignoring discrimination based on race, religion, color] as resisting "an overloaded UN human rights program being further expanded into a cultural, religious, regional and historically sensitive minefield".

[94] Syrian Statement, *supra* note 93.

[95] *Ibid*.

[96] *Ibid*.

[97] For a helpful overview of the depth and breadth of NGO and civil society advocacy on sexual and gender diversity at the UN see e.g. *The Time has Come*, online video: (ARC International, 2013) online: Vimeo <http://vimeo.com/67796115> [*Time has Come*].

[98] *Declaration of Montréal* (26-29 July 2006), online: Declaration of Montréal <http://www.declarationofMontréal.org/declaration/> [*Declaration of Montréal*].

[99] "L'ONU interpellée" (28 July 2006), online: Radio-Canada <http://www.radio-canada.ca/regions/Montréal/2006/07/28/001-Declaration-Montreal.shtml>.

possible terms, so as to make the document useful at a global level and in all parts of the world."[100]

In 2007, an international group of human rights experts came together to establish the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity.[101] Intended as a formal set of "international legal principles on the application of international law to human rights violations based on sexual orientation and gender identity,"[102] the principles connect existing human rights norms and standards to issues of sexual and gender diversity, supplemented by specific recommendations urging the UN to integrate rights on sexual and gender diversity into their practices and procedures.[103] The Yogyakarta Principles were truly an activist product intended to provide guiding norms or frameworks for advocates, institutions and organizations engaged in rights development on sexual and gender diversity in the international sphere.[104] The principles have been cited and incorporated by various UN agencies and entities.[105]

In March 2011, a joint statement was delivered in the 16th Human Rights Council by Colombia on behalf of a record 85 states on ending acts of violence and related human rights violations based on sexual orientation and gender identity.[106] On June 15, 2011, the Human Rights Council passed the first-ever UN Resolution on Human Rights, Sexual Orientation and Gender Identity, requesting the High Commissioner for Human Rights prepare a report on violence and discrimination on the basis of sexual orientation and gender identity, and calling for a panel discussion to be held at the 2012 Human Rights Council to discuss the findings of the study and consider appropriate follow-up measures.[107] The report of the High Commissioner, issued in 2011,

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[100] *Declaration of Montréal*, *supra* note 98.

[101] *Yogyakarta Principles*, *supra* note 21.

[102] See *ibid* at Additional Recommendations A-E: "United Nations Human Rights Treaty Bodies vigorously integrate these Principles into the implementation of their respective mandates, including their case law and the examination of State reports, and, where appropriate, adopt General Comments or other interpretive texts on the application of human rights law to persons of diverse sexual orientations and gender identities."

[103] *Ibid*.

[104] See generally O'Flaherty & Fisher, *supra* note 7, for a useful overview of the Yogyakarta Principles and the process by which the Principles were developed. But see Swiebel, *supra* note 8 at 31-33.

[105] See e.g., the Committee on Economic, Social and Cultural Rights, *General comment no. 20, Non-discrimination in economic, social and cultural rights (art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)*, UNESCOR, 42d Sess, UN Doc E/C.12/GC/20, (2009) at para 32, note 25, which referred to the Yogyakarta Principles as a "source of guidance" on definitions of sexual orientation and gender identity; and Carlos F Cáceres et al, "Review of Legal Frameworks and the Situation of Human Rights related to Sexual Diversity in Low and Middle Income Countries" (Study published by UNAIDS, December 2009), online: UNAIDS <http://data.unaids.org/pub/Report/2009/20091215_legalframeworks_sexualdiversity_en.pdf>.

[106] Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Columbia*, UNHRCOR, 16th Sess, UN Doc A/HRC/16/22, (2011) online: <http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/16/22>.

[107] Human Rights Council, *Human rights, sexual orientation and gender identity*, UNGAOR, 17th Sess, UN Doc

documents high rates of violence and discriminatory laws and practices based on sexual orientation and gender identity around the world, and advises that international human rights law be used to end these violations.[108]

Based on the report of the High Commissioner, the first UN intergovernmental panel discussion on the application of international human rights law to end violence and discrimination based on sexual orientation and gender identity was convened at the 19th session of the Human Rights Council in March 2012.[109] Pakistan, as leader of the OIC, wrote a letter to the President of the Human Rights Council expressing grave concerns about the panel and "attempts to create controversial 'new notions' or 'new standards' by misinterpreting the *Universal Declaration of Human Rights* and international treaties to include such notions that were never articulated or agreed to by the UN membership."[110] At the beginning of the panel, delegates from UN member states belonging to the OIC staged an unprecedented mass walkout.[111] Of the thirty-three states that remained to participate in the panel, speakers emphasized that "the issue was not about creating new rights for certain people but about ensuring that all human rights could be enjoyed by all human beings" regardless of sexual orientation or gender identity.[112]

The theme of "no new rights" is prominent throughout the human rights

A/HRC/17/L.9/Rev.1, (2011).

[108] High Commissioner's Report, *supra* note 5. See also Human Rights Watch, *Historic Decision at the United Nations* (17 June 2011), online: Human Rights Watch < http://www.hrw.org/news/2011/06/17/historic-decision-united-nations >.

[109] Ban-Ki Moon, "UN Secretary-General message at Human Rights Council", online video: (Youtube, 2012), online: YouTube <http://www.youtube.com/watch?v=qtxU9iOx348>. At the opening of the panel, Secretary-General Ban-Ki Moon expressed his support, declaring, "[w]e see a pattern of violence and discrimination directed at people just because they are gay, lesbian, bisexual or transgender…This is a monumental tragedy for those affected -- and a stain on our collective conscience. It is also a violation of international law. You, as members of the Human Rights Council, must respond".

[110] Zamir Akram, *Letter from Permanent Mission of Pakistan to the United Nations to Laura Dupuy Lasserre, President of the Human Rights Council*, No.Pol/SO/2012, (14 February 2012), online: <http://www.keepandshare.com/doc/3579062/oic-to-president-pdf-february-20-2012-10-22-am- 67k?dn=y> [*Pakistan's Letter*].

[111] See Stefano Gennarini, "UN Delegates Walk Out on Sexual Orientation Panel at Human Rights Council" (15 March 2012), online: C-Fam <http://www.c-fam.org/fridayfax/volume-15/un-delegates-walk-out-on-sexual-orientation-panel-at-human-rights-council.html>; 17 of the 47 state members of the Human Rights Council belong to the 57-member Organization of the Islamic Conference (OIC); "Speaking before the walkout […], Pakistan described homosexuality as 'licentious behavior' while African group leader Senegal said it was not covered by global human rights accords. […] Mauritania, for the Arab group, said attempts to impose 'the controversial topic of sexual orientation' would undermine discussion in the council of all genuine human rights problems." Robert Evans, "Islamic States, Africans walk out on UN gay panel" Reuters (8 March 2012), online: Reuters <http://in.reuters.com/article/2012/03/07/un-gays-idINDEE8260GT20120307 >.

[112] See Office of the High Commissioner for Human Rights, News Release, "Human Rights Council holds panel discussion on discrimination and violence based on sexual orientation and gender identity" (7 March 2012) online: Office of the High Commissioner for Human Rights <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11920&LangID=E>. Some speakers said they found the notion of sexual orientation vague and controversial and worried that the debate could lead to discord among UN member states. There was also reaffirmation of the importance of respecting cultural and religious values when dealing with human rights issues.

discourse on sexual and gender diversity and was recently confirmed in a 2012 publication by the Office of the High Commissioner for Human Rights entitled, "Born Free and Equal: Sexual Orientation, Gender Identity and International Human Rights Law (Free and Equal)."[113] Free and Equal confirms the UN position that the legal obligation of states to "safeguard the human rights of LGBT and intersex people [is] well established in international human rights law on the basis of the *Universal Declaration of Human Rights* and subsequently agreed international human rights treaties."[114] In July 2013, the Office of the High Commissioner for Human Rights launched the Free and Equal public education campaign that "aims to raise awareness of homophobic and transphobic violence and discrimination, and encourage greater respect for the rights of LGBT people."[115]

## C. The "Term of Inclusion": SOGI

It is apparent that over the past two decades sexual and (to a lesser extent) gender diversity have been integrated into the international human rights agenda at the UN. While the substance of these debates remains "a battleground within the UN human rights system,"[116] one of the key conceptual vehicles – or, to return to Narayan's language, the "term of inclusion" – through which sexual and gender diversity are being incorporated into international human rights discourse is the category of sexual orientation and gender identity (SOGI).[117] The predominant approach in international human rights discourse has been to attach "sexual orientation" and "gender identity" individually or in concert, to existing human rights norms and guarantees, including privacy, non-discrimination and health.[118]

Matthew Waites describes SOGI as "pivotal in the contestation of human rights discourses and global governance by prevailing international lesbian, gay, bisexual and transgender…and human rights non-governmental organizations and activist networks"[119] as well as the UN.[120] SOGI is the discursive category through which sexual and gender diversity is being

[113] Office of the High Commissioner for Human Rights, *Born Free and Equal: Sexual Orientation, Gender Identity and International Human Rights Law* (New York and Geneva: UN, 2012) at 10, online: OHCHR <http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf> [*Free and Equal*].

[114] *Ibid*.

[115] Free and Equal, Press Release, "UN Human Rights Office Launches Unprecedented Global Campaign for Lesbian, Gay, Bisexual and Transgender Equality" (26 July 2013) online: PRWeb <http://www.prweb.com/releases/2013/7/prweb10967571.htm>; see also *Free and Equal*, *supra* note 113.

[116] Saiz, *supra* note 7 at 50.

[117] *Ibid*.

[118] Roseman & Miller, *supra* note 13 at 251, describing the frames through which these rights have been developed as including "economic and social rights/health, discrimination against women, torture, disability, children, and race discrimination."

[119] Matthew Waites, "Critique of 'sexual orientation' and 'gender identity' in human rights discourse: global queer politics beyond the Yogyakarta Principles" (2009) 15 Contemporary Politics 137 at 137.

[120] *Ibid*.

introduced, interpreted and regulated in the UN forum. It is also the descriptor through which the subjects of human rights "are themselves constituted by the very process of articulating and demanding enforcement of human rights."[121] Costas Douzinas explains:

> Human rights struggles are symbolic and political: their immediate battleground is the meaning of words, such as "difference" and "equality" or "similarity" and "freedom," but if successful, they have ontological consequences—they radically change the constitution of the legal subject and affect peoples' lives.[122]

In shaping the discourse of sexual and gender diversity in international human rights discourse, SOGI is also constitutive of the international legal subjects it describes, making the meaning and content of SOGI itself "contested terrain."[123]

Though it is often relied upon in the UN arena as a largely coherent descriptor with global resonance, SOGI is a complex and particular category.[124] It carries with it specificities of time and place and assumptions about who belongs within its boundaries and who is left outside. Human rights "are an evolving, living body of ideas, not a static set of norms,"[125] and as the agenda on sexual and gender diversity continues to evolve, it is important to consider not only the positive, rights-affirming work that SOGI is doing as the "term of inclusion" in the UN arena, but also the risks that SOGI potentially poses to the evolving discourse connecting international human rights and sexual and gender diversity.[126]

## III. Problematizing SOGI as the Touchstone for International Human Rights

Drawing on the work of Sara Ahmed and Judith Butler, Matthew Waites argues that rather than viewing the rise of SOGI in international human rights discourse "as signaling the eradication of the normative privileging of particular genders and sexualities, it can usefully be interpreted as a reconfiguration of…the 'heterosexual matrix': that grid of cultural intelligibility through which bodies, genders and desires are naturalized."[127]

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[121] Pheng Cheah, "Posit(ion)ing Human Rights in the Current Global Conjuncture" (1997) 9:2 Public Culture 233 at 256.

[122] Costas Douzinas, "Critique and Comment: The End(s) Of Human Rights" (2002) 26 Melbourne UL Rev 445 at 457.

[123] Ratna Kapur, "Human Rights in the 21 Century: Take a Walk on the Dark Side" (2006) 28 Sydney L Rev 665 at 670, which referred to the discourse of human rights generally.

[124] *Free and Equal*, *supra* note 115 at note 2.

[125] Corrêa, Petchesky & Parker, *supra* note 14 at 153.

[126] *Ibid*.

[127] Waites, *supra* note 119 at 138, citing Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (London: Routledge, 1990) at 151, which described the "heterosexual matrix".

In other words, the incorporation of SOGI into human rights discourse at the UN produces a new matrix of inclusion and exclusion that must be unpacked, analyzed and contested. Part of this task involves consideration of the ways that the "term of inclusion" upon which the matrix is grounded functions to delineate the discursive boundaries of evolving human rights norms and standards, potentially leaving some groups and individuals outside of human rights, looking in.

This section outlines in brief three distinct but related critiques of the new heterosexual matrix at the UN. All three critiques are related in part to the positioning of SOGI as the discursive vehicle by which sexual and gender diversity are included in international human rights: 1) the marginalization of trans people, gender expression and intersex people in international rights discourse; 2) the entrenchment in international rights discourse of Western-based identity categories that lack broad applicability across contexts; and 3) the evolution of fragmented norms on sexual and gender diversity resulting from the addition of SOGI to established human rights discourses.

What these insights have in common is an overarching concern about exclusion. Sonia Corrêa, Rosalind Petchseky & Richard Parker frame this issue in the following terms:

> We need to be aware of the underlying structure of group constitution as always, and inevitably, exclusionary. As [Judith] Butler reminds us, recognitions is "a site of power by which the human is differentially produced," and thus every act of recognition (for example, granting of sexual rights) becomes a way of excluding some for the sake of establishing the human-ness of others.[128]

The question of who risks remaining outside the boundaries of international human rights related to sexual and gender diversity and why is a subject of ongoing debate in scholarly literature and advocacy on rights related to sexual and gender diversity at the UN. Some of this work is canvassed below. This section draws from and builds upon the existing debate by focusing on the ways that the proliferation of the term "sexual orientation and gender identity" in UN discourse shapes and creates a particular landscape of human rights related to sexual and gender diversity that may result in unintentional exclusions. While each of the critiques surveyed here warrants much deeper exploration then the present analysis allows, the intention of this section is to highlight some of the "tendencies toward status quo or exclusionary claims-making and norms-development"[129] connected to the positioning of SOGI as the vehicle for linking human rights and sexual and gender diversity in the

[128] Corrêa, Petchesky & Parker, *supra* note 14 at 161, citing Judith Butler, *Giving an Account of Oneself* (New York: Fordham University Press, 2005) at 2.

[129] Miller, "Figure of Gender", *supra* note 13 at 1 (this is not to imply that reliance on SOGI has, or will necessarily give rise to all or any of these unintended consequences in practice).

UN forum.[130]

## A. Who's Out? Trans Identity, Gender Expression and Intersex People

Apparent in the evolution of the SOGI agenda at the UN over the past two decades, summarized above, is inconsistent and at times piecemeal treatment of gender identity and gender expression with limited attention to human rights issues related to intersex people. More recently, however, UN discourse has started to name human rights issues related not only to sexual orientation, but also gender identity, gender expression and intersex status. Generally, this diverse set of issues[131] continues to be addressed together under the singular umbrella of SOGI; for example in the High Commissioner's 2011 report and the 2013 Free and Equal guide.[132] Beneath the SOGI umbrella, however, is a tendency for some groups formally included in the acronym to nonetheless "get short shrift in actual advocacy and policy."[133]

Treating "SO" and "GI" as a unified discursive category poses a significant risk that trans people and human rights issues related to gender identity and expression will simply disappear from human rights discourse, or be included only as an afterthought.[134] The exclusion of gender identity and expression is apparent in much of the early human rights discourse canvassed above, including the ill-fated 2003 draft resolution proposed by Brazil, which focuses solely on sexual orientation, with no mention of human rights related to gender identity or expression.[135] The fact that the human rights of trans people and issues related to gender identity and expression risk being sidelined in the SOGI agenda is particularly troubling because, as the High Commissioner's 2011 report demonstrates, those who are, or who are perceived to be trans are most likely to be the targets of discrimination and

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[130] *Ibid*.

[131] See e.g. Gayle Rubin, "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality" in Carole Vance, ed, *Pleasure and Danger: Exploring Female Sexuality* (Boston: Routledge & Kegan Paul, 1984) 267 at 308.

[132] High Commissioner's Report, *supra* note 5; *Free and Equal*, *supra* note 115.

[133] Miller, "Figure of Gender", *supra* note 12 at note 8. See also Kate Sheill, "Losing Out in the Intersections: Lesbians, Human Rights, Law and Activism" (2009) 15 Contemporary Politics 55.

[134] This inclination reflects a similar trend in much of the Western world, where trans issues have historically been subsumed within the GLBT rights agenda. That agenda has focused overwhelmingly on gay and lesbian rights in general, and, in recent years, on same-sex marriage equality in particular. See e.g. Shannon Price Minter, "Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion" in Paisley Currah, Richard M Juang & Shannon Minter, eds, *Transgender Rights* (Minneapolis: University of Minnesota Press, 2006) 141 at 142, stating, "the question that calls for an explanation is not whether transgender people can justify their claims to gay rights, but rather how did a movement launched by bull daggers, drag queens, and transsexuals in 1969 end up viewing transgender people as outsiders less than thirty years later?"

[135] *Brazil Resolution*, *supra* note 79. See also New Zealand, "Joint Statement on Sexual Orientation and Human Rights" (Statement delivered by New Zealand at the Commission on Human Rights, March 2005), online: ARC International <http://arc-international.net/global-advocacy/sogi-statements/2005-joint-statement>.

violent, hateful attacks.[136]

Even where gender identity and expression are on the agenda, the use of SOGI suggests that the human rights interests, goals and priorities relevant to sexual orientation and gender identity are identical, or at least convergent. The primary focus of the current SOGI agenda is on the elimination of discrimination and violence based on sexual orientation and gender identity, and certainly this is a critical goal for ensuring more fulsome recognition of human rights across a diversity of sexual and gender identities and expressions.[137] However, there is an array of other critical human rights issues unique to the trans community that may be less likely to receive dedicated attention under the SOGI umbrella. For example, in 1996 the International Conference of Transgender Law and Employment Policy adopted an International Bill of Gender Rights (IBGR), identifying priority issues including the right of all individuals "to define, and to redefine as their lives unfold, their own gender identities, without regard to chromosomal sex, genitalia, assigned birth sex, or initial gender role,"[138] the right "not to be denied the right to change their bodies as a means of expressing a self-defined gender identity,"[139] and the "right of access to gendered space and participation in gendered activity."[140]

Some of these issues were briefly acknowledged in the 2011 report of the High Commissioner, who identified as human rights problems the inability of trans people to obtain legal recognition of their lived gender through the issuance of new birth certificates or other identification and regulations making such documentation contingent upon sterilization or divorce.[141] However, there is no UN study or report devoted to the unique and diverse human rights issues faced by trans individuals or communities, or those who engage in non-normative gender expression, in various parts of the world. It is imperative that evolving international human rights norms actively engage with, and are inclusive of trans people *qua* trans people, and address the specific human rights priorities related to gender identity and expression, as distinct from sexual orientation and same-sex behaviour. This might mean disaggregating "GI" from "SO" and engaging a more expansive and affirmative vision of gender rights beyond non-discrimination based on gender identity.[142]

The position of intersex people and communities within the SOGI

[136] High Commissioner's Report, *supra* note 5.

[137] See e.g. *Free and Equal*, *supra* note 113.

[138] *International Bill of Gender Rights*, reproduced in "Appendix: The International Bill of Gender Rights" in Currah, Juang & Minter, *supra* note 136 at 327 at art 1.

[139] *Ibid* at art 5.

[140] *Ibid* at art 4.

[141] High Commissioner's Report, *supra* note 5 at paras 71-73.

[142] Tom Dreyfus, "The 'Half-Invention' of Gender Identity in International Human Rights Law: From *CEDAW* to the Yogyakarta Principles" (2012) 37 Australian Feminist Law Journal 33; Waites, *supra* note 119 at 147, citing in part Minter, *supra* note 134, which notes that there are ongoing debates about whether trans activists "should aspire to 'simply human rights', rather than 'transgender rights'".

agenda is potentially even more tenuous, given that intersex is not expressly part of the SOGI acronym, and is entirely distinct from the categories "sexual orientation" or "gender identity."[143] This means that intersex people risk literal exclusion from the SOGI agenda in UN human rights forums. For example, the international advocacy network Organization Intersex International (OII) carefully mapped the use of the word "intersex" during the 2012 Human Rights Council panel on Human Rights, Sexual Orientation and Gender Identity. Secretary-General Ban Ki-Moon "did not mention the word intersex at all nor did he use intersex-inclusive acronyms or attributes formulae"[144] and High Commissioner for Human Rights Navi Pillay mentioned intersex once, noting that "transgender and intersex people are especially poorly served"[145] in healthcare facilities.[146] Both UN officials relied instead on the intersex-exclusive terminology of "sexual orientation and gender identity" or SOGI. Where intersex people are not named as part of the discourse, the distinct human rights issues they face cannot begin to be addressed.

## B. Western-based Identity Categories Grounding Universal Rights

SOGI is often deployed in UN discourse as a neutral descriptor with consistent and coherent meaning across cultures.[147] Yet "sexual orientation" and "gender identity" situate the focus of SOGI discourse on particular concepts of orientation and identity that find origins in the Western world.[148]

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[143] See generally, Organization Intersex International, *March 7 2012 was an historic day for LGBT people at the United Nations Human Rights Council – we seek full and equal intersex inclusion* (12 March 2012), online: OII Intersex Network <http://oiiinternational.com/1707/historic-day-lgbt-people-united-nations-full-equal-intersex-inclusion/> [OII]. Organization Intersex International explains that intersex people have sexual orientations and gender identities "extra to the fact of being intersex" and for this reason, "[i]ntersex is not included in sexual orientation and gender identity aka SOGI"; High Commissioner's Report, *supra* note 5 at 2, which states that SOGI does not include intersex people appears to have been recognized by the High Commissioner for Human Rights at 2.

[144] OII, *supra* note 143. Pillay's statement confirms that where human rights of the intersex community have been addressed in the UN system, the focus has overwhelmingly been on "gender adjustment" surgeries performed on many intersex infants in order to construct "normal" genitalia. See e.g. *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UNGAOR, 22d Sess, UN Doc A/HRC/22/53, (2013) at para 88, where Special Rapporteur Juan E. Méndez formally condemned non-consensual "genital-normalizing surgery, involuntary sterilization, unethical experimentation, [and] medical display" of intersex people.

[145] *Ibid*.

[146] *Ibid*.

[147] This phenomenon is not unique to the UN, as a "host of human rights courts and nongovernmental organizations have emphasized the seeming universality of lesbian and gay identity". See Sonia Katyal, "Exporting Identity" (2002) 14 Yale JL & Feminism 97 at 119 citing a report by Amnesty International, *Breaking the Silence: Human Rights Violations based on Sexual Orientation* (New York: Amnesty International, 1994), as an example of an early report which engaged gay and lesbian rights and declared sexual orientation a fundamental dimension of human identity.

[148] In his seminal work, *The History of Sexuality: An Introduction*, Michel Foucault considered the "veritable discursive explosion" on the subject of sex in Western societies and considers the mechanisms by which Western societies began "putting sex into discourse"; Michel Foucault, *The History of Sexuality: An Introduction* (New York: Random House, 1990). See also Ann Laura Stoler, *Race and the Education of Desire:*

Relying on SOGI as the "term of inclusion" at the UN thus risks entrenching culturally-specific identity-based categories that do not meaningfully reflect the spectrum of sexual and gender diversity around the world as the foundation for international human rights related to sexual and gender diversity. This section queries the "prevailing assumption that concepts of sexual orientation [and gender identity] can be universally generalized across cultures and behaviors."[149]

The critiques canvassed in this section should not be misinterpreted as endorsing the deeply conservative arguments against the inclusion of SOGI on the UN human rights agenda made by a number of states parties, most prominently the 57-member OIC which, as noted above, staged a mass walkout to protest the inaugural debate on SOGI in the Human Rights Council in 2012.[150] These states tend to argue that the emergence of an international human rights agenda on sexual and gender diversity amounts to the imperialist imposition of Western norms and values about sexuality and gender identity on non-Western countries and communities in violation of the principles of respect for state sovereignty and non-intervention into the domestic affairs of member states enshrined in the UN Charter.[151] The basis for many of these arguments is that "indigenous homosexuality fails to exist in non-Western countries, and that the formation of gay communities is an undesirable byproduct of foreign influence and globalization."[152] For example, in its letter to the Human Rights

*Foucault's History of Sexuality and the Colonial Order of Things* (Durham: Duke University Press, 1995) at 7, arguing that the increased discourses of sex in eighteenth and nineteenth century Europe grew out of empire and colonialism, asking whether any of the subjects of that discourse could exist "without a racially erotic counterpoint, without reference to the l*ibid*inal energies of the savage, the primitive, the colonized – reference points of difference, critique and desire?"

[149] Katyal, *supra* note 147 at 99. See also Gilbert Herdt, *Same Sex, Different Cultures: Exploring Gay and Lesbian Lives* (Boulder, CO: Basic Books, 1997).

[150] The Organization of the Islamic Conference is the second largest intergovernmental organization after the UN, online: OIC <http://www.oic-oci.org/home.asp>. Its position against the inclusion of sexual and gender diversity on the human rights agenda at the UN dovetails with arguments made by the Vatican and Christian-right NGOs. The Christian right takes a position against sexual and gender rights grounded on the need to preserve traditional family values. On the Vatican's position regarding rights related to same-sex relationship recognition, see e.g. Congregation for the Doctrine of Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* (3 June 2003), online: The Vatican <http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html>. On the rise of the Christian right in international politics, see Buss & Herman, *supra* note 6 at 121-25.

[151] *UN Charter*, *supra* note 39.

[152] Katyal, *supra* note 147 at 99, noting, as a useful example, the statements of Namibian government official who publically stated, "[i]t is my considered opinion that the so-called gay rights can never qualify as human rights. They are wrongly claimed because it is inimical to true Namibian culture, African culture and religion." See PlanetOut News, *Namibian Call to 'Eliminate Gays'*, (2 October 2000), online: Gay & Lesbian Archives of the Pacific Northwest <http://www.glapn.org/sodomylaws/world/namibia/nanews005.htm>. Similarly, in 2011 Zimbabwean President Robert Mugabe responded to British Prime Minister David Cameron's announcement that Britain would consider the state of GLBTQ rights when determining whether a country would be eligible for foreign aid by saying that "homosexuality was inconsistent with African and Christian values" and Britain should not be imposing its human rights agenda on African nations. See Aislinn Laing, "Mugabe calls David Cameron 'satanic' for backing gay

Council opposing the 2012 SOGI panel on the basis that it would focus on "abnormal sexual behavior" having "nothing to do with human rights,"[153] the OIC argued in part:

> It must…be recognized that the international community agreed during the World Conference on Human Rights, held in Vienna in 1993, that while considering the issue of human rights, national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind. From this perspective, the issue of sexual orientation is unacceptable to the OIC.[154]

There can be little doubt that given "the history of modern colonialism, Western constructs of sexuality [and gender] have permeated debates in other countries and at the UN."[155] However, there is plenty of evidence that advocacy on the SOGI agenda has, from its earliest days, been driven by "a culturally and geographically diverse coalition of groups spanning the global South as well as the North."[156] For example, Françoise Girard notes that when the US-based International Gay and Lesbian Human Rights Commission (IGLHRC) spearheaded a petition to put sexuality on the agenda at the 1994 Beijing Conference, "[t]he geographical and cultural diversity of those who signed the petition was impressive, and it succeeded in countering the notion that sexual orientation was 'a Western or Northern issue.'"[157] Canada-based global advocacy organization ARC International, a key player in UN lobbying efforts on sexual and gender diversity,[158] has recently documented the transnational nature of advocacy efforts related to sexual and gender diversity at the UN in a video entitled "The Time has Come."[159] Ultimately, "the fact that such claims [related to sexual and gender diversity] are so various, recurrent, and scattered across cultures, societies, and historical times belies the assumption that they have any single provenance."[160]

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rights" The Telegraph (24 November 2011), online: The Telegraph <http://www.telegraph.co.uk/news/politics/david-cameron/8912132/Mugabe-calls-David-Cameron-satanic-for-backing-gay-rights.html>.

[153] *Pakistan's Letter*, *supra* note 110 at paras 6 and 8.

[154] *Ibid* at para 7.

[155] Girard, *supra* note 26 at 317. See also Katyal, *supra* note 147 at 98, noting the pervasiveness of these constructs is evident, for example, in the fact that the word "gay has been borrowed into Japanese, Portuguese, Spanish, Thai, Turkish and other languages, signifying its increasingly perceived universality."

[156] Corrêa, Petchesky & Parker, *supra* note 14 at 171.

[157] Girard, *supra* note 26 at 331, citing Susana T Fried & Ilana Landsberg-Lewis, "Sexual rights: From Concept to Strategy" in Kelly D Askin & Dorean M Koenig, eds, *Women and International Human Rights, Vol 3* (London: Transnational Publishers, 2001) 119. The IGLHRC petition at Beijing called on states parties to "recognize the right to determine one's sexual identity; the right to control one's body, particularly in establishing intimate relationships; and the right to choose if, when, and with whom to bear or raise children, as fundamental components of the human rights of all women regardless of sexual orientation."

[158] ARC is the only NGO focused on sexual and gender diversity with a fulltime presence in Geneva, the centre of the UN human rights system, online: ARC International <http://arc-international.net/about>.

[159] *Time Has Come*, *supra* note 97.

[160] Corrêa, Petchesky & Parker, *supra* note 14 at 154, concluding, in the context of addressing the more general claim regarding the "supposed Western bourgeois origins of [human] rights" that in any event, "origins are irrelevant in assessing the ethical validity of social justice claims (which human rights embody)."

Refusing the claim that SOGI rights should be rejected on the basis of their supposedly Western roots does not mean that the discourse of SOGI and its resonance across diverse local contexts must be immune from scrutiny. Assessing and improving the discourse requires questioning "the categories used to produce truth claims about groups or individuals in society."[161] Part of questioning the concepts of "sexual orientation" and "gender identity" must include taking seriously the insights of social constructionists who have demonstrated that sexuality and gender are relationally constructed and performed and may vary "in complex ways across time and place in a manner we are just beginning to apprehend, despite its deceptively imagined 'common sense' relationship [of sexuality and gender] to the body and allegedly unchanging and static nature."[162] This means that UN discourse must not take for granted that notions of "sexual orientation" and "gender identity" translate seamlessly across contexts, and must interrogate the implications of grounding international rights discourse on these specific, identity-based constructs.

Although in the "legal and academic texts which expound human rights law based on sexuality, identity is taken as a given,"[163] Sonia Katyal, in her compelling analysis of the export of sexual identity from the West, confirms that although "the performance of same-sex sexual conduct has occurred throughout recorded history, the emergence of a tangible gay and lesbian identity is an extremely recent development."[164] Katyal argues that while in many parts of the world it is assumed that sexual identity and sexual conduct or partner choice are essentially fixed and interchangeable,[165] the "presumed equation between sexual conduct, sexual orientation, and sexual identity, so prevalent in Western legal thought, tends to swiftly unravel when viewed in a cross-cultural framework"; that is, the framework within which international human rights discourse is created and intended to operate.[166]

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[161] Stephanie Tara Schwartz, Book Review of *Desiring Arabs* by Joseph Massad (2009) 7 Arab Media & Soc'y, online: The American University in Cairo <http://www.arabmediasociety.com/?article=708>.

[162] Miller & Vance, *supra* note 10 at 6. See also Julie Mertus, "The Rejection of Human Rights Framings: The Case of LGBT Advocacy in the US" (2007) 29:4 Hum Rts Q 1036 at 1063 who adds that the focus on identity categories problematically fails to reflect "the self-critique of identity within LGBT communities that reveals LGBT categories as socially constructed and contested." See also Rubin, *supra* note 131 at 275-278, describing sex as "a human product"; Janet Halley, "Sexual Orientation and The Politics of Biology: A Critique of the Argument From Immutability" (1994) 46:3 Stan L Rev 503 at 557; Kenneth Plummer, ed, *The Making of the Modern Homosexual* (Totowa, NJ: Barnes and Noble, 1981).

[163] Wayne Morgan, "Queering International Human Rights Law" in Carl Stychin & Didi Herman, eds, *Law and Sexuality: The Global Arena* (Minneapolis, MN: University of Minnesota Press, 2001) 208 at 216.

[164] Katyal, *supra* note 147 at 99. See also Hoad, *supra* note 7 at 564, concluding, "[l]esbian and gay identity can be figured as a Western import, although no one can claim a monopoly on acts that to a Western eye look homosexual"; and Frank Browning, *A Queer Geography* (New York: Farrar, Straus and Giroux, 1998) at 24 where he characterized GLTBQ pride as America's "global gay export" in gesturing to the prominence of Western voices in the conversation on global GLBTQ rights.

[165] Katyal describes this as the "substitutive" model of sexual identity/conduct.

[166] Katyal, *supra* note 147 at 100.

Numerous scholars have highlighted the challenges of applying or adapting Western notions of sexual orientation and gender identity across diverse local contexts. For example, [redacted] explains how "[d]eploying the 'coming out' narrative in Egypt — an entirely different social and cultural sphere from the US — [has] significantly different and negative consequences" when compared to "coming out" in Canada or the United States.[167] [redacted] highlights the inapplicability of much of the SOGI-based international human rights discourse, with its focus on public sexual identities and "coming out of the closet" in situations where sexual identity is unrecognized and public declarations of sexuality may attract the wrath of the state.[168] Similarly, Peter Drucker has highlighted the problems of translating human rights based on sexual identities in the global South;[169] Shannon Woodcock has considered how the imposition of identity-based discourses of "the sexual act as political identity"[170] constrain existing strategies of identification for Albanian and Romanian women who desire women;[171] and Rosalind Morris tracks the incompatibilities between binary constructions of sexuality and gender identity that characterize the Western model and the tripartite system of gender relations in Thailand.[172] It is clear that cultures and communities around the world "present a wide variety of sexual [and gender] identities unrecognizable in the West"[173] that do not readily map onto the categories of sexual orientation and gender identity.[174]

In addition to disconnects between SOGI and local concepts of sexual and gender diversity, communities and individuals who "would never conceive of identifying [as GLBTQ] and yet who routinely engage in same-sex sexual activity"[175] or non-conforming gender expression may be left out of human rights discourse based on the SOGI identity categories.[176] For example, in his

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[167] [redacted]
See also Hossam Bahgat, "Explaining Egypt's Targeting of Gays" *Middle East Report* (22 May 2006) online: Middle East Report Online <http://www.merip.org/mero/mero072301>.

[168] [redacted]

[169] Peter Drucker, ed, *Different Rainbows* (London: Gay Men's Press, 2000) at 71. See also Peter Drucker, "'In the Tropics There is No Sin': Sexuality and Gay-Lesbian Movements in the Third World" (1996) 218 New Left Rev 75.

[170] Shannon Woodcock, "Globalization of LGBT Identities: Containment Masquerading as Salvation or Why Lesbians have Less Fun" in Mihaela Frunza & Theodora-Eliza Vacarescu, eds, *Gender and the (Post) 'East'/'West' Divide* (Cluj-Napoca: Editura Limes, 2004) at 171.

[171] *Ibid*.

[172] Rosalind Morris, "Three Genders and Four Sexualities: Redressing the Discourses on Gender and Sexuality in Contemporary Thailand" (1994) 2:1 Positions 15.

[173] Mertus, *supra* note 162 at 1064.

[174] *Ibid*.

[175] Katyal *supra* note 147 at 129.

[176] Herdt, *supra* note 149 at 4 explains that some people may "regard themselves as 'heterosexuals', 'straights', or just 'human beings' who on occasion participate in homoerotic encounters for various reasons, including pleasure, money, social expectations, and the absence of other sexual opportunities." See e.g. Steven O Murray & Will Roscoe, "Diversity and Identity: The Challenge of Male Homosexualities" in Steven O Murray & Will Roscoe, eds, *Boy Wives and Female Husbands: Studies in African Homosexualities*

totalizing critique of the effect of Western human rights discourses on Arab discourses of sexuality, particularly same-sex intimacy between men, Joseph Massad finds:

> [a]lthough members of these classes who engage in same-sex relations have more recently adopted a Western identity (as part of the package of the adoption of everything Western by the classes to which they belong), they remain a miniscule minority among those men who engage in same-sex relations and who do not identify as "gay" nor express a need for gay politics.[177]

Rajesh Dhir likewise points out that in India there are at least four categories of men who have sex with men: "[h]omosexuals (self-autonomous gay men); [b]isexuals (behaviourally bisexual men who have sex with men and women); MSM out of economic compulsion (bar boys, sex workers); and, [e]unuchs (Hijras)."[178] Do some of these communities risk falling outside the boundaries of SOGI discourse because same-sex conduct may not align with a clear sexual orientation?

Conditioning human rights discourse on SOGI has the potential to exclude groups of people who need access to rights-based protections or entitlements, including those whose sexual or gender identities do not fall neatly under the umbrella of SOGI, and those at risk of human rights violations based on same-sex or gender non-conforming conduct unrelated to sexual orientation or gender identity. This disconnect risks the imposition of "external [identity] categories onto widely divergent peoples"[179] giving rise to what Katyal calls the burden of identity.[180]A discourse based on SOGI may force people to assume or declare identities that do not naturally apply or exist within their contexts just so they can access human rights. Massad provides an indictment of the burden of identity created by the globalization of human rights discourse on sexual and gender diversity in the following terms:[181]

> In contradistinction to the liberatory claims made by the Gay International [aka Western human rights discourse] in relation to what it posits as an always already homosexual population…it is the very discourse of the Gay International, which both produces homosexuals as well as gays and lesbians, where they do not exist

(New York: Palgrave, 1998) at 267.

[177] Joseph Massad, *Desiring Arabs* (Chicago, IL: University of Chicago Press, 2007) at 173. Massad further found this point "is conceded by the Gay International whose descriptions of the sexual practices of Arab men…stress the 'prevalence' of same-sex contact while acknowledging he dearth of 'gay' politics or identification."

[178] Rajesh Dhir, "Men Who Have Sex with Men and the Law" (Paper delivered at the Lawyers Collective HIV/AIDS Unit Workshop for Judges, Mumbai, 7-8 January 1999), [unpublished].

[179] Katyal, *supra* note 147 at 175. See also Baden Offord & Leon Cantrell, "Homosexual Rights as Human Rights in Indonesia and Australia" (2001) 40:3-4 J of Homosexuality 233.

[180] Katyal, *supra* note 147.

[181] Massad, *supra* note 177 at 161 describes the "missionary task" assumed by "[w]estern male white-dominated organizations" at the UN "to defend the rights of 'gays and lesbians' all over the world and to advocate on their behalf."

> and represses same-sex desires and practices that refuse to be assimilated into its sexual epistemology."[182]

In other words, Massad finds that the reification of identity categories related to sexual orientation "has material consequences for the subjects they label"[183] in at least two ways: the discursive creation of new subjects through the imposition of previously unknown sexual identities (i.e. "gay"); and the concurrent stifling of existing sexual identities and expressions that cannot find recognition in the landscape created by identity-based discourse.[184] These are troubling possibilities for the SOGI agenda.

## C. Adding SOGI to Existing Human Rights Norms

Like most domestic and regional rights frameworks, the UN system "tends toward responding to fixed and non-intersecting categories of identity" in creating and enforcing international human rights.[185] One need only consider the contours of the UN treaty body system to see how many human rights treaties and their controlling bodies are focused on groups that share some identity thought to be objectively discernable like race, gender or disability.[186] Because of the receptivity of the UN human rights system to arguments that a discernable group with a shared identity requires human rights protections and entitlements, mobilization around identity categories is a logical strategy choice.[187] As the chronology in Part I demonstrates, SOGI purports to define an identity-based constituency and facilitates incorporation of members of this constituency into settled language on existing international human principles like non-discrimination, health and privacy.[188] While focusing on the incorporation of the category of SOGI is good strategy within the UN system,

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[182] *Ibid* at 162-63.

[183] Massad's arguments have been subject to important critiques see e.g. Schwartz, *supra* note 161; Rayyan Al-Shawaf, "Desiring Arabs" (2008) 12 Democratiya 103.

[184] Schwartz, *supra* note 161.

[185] Alice M Miller, "Human Rights and Sexuality: First Steps Toward Articulating a Rights Framework for Claims to Sexual Rights and Freedoms" (1999) 93 ASIL PROC. 288. See e.g. Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13:1 CJWL 37 (on the categorical approach in the Canadian context).

[186] Dreyfus, *supra* note 142 at 37 stated, "[t]raditional jurisprudence requires that individuals and their rights be classified into discrete categories, 'even though such categories [may] not reflect reality'", citing Julie A Greenberg, "The Roads Less Travelled: The Problem with Binary Sex Categories" in Currah, Juang & Price Minter, eds, *supra* note 136, at 51, 55.

[187] Mertus, *supra* note 162 at 1063.

[188] See e.g. Human Rights Committee, *Toonen*, *supra* note 3; Commission on Human Rights, *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UNESCOR, 60th Sess, UN Doc E/CN.4/2004/49, (2004); in 2009, the Committee on Economic, Social and Cultural Rights, the treaty body responsible for monitoring the International Covenant on Economic, Social and Political Rights, confirmed in General Comment No 20 that "other status" as recognized in article 2(2) of the ICESPR includes sexual orientation and gender identity are included in the prohibited grounds of discrimination: Committee on Economic, Social and Cultural Rights, *General Comment No 20*, UNESC, 42nd Sess, UN Doc E/C.12/GC/20, (2009) at para 32.

doing so facilitates the "additive" norm-creation process of simply adding a newly defined group to established discourses of human rights without querying or disturbing the established discourse itself.[189] This carries particular risks to the evolution of the discourse, both conceptual and practical.

First, the "additive" formula presumes compatibility between settled human rights frameworks and institutions – themselves shaped by dominant and often relatively simplistic understandings of sex and gender – and complex, contested and highly contextual questions about sexual and gender diversity. Mindy Roseman and Alice Miller describe UN treaty bodies as "at times, remarkably simplistic in their understanding of sexuality and rights"[190] and argue that the lack of conceptual clarity and consistency in emerging international standards on the relationships between sex, gender, sexual orientation, gender identity, gender expression and intersex can be traced in part "to the limited 'folk knowledge' of many experts in human rights bodies" on these issues."[191] For example, Tom Dreyfus notes that when SOGI is added to the existing *CEDAW* framework, which relies on a binary model of sex and gender (man/woman), foundational questions about the compatibility between that framework and the complex experiences of trans and intersex people go untroubled:

> The lived experiences of transgender, intersex and other gender non-conforming people demonstrate that it is necessary to complicate conceptions of sex and gender beyond the normalised binaries of male/female or masculine/feminine. Laws such as *CEDAW* that assume a binary model of sex cannot be "universal" because "[t]he bodies of the millions of intersex people have taken a combination of male and female forks and have followed the road less travelled."[192]

What happens at the intersections of existing rights frameworks and issues of sex and gender diversity complicates the ideal that once SOGI is inserted into a given human rights framework, rights will simply flow to the people who need them, when and where they are required.

Second, because the UN human rights system focuses on categorical guarantees monitored by treaty bodies that are highly fragmented, the emerging SOGI discourse tends to focus singularly on "sexual orientation" and "gender identity" in distilling and describing the human rights concerns

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[189] Sherene Razack, "Beyond Universal Woman: Reflections on Theorizing Differences Among Women" (1996) 45 UNBLJ 209 at 211 explained the "additive" model of addressing difference between women as: "take what happens to White, heterosexual, able-bodied, middle-class women and graft on the experience of racism, homophobia, abelism and class exploitation."

[190] Roseman & Miller, *supra* note 13 at 372.

[191] *Ibid* at 326. See also Linda Mealey, *Sex Differences: Development and Evolutionary Strategies* (Waltham: Academic Press, 2000) at xii-xiv, explaining how the "folk knowledge" of gender and sex differences is often inaccurate, incomplete, and perpetuates sexual stereotypes.

[192] Dreyfus, *supra* note 142 at 36-37 citing Greenberg, *supra* note 186 at 55.

at issue.[193] This kind of single-axis framework for addressing human rights violations based on a singularly-defined identity tends to "privilege notions of a clear, coherent and unitary identity over conceptions of blurred identifications."[194] Accordingly, individuals who experience discrimination on the basis of multiple, intersecting or interlocking axes of discrimination must distil complex social identities and experiences into a single experience. Single-axis analyses can lead to overly-simplified understandings of human rights claims and claimants, because those "who are discriminated against in complex ways will fail if they cannot simplify the story of who they are and of their unequal treatment so that it resonates with the…narrower understanding of the category [i.e. SOGI] grounding their claim."[195]

Amanda Swarr and Richa Nagar, for example, consider the ways in which development theorists and feminist theorists often understand sexual and gender identities largely in isolation, divorced from "struggles around resources, livelihoods, and sociopolitical empowerment."[196] This approach risks rendering invisible "not only the experiences of a vast majority of poor women in same-sex relationships living in the global South but also the structural processes that mold sociosexual practices and struggles."[197] A discourse that structurally excludes consideration of critical aspects of the constitution and performance of sex, gender, sexuality and gender identity will necessarily oust the experiences of some individuals and communities and risks embedding a partial discourse.[198]

Third and finally, the "additive" formula of norms-generation at the UN facilitated by the use of SOGI facilitates the emergence of a distinct patchwork of human rights[199] based on various doctrinal guarantees including privacy, health and non-discrimination.[200] While these sites have

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[193] Roseman & Miller, *supra* note 13 at 372.

[194] Waites, *supra* note 119 at 147.

[195] Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 Queen's LJ 179, making this point in the context of Canadian anti-discrimination law.

[196] Amanda Lock Swarr & Richa Nagar, "Dismantling Assumptions: Interrogating Lesbian Struggles for Identity and Survival in India and South Africa" (2003) 29:2 Signs 491 at 492.

[197] *Ibid*.

[198] Judith Butler, "Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory" in Sue Ellen Case, ed, *Performing Feminisms: Feminist Critical Theory and Theatre* (Baltimore: John Hopkins University Press, 1990) 270 at 271.

[199] This reflects a general tendency in international human rights law toward fragmentation, sometimes called "the silo effect". The trend toward solitary action and lack of dialogue between the various UN treaty bodies and between treaty and political bodies is in part due to the lack of final arbiters across political and treaty bodies on the status of any given issue.

[200] Roseman & Miller, *supra* note 13 at 372, conclude: "[t]he diverse frames of the treaties inevitably make for distinct approaches to sexual rights questions… [t]his fractured process is duplicative and exhausting to some bureaucrats and the NGOs that work across treaties… [and] militates against NGO coalitional work that draws attention to the common repressive powers functioning through rules that criminalize sex outside of marriage for different and same-sex persons, and rules that seek to penalize abortion and homosexuality as expressions of gendered revolt."

been variously productive homes from which to build momentum around rights related to sexual and gender diversity, ongoing fragmentation means that rights are conceptually fragile and risk uncertainty and inconsistency in their application. Alice Miller and Mindy Jane Roseman explain that the multiplicity of approaches to questions of human rights related to sexual and gender diversity means that "[t]he resulting norms neither necessarily contribute to protecting the full range of potential sexual rights nor encompass the idea of the fully human person envisioned by human rights."[201] Miller and Roseman find that the "ideal functional response to the *ad hoc* aspect of the treaty body jurisprudence could be a joint general comment across the treaty bodies on sexual rights"[202] but conclude that this outcome is unlikely because of the general reluctance of UN state parties to pursue significant treaty body reform.[203]

This section has suggested that the discourse of SOGI gives rise to a new matrix of sex and gender diversity at the UN that is hierarchical (giving lesser or limited attention to issues related to gender identity and expression and intersex people); that fails to reflect sex and gender subjectivities and practices across contexts (because SOGI is grounded in Western-based identity-based categories); and that lacks a unified and predictable normative home (because SOGI facilitates the simple addition of "sexual orientation" and "gender identity" to existing human rights principles). The danger inherent in the realization of these risks is the systematic exclusion from human rights protections and entitlements of certain communities whose conduct or identities do not fit neatly within the boundaries of this discourse.

## IV. Implications for Human Rights Policy and Practice

Every human rights project in the UN forum faces its own unique set of practical and conceptual challenges, and the agenda on sexual and gender diversity is no exception. The argument pursued in this paper suggests that in evaluating progress in the field of human rights, it is important to take a critical view not only of human rights outcomes, but also of the discourses through which those outcomes are produced; discourses centred on a key "term of inclusion," like SOGI. The intended and unintended work that these key terms do in creating the legal subjects regulated by human rights, defining the boundaries of inclusion and exclusion and influencing advocacy and strategy, makes them foundational

[201] *Ibid* at 373.

[202] *Ibid* citing Office of the High Commissioner for Human Rights, *The United Nations Human Rights Treaty System, Fact Sheet No 30 Rev 1*, (New York and Geneva: UN, 2012), online: Office of the High Commissioner for Human Rights <www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf>.

[203] *Ibid*. See also Manfred Nowak, "The Need for a World Court of Human Rights" (2007) 7 Hum Rts L Rev 251.

to human rights processes and outcomes and worthy of attention and careful critique. This final section considers the implications of the foregoing analysis for human rights policy and practice.

The risks outlined above do not automatically lead to the conclusion that SOGI ought to be abandoned in human rights struggles, nor do they necessarily suggest some fundamental, insurmountable dissonance between human rights frameworks and issues of sexual and gender diversity. Indeed, there are compelling strategic arguments in favour of maintaining SOGI as the touchstone of the human rights agenda related to sexual and gender diversity. One might argue, for example, that notwithstanding its shortcomings, SOGI has been remarkably productive in making significant inroads in the UN arena over a relatively short period of time. To turn around and shift the framework now risks undoing all the positive outcomes built upon SOGI.

If SOGI were ousted, another "term of inclusion" would inevitably emerge. Katyal argues that human rights related to sexual diversity should advance beyond identity-based protections toward a unified framework premised on a robust right to sexual autonomy or sexual self-determination that "centers on the freedom to seek sexual fulfillment and freedom from sexual coercion."[204] Chaobang recommends sexual diversity rights as "a conceptual base for human rights framing, or at least perhaps a stepping stone towards a better international paradigm,"[205] arguing that the concept of sexual diversity represents "a universal common denominator, that *all* sexual identities, orientations and expressions…must be protected by the human rights system."[206] While these proposed terms of inclusion may mitigate some of the risks of exclusion inherent in the existing SOGI-based system, they would nonetheless give rise to a new set of costs and benefits, of boundaries and exclusions. For example, Annamarie Jagose considers attempts to situate the term "queer" as a universal category or descriptor around which to organize rights related to sexual and gender diversity, but concludes that many people of diverse sexual and gender identities, orientations or expressions "are neither interpellated by the term nor persuaded that the new category describes or represents them."[207]

In any event, even if one concluded that SOGI *should* be done away with in favour of some alternative framing, I agree with Vanja Ilamzic who finds, "[s]exual orientation and gender identity are firmly established categories in international human rights law."[208] Accepting that SOGI is and will remain the

[204] Katyal, *supra* note 147 at 169 referencing Stephen J Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Cambridge: Harvard University Press, 2000).
[205] Chaobang, *supra* note 19 at 108.
[206] *Ibid,* adding the caveat that sexual diversity rights would not extend to protect sexual coercion or abuse.
[207] Annamarie Jagose, *Queer Theory: An Introduction* (New York: NYU Press, 1997) at 103, made these comments primarily in the context of the North American advocacy and organizing.
[208] Vanja Ilamzic, "The Case of 'Queer Muslims': Sexual Orientation and Gender Identity in International

"term of inclusion" in the discourse of sexual and gender diversity at the UN, the challenge then becomes how to "use that language very carefully, very self-critically, and always with an eye to deconstructing its implicit exclusions."[209] Recalling that the gradual incorporation of SOGI into the discourse of human rights does not "signal the unqualified dissipation of inequalities in human rights relating to sexuality and gender"[210] but instead indicates a re-constitution of the heterosexual matrix in human rights law and discourse; the next phase of engagement with SOGI requires new thinking about how the term can be deployed in ways that are more inclusive, more context-specific and lead to outcomes that are less fragmented and more coherent.[211]

Matthew Waites concludes that because SOGI is firmly established as part of the human rights lexicon:

> [t]hose allied to a broadly conceived ["global queer politics"]…need to switch from unproblematized, undefined uses of ["sexual orientation and gender identity"] to taking the opportunities that arise to offer careful, explicit definitions of the concepts that are compatible with the diversity of sexual and gender subjectivities that exist in the global arena.[212]

Waites' prescription is no small task, particularly in the UN environment where "a pragmatic approach towards human rights discourse remains important… [because] we must not lose sight of the goal to establish the universality of sex and gender human rights in order to improve the lives of those people who continue to be discriminated against by their absence."[213]

One way to conceptualize the critical application of SOGI – that is, continued strategic reliance on SOGI while maintaining a critical posture in relation to its shortcomings – is through the lens of postcolonial theorist Gayatri Chakravorty Spivak's strategic essentialism. Strategic essentialism refers to a strategy whereby a community or group invokes a collective, problematic category that often flattens difference and exclusions, like SOGI, in order to achieve a political or strategic goal, while at the same time criticizing the category as conceptually tenuous or problematic. Strategic essentialism involves "the acknowledgment of the dangerousness of something one cannot not use."[214] Strategic essentialism has the benefit of maintaining the existing, SOGI-based discourse, while at the same time creating more space for dialogue and discourse about the dangers and risks of SOGI itself.

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Human Rights Law and Muslim Legal and Social Ethos" (2011) 11:2 Hum Rts L Rev 237 at 251.

[209] Corrêa, Petchesky & Parker, *supra* note 14 at 161 (in the context of human rights language generally).

[210] Waites, *supra* note 119 at 153.

[211] *Ibid*.

[212] *Ibid*. Importantly, Waites acknowledges that sometimes strategy will dictate avoidance rather than engagement with definitional debates in certain contexts. See also Girard, *supra* note 27.

[213] Dreyfus, *supra* note 142 at 49-50. See also Gayatri Chakavorty Spivak, *Outside the Teaching Machine* (New York: Routledge, 1993) at 4, confirming, "[a] strategy suits a situation; a strategy is not a theory".

[214] *Ibid* at 5.

There will of course continue to be live questions about how to manage these strategic maneuvers in relation to short and long term goals, for the "tension between short-term reform and long-term transformation is a problem that has haunted every progressive social movement; on some levels, we cannot escape it."[215] For example, while privacy rights enshrined in various international instruments have served as the normative basis from which the UN has condemned the criminalization of consensual same-sex sexual behavior in countries around the world,[216] privacy as a defining right for sexuality also tends to reinvigorate the naturalized, traditional ideal that "good" sexuality belongs in the bedroom and only then is worthy of protection from state interference. This risks undoing years of feminist advocacy aimed at re-conceptualizing the public-private divide to reveal violence and abuse in the home, obscures the ways that sexuality is created and negotiated through both public and private spaces, and fails to capture discrimination that occurs in the public sphere on the basis of sexuality.[217] Extending human rights protection to same-sex conduct through the vehicle of privacy may serve critical short-term human rights goals like ending the criminalization of same-sex behavior. At the same time, privacy may impede longer-term aims like addressing the public dimensions of homophobia and transphobia that function to make those perceived to be violating the norms of sexual and gender expression susceptible to public violence and harassment.[218]

In my view, "[e]nsuring that…sex and gender human rights…are incorporated within the bodies of binding international legal instruments remains paramount."[219] Thus, the most important insight to be gleaned from the analysis presented here is the value of keeping critical questions on the agenda as human rights related to sexual and gender diversity continue to evolve at the UN. The question of what happens when SOGI is introduced "into mainstream human rights discourse, [and is] subject to interpretation in the context of broader gender and sexuality discourses operating in global governance and a fragile emergent global civil society"[220] should remain at the forefront of the debate.[221] Meaningful engagement with this difficult question increases the possibility that human rights processes and outcomes will be

[215] Corrêa, Petchesky & Parker, *supra* note 14 at 157.
[216] See e.g. Human Rights Committee, *Toonen*, *supra* note 3.
[217] See e.g. Celina Romany, "Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law" (1993) 6 Harv Hum Rts J 87; Ruth Gavison, "Privacy and the Limits of Law" (1980) 89:3 Yale LJ 421; Sally Goldfarb, "Violence Against Women and the Persistence of Privacy" (2000) 61 Ohio St LJ 1.
[218] See Katyal, *supra* note 147 at 166 noting that in India activists have "implicitly recognized that a privacy-based strategy towards constitutional protection is much more inclusive than a anti-discrimination model because it does not require a certain self-identification… to access its protections."
[219] Dreyfus, *supra* note 142 at 49.
[220] Waites, *supra* note 191 at 152-53.
[221] *Ibid*.

attentive to the risks of exclusion canvassed above. In the same moment that we celebrate the progress made by SOGI in advancing human rights related to sexual and gender diversity, we must continue to engage the potential risks and unintended consequences of relying on SOGI to ground international human rights discourse.

## V. Conclusion

This paper began by mapping the emergence of the descriptor "sexual orientation and gender identity," or SOGI, as the key conceptual vehicle through which issues related to sexual and gender diversity have been incorporated into international human rights discourse at the UN. I then inquired into some of the risks or tensions bred by the reliance of this discourse on SOGI as the touchstone of the emerging human rights agenda, outlining three related, but specific critiques: the sidelining of human rights issues related to gender identity and expression and intersex people; the tension between the dominant understanding of SOGI as a Western identity category and the framing of universal rights; and the fragmentation of rights resulting from the "additive" formula of norms development. Finally, I characterized SOGI as an example of strategic essentialism in the international realm and identified some of the challenges arising from these critiques as requiring more and different engagements with SOGI.

Ultimately, these insights reveal as much about the character of the international human rights system as about the particularities of ongoing struggles related to sexual and gender rights; human rights are "fluctuating in development in light of local politics and use, and possibly varying in impact on the ground, yet couched in a global language of universal entitlements and inalienable rights and forged in settings with international law rules."[222] Balancing the tensions that inevitably arise in all kinds of human rights claims-making – between the local and the global, the individual and the collective – all in the context of the state-centric, highly politicized UN system, is an ever-evolving process. Part of that process must include careful attention to the possible unintended consequences of relying on certain discursive mechanisms to facilitate the introduction of a new community and a new set of human rights issues, into the realm of international human rights.

[222] Roseman & Miller, *supra* note 13 at 375.