

Securing Sexual Orientation and Gender Identity Rights within the United Nations Framework and System: Past, Present and Future

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*You, at the United Nations, have a particular role to play. You have a responsibility. Lesbians, gays, bisexuals, transgender people are equal members of the human family whose rights you have sworn to uphold. Those who face hatred [and] violence look to you for protection (...) Do not fail them.*²

Desmond Tutu

Introduction

Since the very emergence of human rights, “the controversy over which should be considered human rights, and to whom they should extend has thrived”.³ Those of diverse sexual orientation and gender identity (SOGI) continue to fight amidst such controversy for recognition of their rights.⁴ In almost every region of the world, people face persistent human rights violations by reason of their actual or perceived SOGI.⁵ This ranges from targeted violence to discrimination in all aspects of society.⁶ The formal protection afforded to those of diverse

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 - 2 Tutu, D., “Video Message: Ending Violence and Criminal Sanctions based on Sexual Orientation and Gender Identity”, 17 September 2010, available at: <http://arc-international.net/global-advocacy/human-rights-council/hrc15/panel-tutu-en>.
 - 3 Persad, X.B.L., “An Expanding Human Rights Corpus: Sexual Minority Rights As International Human Rights”, *Cardozo Journal of Law and Gender*, Vol. 20, 2009, p. 337.
 - 4 The terms “sexual orientation” and “gender identity” are used throughout this article to mirror the language frequently proliferated within the UN. The extent to which sexual orientation and gender identity (SOGI) includes intersex persons has been subject to some debate and for the purposes of space will not be included in this article. For a useful discussion of the terms “sexual orientation” and “gender identity”, see Waites, M., “Critique of ‘Sexual Orientation’ and ‘Gender Identity’ in Human Rights Discourse: Global Queer Politics Beyond the Yogyakarta Principles”, *Contemporary Politics*, Vol. 15, 2009.
 - 5 O’Flaherty, M., “Sexual Orientation and Gender Identity”, in Moeckli D., Shah S. and Sivakumaran S., (eds.) *International Human Rights Law*, Oxford University Press, 2010, p. 331.
 - 6 O’Flaherty, M. and Fisher, J., “Sexual Orientation and Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles”, *Human Rights Law Review*, Vol. 8, 2008, pp. 207–14.

SOGI varies widely throughout the world. Recent trends have been remarkably antagonistic; whilst steps towards same-sex marriage rights (often purported to be one of the last triumphs of equality) have been increasingly endorsed,⁷ the spread of “homosexual propaganda” bills has been nearly as swift.⁸

Thus the global rights movement for SOGI rights has been defined by “periods of advancement matched with regression”.⁹ This article reflects on whether international human rights law has made room for the development of SOGI rights, with a focus on the UN framework and system; given that the UN, as the foremost progenitor in the development and protection of international human rights, holds the most relative importance. In order to deduce what room has been made for the development of SOGI rights, this article will consider both the development of the law in this forum, and the extent of integration within the monitoring mechanisms.

Section 1 will briefly discuss the applicability of SOGI rights in the current UN framework. The aim of section 2 is to highlight the limited protection afforded by current international law, based on the most authoritative proclamations within treaty and political bodies. This will be followed, in section 3, by an assessment of the extent to which the UN system has made a concerted effort to continually and adequately address violations of SOGI rights. Analysis will draw on the most relevant monitoring bodies in this regard: the Human Rights Committee (HRC) in its concluding observations; the special procedures mechanisms; and the Universal Periodic Review (UPR). In concluding that international human rights law has made notable, though insufficient, room for SOGI rights within the UN framework and system, section 4 draws on this analysis in looking at future progression. This article first considers the merits of a specialised convention; however, it recommends advocacy towards a dedicated special procedure as a more constructive route to advancing and securing SOGI rights.

1. The Application of Sexual Orientation and Gender Identity to the United Nations Framework

Where international human rights law previously remained silent on issues relating to SOGI, increasing interaction within the last few decades has been met with contention. Before analysing current protection and integration, this section briefly engages with some of the distinct challenges faced, and demonstrates the valid application of SOGI rights within this framework.

7 Most recently, the landmark case which stated the right to marry in the US is guaranteed to same-sex couples. See *Obergefell et al. v Hodges, Director, Ohio Department of Health, et al.* 576 US (2015).

8 For instance, Tanzania and Belarus: International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), *State Sponsored Homophobia*, 2014, p. 9.

9 Narayan, P., “Somewhere Over the Rainbow...International Human Rights Protections for Sexual Minorities in the New Millennium”, *Boston University International Law Journal*, Vol. 24, 2006, p. 316.

The foundational instruments of international human rights law consists of two binding foundational treaties, the International Covenant on Civil and Political Rights (ICCPR)¹⁰ and the International Covenant on Economic Social and Cultural Rights (ICESCR).¹¹ As well as these, the Universal Declaration of Human Rights (UDHR)¹² is a key document from which the treaties were derived, and the principles of which they seek to protect. These instruments provide the grounding on which international human rights law is principally based, referencing important principles of non-discrimination and equality,¹³ as well as universality, inalienability and indivisibility of rights.¹⁴

Most notably, the Article 26 non-discrimination provision in the ICCPR provides a demonstrative list of prohibited categories, such as “race, colour, sex”, whilst further providing for the inclusion of “other status”. Whilst SOGI “is on its face an obvious case of an ‘other status’ by which human beings are singled out for invidious discrimination”,¹⁵ in practice this incorporation has garnered much resistance.

Concerns have surfaced regarding the inherent compatibility of SOGI related issues within a “category”. This firstly involves the perception that SOGI cannot be adequately defined within the static nature required by a human rights framework. The inherent reliance on binary categories of “male” and “female” which appear “deeply embedded in human rights discourse” may present a number of issues.¹⁶ For instance, where terms such as lesbian, gay, bisexual or transgender (LGBT) have undoubtedly evolved from western language, such terms necessarily excludes those whom this category does not readily encompass. There are recognised instances “where sexuality and gender forms elude Western categories”, and where this occurs it necessarily results in “problematizing the Western gender/sexuality distinction itself”.¹⁷ Even the seemingly inclusive terms of “sexual orientation” and “gender identity” appear to ignore those whose behaviour does not necessarily succeed their identity, such as “men who have sex with men” but do not identify as “gay”.¹⁸

10 International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171, 16 December 1966.

11 International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 UNTS 3, 16 December 1966.

12 UN General Assembly, Universal Declaration of Human Rights (UDHR), UN Doc. A/810, 10 December 1948.

13 UDHR, Articles 1, 2 and 7; ICCPR, Articles 2 and 26; and ICESCR, Article 2.

14 UDHR, Preamble; ICCPR, Preamble; and ICESCR, Preamble.

15 Donnelly, J., “Non-Discrimination and Sexual Orientation: Making a Place for Sexual Minorities in the Global Human Rights Regime”, in Baehr, P., Flinterman C. and Senders M., (eds), *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights*, Royal Netherlands Academy of Arts and Sciences, 1999, p. 20.

16 Correa, S., Petchesky, R. and Parker, R., *Sexuality, Health and Human Rights*, Cambridge University Press, 2008, p. 204.

17 See above, note 4, p. 139.

18 *Ibid.*

Those advocating for SOGI rights may find difficulties with tackling disputes over incompatibility with the human rights framework, with some proponents opting towards grounds based approaches, and seeking to combine SOGI with existing movements. One example is the inclusion of SOGI with reproductive rights, under a more expansive view of “sexual and gender rights”. Arguably, such an approach may ignore the historical traction to which identity politics are tied, as well as undesirably blur the boundaries between gender roles.¹⁹

However, to the extent that “SOGI” does not adequately fit its purpose, Waites remarks that this does not necessarily require abandonment of such concepts; but rather countering with political analysis “in the context of recognition of their dominant meanings” in order to regularly demarcate and address its limits.²⁰ Where a more fluid approach is taken, it helps to encompass the need for language that carries the capacity for change, whilst retaining a self-critical perspective.²¹ Such an approach is not an inherent obstacle to its codification, however, as this has been done elsewhere: “the problem of naming unstable categories is by no means unique to the area of sexuality (...) ‘race’ and ‘gender’ are also volatile social constructs rather than ‘fixed’ or ‘natural.’”²²

Thus, language encompassing SOGI as a category does not render it inherently incompatible to protection; as such diversity exists, the limited “mandate of human rights allows us to identify elements of unity, and to invoke these for the specific goal of promoting fundamental rights”.²³ Notwithstanding this, where such language is relied upon, it could valuably be coupled with the promotion of understanding cross-cultural distinctions, particularly where states attempt to limit this by protesting the existence of any such groups; as people of diverse SOGI, but equally diverse designation, are existent in every society throughout the world.²⁴ Indeed, such variations exist between national contexts for those other prohibited categories. It is true, however, that this “difficulty of naming sexual dissidents as subjects of international standards has reinforced indivisibility and lack of protection”.²⁵

There is no inherent reason for those of diverse SOGI to be excluded from protection under the “other” category, and to the extent that such explicit language is required for protection, this would signify an endemic failure of the international human rights system.

19 Kukara, E., “Sexual Orientation and Non-Discrimination” *Peace Review: A Journal of Social Justice*, Vol. 17, 2006, p. 186.

20 See above, note 4, p. 151.

21 Petchesky, R., “The Language of ‘Sexual Minorities’ and the Politics of Identity”, *Reproductive Health Matters*, Vol. 17, 2009, p. 109.

22 Saiz, I., “Bracketing Sexuality: Human Rights and Sexual Orientation – A Decade of Development and Denial at the UN”, *Sexuality Policy Watch*, 2005, p. 18.

23 Heinze, E., *Sexual Orientation: A Human Right*, Martinus Nijhoff, 1995, p. 29.

24 See above, note 19, p. 186.

25 See above, note 22, p. 18.

Indeed, it has been said that “if human rights doctrine cannot meet the needs of a minority persecuted on the basis of its status, the doctrine itself may well find claims to universality are undermined”.²⁶

SOGI issues are innately compatible with, and applicable within, existing international human rights protection. Whilst tactics have been used to delay the development of SOGI rights within the human rights framework, it is essential to remember that “[f]or all its shortcomings, international human rights law, today, is the best existing framework not only for attempting to implement, but also for understanding and debating.”²⁷

2. Development and Status of Sexual Orientation and Gender Identity Rights

Following the lack of explicit inclusion of SOGI rights in treaties, the development of relevant law that has ensued has been both patchy and slow. Limited progress has been made within relevant treaty bodies and political forums; and these are considered the foremost authoritative sources in determining the status of these rights.

a. HRC Jurisprudence and Authoritative Commentary

The HRC is the body that oversees the implementation of the ICCPR, and can receive individual complaints subject to ratification of an optional protocol.²⁸ The communications of the HRC can carry sufficient weight, and are often deemed to have a quasi-judicial nature. The ICCPR will be the main focus of the treaty bodies here as the most widely ratified treaty covering the broadest range of rights relevant to SOGI,²⁹ which has led to its collective jurisprudence being considered to provide the “strongest explicit protections against discrimination on the basis of sexual orientation”.³⁰

The first express consideration of sexual orientation rights dates to 1982, in *Hertzberg v Finland*,³¹ where the HRC dismissed an Article 19 claim for freedom of expression, admitting a wide benchmark by stating that as “public morals differ widely (...) a certain margin of discretion must be accorded to the responsible national authorities”.³² It wasn’t until 1994 that real progress regarding sexual orientation rights was made in this forum, in the landmark

26 See above, note 19, p. 186.

27 See above, note 23, p. 11.

28 First Optional Protocol to the ICCPR, 999 UNTS, 19 December 1966.

29 Some other treaty bodies, such as the Committee on the Elimination of Discrimination against Women that have addressed SOGI, will not be covered in this article.

30 See above, note 19, p. 183.

31 UN Human Rights Committee (HRC), *Hertzberg et al v Finland*, Communication No. 61/1979, UN Doc. CCPR/C/OP/1, 2 April 1982.

32 *Ibid.*, Para 10.

case of *Toonen v Australia*.³³ This challenged a Tasmanian sodomy law prohibiting consensual same-sex conduct, with the HRC ruling that the relevance of Article 17 privacy rights in this regard was “undisputed”, and rejecting the Tasmanian government’s morality claims. This was the first finding that states did not hold exclusive jurisdiction on such “moral issues”, and was hailed as the first “juridical recognition of gay rights on a universal level”.³⁴

However, basing the decision on privacy, the HRC merely affirmed the relevance of the Article 26 prohibition of discrimination – a seemingly missed opportunity. In addition, its conclusion that “sexual orientation” fell within the prohibited category of “sex” was considered an easy option in bypassing the issue of status,³⁵ and a matter of confusion.³⁶ Importantly, the decision resulted in unclear boundaries for exceptions to such rights. For instance, some consider that the decision bars morality arguments altogether for the criminalisation of homosexuality³⁷ or “expressly dismissed cultural relativism”,³⁸ whereas others believe a more homogenous moral and legal code could be a potentially objective justification.³⁹

The subsequent case of *Joslin v New Zealand*⁴⁰ demonstrated a clear limit that the Committee was willing to impose, in denoting the right to marry under Article 23 as “only the union between a man and a woman”.⁴¹ The decision itself was described as “difficult to square with prior precedent”,⁴² particularly in light of the HRC’s previous remarks on the evolving nature of the family unit.⁴³ Tahmindjis remarked:

[I]t gives no authority for this sweeping statement, attempts not even a modicum of interpretation, ignores any possibility of evolving social constructions of mar-

33 HRC, *Toonen v Australia*, Communication No. 488/1992, UN Doc. CCPR/C/50D/488, 25 December 1992.

34 Joseph, S., “*Toonen v Australia: Gay Rights under the ICCPR*”, *University of Tasmania Law Review*, Vol. 13, 1994, p. 394.

35 Clavier, S., “*Objection Overruled: The Binding Nature of the International Norm Prohibiting Discrimination against Homosexual and Transgendered Individuals*”, *Fordham international Journal*, Vol. 35, 2011, p. 394.

36 Gerber, P. and Gory, J., “*The UN Human Rights Committee and LGBT Rights: What Is It Doing? What Could It Be Doing?*”, *Human Rights Law Review*, Vol. 14, 2014, p. 429.

37 See above, note 9, p. 322

38 Garvey, T., “*God v Gays? The Rights of Sexual Minorities in International Law as Seen Through the Doomed Existence of the Brazil Resolution*”, *Denver Journal of International Law and Policy*, Vol. 38, 2010, p. 671.

39 Cowell, F. and Milon, A., “*Decriminalisation of Sexual Orientation through the Universal Periodic Review*”, *Human Rights Law Review*, Vol. 12, 2012, p. 344.

40 HRC, *Joslin v New Zealand*, Communication No. 902/1999, UN Doc CCPR/C/75/D/902/1999, 30 July, 2002.

41 *Ibid.*, Para 12.

42 See above, note 3, p. 369.

43 HRC, *General Comment No 19: Article 23 (Protection of the Family, the Right to Marriage and Equality of the Spouses)*, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 1990.

*riage, and leaves the notion of fundamental meanings of concepts in the Covenant in the care of the States.*⁴⁴

A separate concurring opinion of two HRC members suggested an element of undefined flexibility by stating that a difference in treatment “may very well, depending on the circumstances of a concrete case, amount to prohibited discrimination”.⁴⁵

Subsequent decisions of the HRC appear to depart from previous approaches. *Young v Australia*⁴⁶ concerned the denial of pension from Young’s deceased same-sex partner; and the HRC explicitly stated that sexual orientation was included within the “other status” category in Article 26. However, after confirming the applicability of sexual orientation to Article 26, the HRC failed to expand further on its limitations, stating only that it repeatedly observed, “that not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria”.⁴⁷ *Young* was followed by the case of *X v Colombia*,⁴⁸ also involving denial of pension rights on the basis of sexual orientation, similarly finding that Article 26 was applicable under “other status”. The case generated a dissenting opinion from two members who instead stated that Article 26 should be read in light of Article 23, defining family as “the natural and fundamental group unit of society”.⁴⁹

Most recently, the case of *Fedotova v Russian Federation*⁵⁰ brought the first important affirmation of sexual orientation rights outside of Articles 17 or 26, signalling “a greater awareness of the entitlement of sexual minorities to enjoy the full spectrum of rights under the ICCPR”.⁵¹ The case concerned a ruling under the Article 19 protection of freedom of expression and opinion against a Russian ban on “homosexual propaganda”, and demonstrated evolutive reasoning in reversing the similar *Hertzberg*. Russia based their case on morality; however, while referencing principles of universality and non-discrimination, the HRC noted that arguments based on morals could not be derived merely from a *single* tradition, as public morals stemmed “from many social, philosophical and religious traditions”.⁵²

44 Tahmindjis, P., “Sexuality and International Human Rights” *Journal of Homosexuality*, Vol. 48, 2005, p. 18.

45 See above, note 40, Appendix.

46 HRC, *Young v Australia*, Communication No. 941/2000, 18 September 2003.

47 *Ibid.*, Para 10.4.

48 HRC, *X v Colombia*, Communication No. 1361/2005, 6 August 2003.

49 *Ibid.*, Annex.

50 HRC, *Fedotova v Russian Federation*, Communication, No. 1932/2010, 31 October 2012.

51 See above, note 36, p. 433.

52 See above, note 50, Para 22.

As the ICCPR is a broad instrument, “adjudication is required to work out the meanings and boundaries of rights but also the expanding duties to respect, protect and promote them”.⁵³ However, a wide discretion is provided to states when the scope of limitations to restrict SOGI rights is unsettled, and this further leaves unexplored the legal basis of “the legitimacy or veracity of potential political objections”.⁵⁴ The protection of rights appears to rest with the discretion of discordant committee members, and it is clear that the HRC “struggles with the interplay between human rights norms which affect the rights of LGBT persons and the restrictions placed on the norm by the state party”.⁵⁵

Whilst such jurisprudence is readily understood to similarly relate to gender identity claims, the HRC has not yet addressed gender identity in its decisions, leaving protection on the basis of gender identity even more ambiguous.⁵⁶ Gerber and Gory have highlighted a number of missed opportunities by the HRC to confirm the applicability of SOGI within General Comments,⁵⁷ a tool which has been utilised by other treaty bodies to clarify their stance in respect of SOGI rights.⁵⁸ However, both sexual orientation and gender identity have been included in a recent comment on liberty and security of person.⁵⁹ Whilst not a comprehensive affirmation of SOGI, this has importantly referenced gender identity, and could make way for a broader thematic comment.

Whilst the ability of the HRC to make “authoritative interpretations” is disputed,⁶⁰ and though most states do not generally hold them to be legally binding,⁶¹ communications undeniably generate significant legal effect. For instance, a number of states invoked *Toonen* as authoritative reference to challenge sodomy laws.⁶² Thus, the actions of the HRC could hold invaluable weight in the scheme of protecting SOGI rights. However, the HRC has yet to construct “a satisfactory overall approach”.⁶³ The decisions and commentary of the HRC offer

53 Alston, P. and Crawford, J., *The Future of UN Human Rights Treaty Monitoring*, Cambridge University Press, 2000, p. 26.

54 See above, note 39, p. 344.

55 See above, note 36, p. 433.

56 The HRC has recognised gender identity within its concluding observations.

57 See above, note 36, p. 422; see also, for example, HRC, *General Comment No 34: Freedoms of Opinion and Expression (Article 19)*, UN Doc. CCPR/C/GC/34, 2011.

58 For example, Committee on Economic Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health*, UN Doc. E/C.12/2000/4, 2000.

59 HRC, *General Comment No 35: Article 9 (Liberty and Security of Person)*, UN Doc. CCPR/C/GC/35, 2014.

60 See above, note 15, p. 21.

61 See above, note 22, p. 17.

62 For example, *Texas (Lawrence v Texas)* 2003 123 Ct 2472.

63 See above, note 19, p. 187.

an incomplete perspective on the strength of SOGI claims, particularly in respect of other rights, claims based on gender identity, and in leaving a seemingly undetermined space for state restrictions.

b. Political Body Statements, Resolutions and Declarations

A wider and more inclusive process of norm creation can take place within the political bodies. Texts produced by the Human Rights Council (and its predecessor, the Commission on Human Rights) as well as the General Assembly have the potential to carry enormous significance for normative development, as well as setting and shaping the UN agenda. Thus, it is true that “any evaluation of the status of sexual minorities within the context of the United Nations must take more political bodies into account”.⁶⁴

The first landmark efforts towards affirming broad protection for sexual orientation within the political bodies began in the Commission for Human Rights, with the 2003 draft “Resolution on Sexual Orientation” (Brazil Resolution).⁶⁵ This attempted to merely affirm that the application of pre-existing rights in the foundational documents also applied regardless of sexual orientation. However, in failing to articulate specific rights, critics feared the creation of extra rights for SOGI. Indeed, the proposal sparked an immediate counter-statement supported by 55 states. This denounced sexual orientation as a human rights issue on numerous grounds: lack of explicit inclusion in instruments; failure to properly define its “category”; and as an issue that did not concern the southern states.⁶⁶ However this reaction was not limited to the south, with one western state responding that it would not support a resolution on sexual orientation requiring “some sort of universal application”.⁶⁷ After postponing for a year, Brazil dropped the resolution before a vote, stating that they “had not been able to arrive at the necessary consensus”.⁶⁸ However, significant implications followed. Some states argued that by not reaching a vote, the Commission did not intend to guarantee the rights in the Brazil Resolution, and considered that expressly refusing the language of sexual orientation may alleviate any obligations arising from further interpretations of the law.⁶⁹ However, in elevating discussion, this led to a joint statement supported by 54 states that that they

64 Heinze, E., “Sexual Orientation and International Law: A Study in the Manufacture of Cross-cultural Sensitivity”, *Michigan International Law Journal*, Vol. 22, 2001, p. 294.

65 Commission on Human Rights, *Human Rights and Sexual Orientation: Draft Resolution*, UN Doc. E/CN.4/2003/L.92, 2003.

66 See above, note 38, p. 671.

67 Lau, H., “Testing the Universality of International Human Rights Law”, *The University of Chicago Law Review*, Vol. 71, 2004, p. 1703.

68 Commission on Human Rights, *Summary Record of the 49th Meeting*, E/CN.4/2004/SR.49, 22 April 2004, Para 100.

69 See above, note 38, p. 671.

“cannot ignore” violations of human rights based on SOGI,⁷⁰ which despite having little value and strength in terms of declaring rights, importantly marked the first inclusion of gender identity in a UN statement.

It was not until 2008, that the first significant discussion of the concerns of SOGI were placed on the UN agenda, this time within the General Assembly. It was here that the Netherlands and France presented the “UN Declaration on Sexual Orientation and Gender Identity”, originally signed by 66 states, and later increasing to 85.⁷¹ It strongly affirmed the application of non-discrimination principles, and condemned a number of abuses such as the criminalisation of same-sex relations, and violence and torture. This provided the broadest protections detailed within the political bodies (despite no reference to positive rights). Yet, in failing to garner support, it merely remained a declaration of symbolic nature, and “offers no framework for assessing sexual and gender rights claims”.⁷² Interestingly, two states signing the declaration criminalised same-sex relations at that time, perhaps an apt demonstration of the lack of real value or force placed on the declaration. It is also significant that the counter-statement that followed drew near equal support in proclaiming a “misinterpretation” of the law, with “no legal foundation”, and furthermore the “right of member states to enact legislation meeting the just requirement of morality and public order”.⁷³

Furthermore, this increased attention produced an apparent backlash in 2010, when the previous success of the inclusion of sexual orientation in annual resolutions on extrajudicial summary executions was suddenly removed. Considering the text concerned both basic and fundamentally accepted rights, this marked clear regression for the movement.⁷⁴ Though restored the following year, this illustrates that “the subject area is highly controversial and in a state of political flux”.⁷⁵

However, in 2011, a significant milestone was reached for the SOGI rights movement, when the Human Rights Council adopted a Resolution (2011 Resolution) though only by 23 members to 19, and with three abstentions.⁷⁶ This expressed “grave concern” for global acts of discrimination and violence, but made little reference to rights otherwise, leading to criticism

70 See above, note 6, p. 230.

71 Human Rights Council, *Joint Statement from the Permanent Representatives of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the United Nations addressed to the President of the General Assembly*, UN Doc. A/63/635, 18 December 2008.

72 Wolfe, C., “The United Nations Declaration on Sexual Orientation and Gender Identity 2008: Tracing the Evolution of LGBT Minority Rights Within the UN”, *Social and Policy Review*, Vol. 22, 2012, p. 57.

73 See above, note 3, p. 367.

74 Crawley, W., *Does the UN Now Support the Execution of Gays?*, *BBC News*, 19 November 2010.

75 See above, note 5, p. 343.

76 Human Rights Council, *Resolution 17/19, Human Rights, Sexual Orientation and Gender Identity*, UN Doc. A/HRC/RES/17/19, 14 July 2011.

that “despite the positive perception (...) [it] fails to clearly identify rights for LGBT people”.⁷⁷ In addition, the weak consensus leaves the strength of the 2011 Resolution dubious, notably as it split the Human Rights Council, a body exclusively dedicated to the protection of human rights, down the middle.⁷⁸ Nevertheless, the real legacy of the 2011 Resolution may have come from the mandated request that the Office of the High Commissioner for Human Rights (OHCHR) conduct a study documenting SOGI abuses – the first real, though limited, action towards a continued focus on SOGI.⁷⁹ In addition, it importantly allowed for a constructive 2012 Panel Discussion dedicated to SOGI, despite resulting in an unprecedented walkout by a number of states before its commencement.

The Human Rights Council importantly passed another resolution in 2014,⁸⁰ reaffirming its 2011 predecessor in condemning discrimination based on SOGI in all regions of the world, with a limited increase in support (25 in favour, with 14 against and 7 abstentions). Attempts to restrict its relevance to those only who had expressly supported SOGI rights in their country were rejected, and the resolution requested another 2015 follow up report documenting SOGI abuses, which demonstrates another important and dedicated focus on SOGI issues.⁸¹

However, the texts of the statements, declarations and resolutions themselves fail to clarify any real content of SOGI rights, and as such, “the contours of [SOGI] rights are unclear”.⁸² In 2007, 29 independent experts, drawing on the applicability of existing international framework and attempting to fill the gap left by the political bodies, produced the Yogyakarta Principles.⁸³ The principles have received some positive response. However, despite the fact that some drafters held current or former UN posts, their origination from outside the UN and a lack of UN support in wholly endorsing the principles has downplayed their significance and generated accusations that the instrument was produced by “individuals acting on their own accord”.⁸⁴

77 Braun, K., “Do Ask, Do Tell: Where is the Protection against Sexual Discrimination in International Human Rights Law?” *American University International Law Review*, Vol. 29, 2014, p. 888.

78 See above, note 3, p. 367.

79 Human Rights Council, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity – Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/19/41, 17 November 2011.

80 Human Rights Council, *Human Rights Sexual Orientation and Gender Identity*, UN Doc. A/HRC/27/L.27/Rev.1, 24 September 2014.

81 International Gay and Lesbian Human Rights Commission (IGLHRC), “UN Human Rights Council Votes To Support LGBT Rights”, 26 September 2014, available at: <http://iglhrc.org/content/un-human-rights-council-votes-support-lgbt-rights>.

82 See above, note 67, p. 1698.

83 Yogyakarta Principles: Principles on the Application of International Human Rights Law to Sexual Orientation and Gender Identity, 2007.

84 For example, Malta, see above, note 77, p. 886.

Ultimately, any discussion of enshrining sexual orientation as an explicit category within new declarations and resolutions “has consistently been met with unyielding opposition”.⁸⁵ Whilst having the potential to produce important legal consequences, agreement and repetition are important components of norm development; which have faced limited success in respect of SOGI. When confronted with such a high level of reproach, the legitimacy and strength of affirmations of basic SOGI rights within these forums is weakened.⁸⁶ It is necessary to aim particular criticism towards the Human Rights Council; a human rights focussed body that nonetheless sees the election of countries like China, Russia, Cuba and Saudi Arabia who themselves “systematically violate the human rights of their own citizens and they consistently vote the wrong way on the UN initiatives to protect the human rights of others”.⁸⁷ Tactical and bloc voting has created double standards and selectivity in key decisions, and such candidates “undermine the credibility and effectiveness of the UN human rights system”.⁸⁸ Often instead of advancing human rights issues, these political bodies have instead created a space for airing arguments from delegates engaging in empty rhetoric, lacking legitimate legal grounds, and essentially leaving the power of advancing SOGI rights in their unwilling hands. Compared to this, it seems a “vigorous defence of the universality of rights related to sexual orientation has generally been lacking at the UN”.⁸⁹ One contributing factor may be the mere handful of SOGI NGO’s granted UN consultative status, limiting their ability to take part in UN activities and counter opposition, and demonstrating a lack of integration.⁹⁰

In placing SOGI on the UN agenda, the political forums have managed somewhat to affirm the relevance of SOGI within international human rights. However, within SOGI related statements, resolution and declarations, it can be seen that even the most basic affirmations of SOGI rights have failed to achieve significant consensus, and contain little useful articulation. Thus, the status afforded to SOGI rights in their legal development remains of limited value. As the application of human right principles to SOGI “still remains a matter of broad interpretation”,⁹¹ it leaves open restrictions on rights, and limits the ability for advocates to challenge their state. Whilst delineating the content of rights is not incumbent on their existence, Donnelly notes that “without authoritative international standards (...) to what can states be held

85 See above, note 72, p. 55.

86 Roseman, M.J. and Miller, A.M., “Normalising Sex and its Discontents: Establishing Sexual Rights in International Law”, *Harvey Journal of Law and Gender*, Vol. 34, 2011, p. 366.

87 Human Rights Foundation, “The UN’s Human Rights Council Farce: U.S. Silent as Brutal Regimes Take Seats”, 15 November 2013, available at: <http://humanrightsfoundation.org/news/the-uns-human-rights-council-farce-us-silent-as-brutal-regimes-take-seats-00329>.

88 *Ibid.*

89 See above, note 64, p. 284.

90 See above, note 6, p. 229.

91 See above, note 72, p. 57.

accountable?”⁹² In order to successfully create change, norms must be further spelt out into obligations and rights, with clear components in identifying their path to national implementation. This is important not only in providing political pressure for reform, but to provide a clear avenue and base from which state laws may be successfully challenged.

The analysis in this section has demonstrated that whilst SOGI has been affirmed numerous times as applicable to international human rights law, mainly regarding non-discrimination, the strength and boundaries of such rights remain unclear. Thus, in concluding that “a certain degree of legal uncertainty persists”,⁹³ it must be concluded that the UN has not sufficiently developed and articulated the status of SOGI rights.

3. Addressing Violations of Sexual Orientation and Gender Identity Rights in Monitoring Mechanisms

Analysing the extent to which violations of SOGI rights are sufficiently addressed within broader state monitoring mechanisms provides a useful indication of their integration. In examining the concluding observations of the HRC and the extra-conventional mechanisms within the special procedures and the Universal Periodic Review, the truly ad-hoc and fluctuating attention placed on SOGI issues becomes evident.⁹⁴

a. HRC Concluding Observations

The HRC, in undertaking a mandatory state reporting procedure for those bound by the IC-CPR,⁹⁵ has been the most active in terms of its inclusion of SOGI within concluding observations.⁹⁶ The function of these recommendatory comments is both highlighting violations of human rights, and praising positive progression towards treaty obligations.

As concluding observations link human rights issues directly to a binding treaty counter-part, they encompass a somewhat more legalistic avenue for addressing SOGI rights violations; though its exact authority is unsettled. This is perhaps demonstrated by the fact that the HRC referenced sexual orientation in its concluding observations before the *Toonen* decision in 1994, and yet that decision is regarded as the first real recognition of sexual

92 Donnelly, J., “The Relative Universality of Human Rights”, *Human Rights Quarterly*, Vol. 29, 2007, p. 31.

93 See above, note 5, p. 341.

94 Whilst being unable to present a fully comprehensive examination, section 3 draws on significant examples and trends in analysing each mechanism’s inclusion of SOGI issues.

95 ICCPR, Article 4.

96 Other treaty bodies have included SOGI within state reports to a lesser extent. For a recent selection, see International Commission of Jurists (ICJ), *Sexual Orientation and Gender Identity in International Human Rights Law: The ICJ UN Compilation*, ICJ, 5th Edition, 2013.

orientation rights at the UN.⁹⁷ In this regard, some states have readily refused any such authoritative interpretations; for instance, following a recommendation to repeal its sodomy law, Trinidad and Tobago stated that due to the lack of any explicit mention of sexual orientation in the ICCPR they would continue criminalisation and follow a “conservative” approach.⁹⁸ Despite this contestation, the interpretative function of a monitoring body cannot be without its consequences and garners at least some special status. In this sense, the importance of including SOGI issues remains vital for both the purposes of highlighting abuses, and providing such interpretation.

A reasonable span of issues have been recognised by the HRC in its observations, though focus has mainly concerned the condemnation of violence, criminalisation of same-sex relations, and anti-discrimination provisions.⁹⁹ The HRC has, however, at times appeared to delve further into SOGI issues by importantly addressing issues such as the social stigma surrounding SOGI,¹⁰⁰ partnership benefits for same-sex couples,¹⁰¹ or other SOGI rights such as freedom of expression and assembly.¹⁰² This has been an important forum in bringing attention to gender identity issues, as little explicit mention has been made elsewhere in the HRC.¹⁰³ Nonetheless, gender identity has still received considerably less attention than sexual orientation. Moreover, although it has been an important forum, the language used by this expert body in its recommendations arguably suggests a “lack of a nuanced understanding on the part of the HR Committee”.¹⁰⁴ For instance, in its observations concerning transsexuals in Ecuador, reference was made to the placement of women in rehabilitation centres for undergoing “sexual re-orientation treatments”.¹⁰⁵

Furthermore, the language in the HRC’s concluding observations has been noted to facilitate a lack of urgency and importance, tending towards generalised comments on violations rather than express and affirmative language on SOGI rights.¹⁰⁶ For instance, Sudan’s criminalisation of same-sex relations on penalty of death was denounced by the HRC as incompatible with the ICCPR, but the HRC then merely asked for information on the patterns and

97 HRC, *Concluding observations, Norway*, UN Doc. CCPR/C/79/Add.27, 4 November 1993.

98 HRC, *Comments by the Government of Trinidad and Tobago on the concluding observations of the Human Rights Committee*, UN Doc CCPR/CO/70/TTO/Add.1/2001, 15 January 2001.

99 See above, note 36, p. 408.

100 HRC, *Concluding observations, Ethiopia*, UN Doc. CCPR/C/ETH/CO/1, 19 August 2011.

101 HRC, *Concluding observations, Armenia*, UN Doc. CCPR/C/ARM/CO/2, 31 August 2012.

102 HRC, *Concluding Observations, Georgia*, UN Doc. CCPR/C/GEO/CO/4, 23 July 2014.

103 HRC, *Concluding observations, Ireland*, UN Doc. CCPR/C/IRL/CO/3, 30 July 2008.

104 See above, note 36, p. 414.

105 HRC, *Concluding observations, Ecuador*, Un Doc. CCPR/C/ECU/CO/5, 4 November 2009.

106 See above, note 9, p. 334.

use of sentences, rather than making any recommendation to de-criminalise (which request, notably, Sudan did not respond to).¹⁰⁷ Indeed, the HRC has regularly asked for “appropriate action” to be taken in response to SOGI issues¹⁰⁸ – a method which not only significantly fails to aid states in implementing measures to address violations, but makes it difficult to assess compliance. Thus, Narayan observed that the lack of strong language regarding SOGI rights abuses has meant that “states take limited, ineffective action to appease the Committee or do not respond altogether”.¹⁰⁹ When this approach is taken, it demonstrates a lack of real commitment to the issues, and in terms of its effectiveness, is arguably little more use than not being referenced at all.

Furthermore, this process faces difficulties which affect its ability to broadly identify and address violations, beyond merely only being able to issue such observations to ICCPR state signatories, effectively ignoring states like Qatar who have neither signed nor ratified the IC-CPR.¹¹⁰ Firstly, backlog in both consideration of state reports and their submission has meant that states like Ghana, which has criminalised same-sex relations, simply fail to be addressed by the HRC.¹¹¹ In addition, the process has proven itself highly dependent on shadow reports in order to pay attention to even the most obvious encroachments. For example, the HRC has failed to comment on even half of the states criminalising homosexuality, and for those which it has addressed its concern, there are strong links to identification in shadow reports.¹¹² This demonstrates both a lack of prioritisation of SOGI violations and a weakness in approach, as the work of civil society is “increasingly repressed”.¹¹³ There is further evidence that SOGI rights remain subject to discretionary rather than systematic inclusion; as Gerber and Gory noted, within the ten year period focussed on, SOGI issues were only frequently raised by five out of a possible 35 HRC members.¹¹⁴ Ultimately, inconsistent practice continues to saturate the work of the HRC, leading to discrepancies in results. For instance, 2013 saw the HRC condemn the continued sodomy laws in Belize,¹¹⁵ but fail to address comparable laws in its concluding observation to Angola.¹¹⁶

107 HRC, *Concluding observations, Sudan*, UN Doc. CCPR/C/79/Add.85/1997, 19 November 1997.

108 For example, HRC, *Concluding observations, Cameroon*, UN Doc. CCPR/C/CMR/CO/4, 4 August 2010.

109 See above, note 9, p. 334.

110 Accurate as of 14 September 2015.

111 Seventy-seven states are currently over 10 years late with their reports: see Office of the High Commissioner for Human Rights, “Late and non-reporting states”, available at: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/LateReporting.aspx.

112 See above, note 36, p. 415.

113 See above, note 96, p. 7.

114 See above, note 36, p. 410.

115 HRC, *Concluding observations, Belize*, UN Doc. CCPR/C/BLZ/CO/1, 26 March 2013.

116 HRC, *Concluding observations, Angola*, UN Doc CCPR/C/AG/CO/1, 29 April 2013.

Overall inclusion of SOGI references has been described by O’Flaherty as “frequent”, despite citing a fairly low engagement of 13 recommendations out of a total of 84 recommendations within a six year period.¹¹⁷ However, a recent study by Gerber and Gory found 54 out of a total of 139 recommendations related to SOGI within the ten year period studied, and concluded that there was “considerable room for improvement”.¹¹⁸ It must be determined in this regard that engagement with only around a third of recommendations, when SOGI violations are thought to exist in every state, does not demonstrate widespread and sufficient attention to SOGI violations, especially considering that not all recommendations are necessarily criticisms.

Thus, whilst the HRC state reporting mechanism should arguably demonstrate the greatest potential for addressing SOGI issues, in building on treaty jurisprudence and utilising its interpretative function, it must be concluded that “the effectiveness of this scheme has not yet been maximised”.¹¹⁹ Though it has usefully interpreted some broader associated obligations, and whilst SOGI inclusion appears to be increasing, it is nonetheless required to be significantly more consistent and expansive in its recommendations.

b. Special Procedures

The special procedures system comprises groups of independent experts (as individuals or part of a working group) mandated by the Human Rights Council to investigate and report human rights issues within the ambit of country specific or thematic mandates (though no mandate is strictly dedicated to SOGI issues).¹²⁰

This mechanism has been referred to as “a response to palliate shortages, gaps and lack of effective procedures of the conventional system”.¹²¹ It has realised some of these intentions in regards to SOGI, particularly ground-based investigations of violations which may go unreported by civil society, and even more likely by states. For example, the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran undertook investigations into SOGI violence based on individual interviews, and noted that many were “beaten by family members at home, but could not report these assaults to the authorities out of fear that they would themselves be charged with a criminal act”.¹²² In addition, the Working Group on Arbitrary Detention has consistently investigated and commented on patterns of violence related to cruel punishments and criminalisation of same-sex relations, as well as the gap between

117 See above, note 5, p. 337.

118 See above, note 36, p. 407.

119 See above, note 9, p. 331.

120 There are currently 41 thematic and 14 country mandates (as of 12 September 2015).

121 Isa, F.G. and de Feyter, K., *International Human Rights Law in Global Context*, Deusto, 2009, p. 621.

122 Human Rights Council, *Report of the 22nd session Agenda item 4*, UN Doc. A/HRC/22/56, 28 February 2013.

legislative and practical protection.¹²³ They have also frequently cited *Toonen* and Article 26 of the ICCPR, and so the special procedures have been useful in re-affirming and complimenting the existing system for protection.¹²⁴

Inclusion of SOGI within special procedures has meant not necessarily having to wait for a state's report or periodic review in undertaking urgent responses to violations. This occurred in respect of Nigeria's proposed regressive legislation on same-sex relations, whereby a joint report not only urged Nigeria to "reconsider the Bill and to ensure that any law that is adopted conforms to international human rights norms and to Nigeria's obligations under international law", but importantly commented that cultural practices "do not absolve governments from their duty to promote and protect all human rights and fundamental freedoms".¹²⁵

Further, outside of mapping violations, some mandate-holders have undergone important exploration into the content of SOGI rights and underlying causes for violations. For instance, the Special Rapporteur on the human right to safe drinking water and sanitation has dealt with SOGI discrimination in access to safe water and sanitation, and noted that combating stigma "requires raising awareness of stigmatizing practices that are pursued under the umbrella of culture, religion and tradition".¹²⁶ Mandate-holders have also increasingly referenced issues outside of discrimination and violence, though this remains a principal focus, to more positive rights of sexual autonomy.¹²⁷ However, these interpretations have resulted in somewhat piecemeal and divergent understandings of SOGI issues, as they are also only considered to the extent that they overlap with the issues of a particular mandate.

The inclusion of SOGI issues has also faced a significant hurdle in relation to the scope of mandates. One of the most controversial examples has been the elaboration of the Special Rapporteur on the right to education in noting comprehensive education requires special attention to sexual diversity, as "everyone has the right to deal with his or her own sexuality without being discriminated against" and "sexual education is a basic tool for ending discrimination against persons of diverse sexual orientations".¹²⁸ This interpretation was followed by enormous hostility, and numerous states condemned the "expanded interpretation by the mandate holder

123 Human Rights Council, *Report of the Working Group on Arbitrary Detention. Addendum: Mission to Colombia*, UN Doc. A/HRC/10/21/Add.3, 16 February 2009.

124 Human Rights Council, *Opinions adopted by the Working Group on Arbitrary Detention (Cameroon)*, UN Doc A/HRC/4/40/Add.1, 2 February 2007.

125 "Independent UN Experts Express Serious Concern over Draft Nigerian Bill Outlawing Same-Sex Relationships", cited in ICJ, *Sexual Orientation and Gender Identity in International Human Rights Law: The ICJ UN Compilation*, ICJ, 5th Edition, 2013, p. 122.

126 General Assembly, *Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Stigma and the realization of the human rights to water and sanitation*, UN Doc. A/HRC/21/42, 2 July 2012.

127 Economic and Social Council, *Report of the Special Rapporteur on Violence Against Women*, UN Doc. E.CN.4/1999/88.Add, 1999.

128 General Assembly, *Report of the United Nations Special Rapporteur on the Right to Education*, UN Doc. A/65/162, 23 July 2010.

of his mandate” without the authority of the Human Rights Council, on issues with “no universal agreement”.¹²⁹ This concern has been reiterated further by mandate holders who have admitted that they have failed to address such issues, stating that, as the question of sexual orientation was not debated within the Human Rights Council on the creation of the mandate, they believed more express authority was required in order for them to consider sexual orientation.¹³⁰ The mere reference to sexual orientation or gender identity within reports can lead to accusations of “over-stepping mandates”, an accusation used by states as an excuse to undermine any work undertaken by mandate holders, and to limit the overall value of that work.¹³¹

Whilst it is inherently more difficult to assess the extent to which SOGI issues are adequately addressed, it should be noted that in absence of a SOGI themed mandate, any inclusion of SOGI issues, particularly the type of in-depth discussion highlighted above, is significant in addressing gaps left open throughout the UN system. It is notable that some reference to SOGI has been made in at least 26 separate mandates since 2007, which does suggest a reasonably wide regard for SOGI issues, and a regard not only confined to violence or torture.¹³² This is important as it exhibits the opinions of a multitude of experts and their interpretation of SOGI as a relevant rights concern, and importantly discusses how SOGI relates to a number of other rights. However, considering the wide discretion for mandate holders, many have remarked there is greater room for attention, and noted that the current practice is “inconsistent”.¹³³ It is also worth considering that whilst some inclusion has provided a thorough focus on SOGI issues, many mandate holders merely make token, minimal reference within a list of discriminated categories¹³⁴ – though of course even highlighting vulnerability and the need for protection deserves some merit. Even these marginal actions that make some reference to those of particular sexual orientations as vulnerable or discriminated against often exclude any reference to gender identity.¹³⁵ A particularly notable missed opportunity also concerns the failure of the UN Sub-Commission on the Promotion and Protection of Human Rights (or its replacement Advisory Committee) to take up SOGI rights within its ambit, despite its role in developing emerging rights, and it having received numerous calls to do so from NGOs.¹³⁶

129 UN News, “General Assembly, Human Rights Council Texts Declaring Water, Sanitation Human Right ‘breakthrough’; Challenge Now to Turn Right into Reality, Third Committee Told”, UN News, 25 October 2010, available at: <http://www.un.org/News/Press/docs/2010/gashc3987.doc.htm>.

130 Human Rights Council, “Statement of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Interactive Dialogue”, 8 September 2006.

131 See above, note 86, p. 363.

132 The ICJ has documented 26 inclusions alone in the 2007-2013 period focussed on. See above, note 96, p. 5.

133 See above, note 6, p. 231.

134 Human Rights Council, *Report of the independent expert on minority issues*, UN Doc. A/HRC/13/23, 7 January 2010.

135 Human Rights Council, *Recommendations of the Forum on Minority Issues at its Third Session*, UN Doc. A/HRC/16/46, 31 January 2011.

136 See above, note 22, p. 11.

Overall, there has been some significant in-depth inclusion of SOGI issues within the special procedures, especially bearing in mind the lack of a dedicated mandate, and thus any requirement for such mention. However, fundamentally, SOGI is neither consistently nor comprehensively referenced, and “there are some violations of rights that are not addressed at all by the existing system”.¹³⁷ There is an unquestionable “need for special procedures mandate-holders to be able to integrate these human rights issues in their work without being attacked for doing so”.¹³⁸ However, to the extent that a lack of explicit permission to address SOGI concerns is hindering individual mandates, this need will likely remain unfulfilled.

c. *Universal Periodic Review*

The UPR arose from the recalibration of the Human Rights Commission, and allows individual states to make recommendations on the human rights record of any other state. With no restraint due to treaty membership or theme, the UPR indeed provides a uniquely inclusionary forum for controversial SOGI issues, as well as civil society participation.¹³⁹ The review categorises the strength of a recommendation from one to five and state responses fall either into the “accepted” category or are otherwise considered “noted”.¹⁴⁰

Whilst the scope of issues has largely concerned decriminalisation of same-sex relations and anti-discrimination, the UPR has further made significant reference to some other issues, such as state duties of public awareness and sensitisation for both sexual orientation and gender identity.¹⁴¹ The flexibility of this process has also allowed for the inclusion of more positive rights not affirmatively acknowledged in any other state monitoring mechanism, such as reference to same-sex marriage¹⁴² and same-sex adoption rights.¹⁴³

137 See above, note 96, p. 6.

138 Human Rights Council, *Human Rights Council Panel on Ending Violence and Discrimination Against Individuals Based on their Sexual Orientation and Gender Identity, Summary of discussion*, UN Doc. A/HRC/19/4, 1, 7 March 2012, Para 25.

139 References are largely made to the first round as has been completed; however, where appropriate reference to the second uncompleted round is made.

140 Recommendations range from 1 (minimal action) to 5 (specific action), available at: http://www.upr-info.org/database/files/Database_Action_Category.pdf; and http://www.upr-info.org/database/files/Database_Methodology_Responses_to_recommendations.pdf.

141 For example, Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Antigua and Barbuda*, UN Doc. A/HRC/19/5, 14 December 2011.

142 Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Austria*, UN Doc. A/HRC/17/8, 18 March 2011.

143 Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Australia*, UN Doc. A/HRC/17/10, 24 March 2011.

In undertaking an overall analysis on the first round of review, it was found that SOGI¹⁴⁴ issues attracted 503 recommendations.¹⁴⁵ This number does, however, form part of a total of 21,356 recommendations, translating to around 2.3% engagement; leading Schulanbusch to designate SOGI as “a marginal issue”.¹⁴⁶ Nonetheless, it should also be borne in mind that within a UN database-compiled list of issues, SOGI ranked 24th out of 55 broad categories in the first round.¹⁴⁷ These statistics show that SOGI issues have been integrated as a genuine concern, though not a main priority.

One important point to note, however, is that the 503 recommendations do not necessarily translate into 503 distinct issues. For example, evidence of overlap can be seen in the five recommendations for decriminalisation of same-sex relations that Brunei Darassulam received.¹⁴⁸ However, issuing comparable recommendations should not be readily considered superfluous, as the strength of five parallel recommendations in comparison to one creates the kind of significant pressure often incumbent to change. For instance Cameroon, famous for its vicious human rights record in regards to SOGI, accepted a recommendation in the second round of reviews to investigate police conduct regarding violence based on sexual orientation after receiving (and rejecting) seven recommendations in the first round.¹⁴⁹

In addition, the category of recommendations suggests a targeted and weighty regard for SOGI concerns when recommending change, as most fell into the two strongest categories; 279 of these attracting category five, with 158 attracting category four, and with only one recommendation receiving a category one recommendation.¹⁵⁰ However, one reference from Bangladesh suggested that Tonga continue criminalising same-sex relations, as it fell “outside the purview of human rights norms”; an instance described as both “novel” and “omi-

144 For the purposes of this section references to SOGI are references to sexual orientation, reference to gender identity, or references to both. The UPR info system processes these categories together in its data.

145 Results generated from highlighting “sexual orientation and gender identity”, “1st round review” and “recommendations only” within the UPR Info Database, available at: <http://www.upr-info.org/database>.

146 Schulanbusch, M.D., “Sexual Orientation and Gender Identity Rights in the Universal Periodic Review” Dissertation for Masters in Human Rights Practice, University of Gothenburg School of Business and Social Sciences, 2013, p. 35.

147 UPR Info, “Statistics of Recommendations”, available at: <http://www.upr-info.org/database/statistics/index.php?cycle=1>.

148 Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Brunei Darassalum*, UN Doc. A/HRC/13/14, 4 January 2010.

149 Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Cameroon*, UN Doc. A/HRC/24/15, 5 July 2013.

150 Results generated from highlighting “sexual orientation and gender identity”, “round 1”, “recommendations only” and “action category”, within the UPR Info Database, available at: <http://www.upr-info.org/database>.

nous”.¹⁵¹ This demonstrates utilisation of the UPR in facilitating denunciation of SOGI rights, beyond merely refusing recommendations.

It also important to note that the span of recommendations in this first round came from only 39 states, the majority of which are from “the West”.¹⁵² This demonstrates that SOGI issues remain a low priority amongst most states, whilst arguably serving to facilitate arguments that such issues stem from western values. This may be a contributing factor to SOGI issues having been generally rejected more than the overall rate of recommendations.¹⁵³ This has further meant that, with the crux of the concentration on other regions, only 57 recommendations were given to western states.¹⁵⁴ While this may indicate a priority towards those violations perceived as most grave, it allows for weaker scrutiny of other violations.

The extent to which gaps exist in addressing SOGI rights can be demonstrated further with the reliance on civil society information. For instance, the Philippines escaped SOGI-related recommendations in the first round following a lack of inclusion within civil society submissions. However, a submission in the second round highlighting widespread discrimination generated a recommendation for comprehensive discrimination legislation.¹⁵⁵ Once again, this can be problematic as although national level submissions from civil society offer the best source of information, the existence of civil society and the extent to which it may face danger in contributing to international scrutiny necessarily limits its abilities.¹⁵⁶

Despite these shortfalls, the heightened focus on decriminalisation has achieved some significant results, with acceptance from five countries within the first round of recommendations to de-criminalise sexual orientation.¹⁵⁷ An important example here is the Seychelles, which, escaping criticism for this legislation under the treaty review process, not only accepted decriminalisation but agreed to take measures to prohibit discrimination based on both sexual orientation and gender identity.¹⁵⁸ Cowell and Milon have acknowledged in this regard that:

151 Caroll, A., “A Voice for Sexual Orientation and Gender Identity in the Universal Periodic Review”, *Centre for Criminal Justice and Human Rights*, 4 December 2014.

152 See above, note 146, p. 35.

153 Seventy-three percent of recommendations in the first round were accepted overall compared to only 36% of SOGI recommendations, *Ibid.*, p. 35.

154 See above, note 151.

155 Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Philippines*, UN Doc. A/HRC/21/1, 29 July 2012.

156 See above, note 8, p. 13.

157 *Ibid.*, p. 12.

158 Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Seychelles*, UN Doc. A/HRC/18/7, 11 July 2011. See also: UPR Info, “Responses to Recommendations, Seychelles”, 5 January 2012, available at: http://www.upr-info.org/sites/default/files/document/seychelles/session_11_-_may_2011/recommendationstoseychelles2011.pdf.

[A] full or active commitment to repeal in response to recommendations is generally given in a country where the penal provisions remain largely or totally un-enforced and are more a matter of historical legacy than a reflection of current government policy.¹⁵⁹

Nonetheless, this indicates the importance of monitoring to initiate discussion, where otherwise a lack of attention may affect no commitment to change.

Overall, it is considered that “[t]he UPR has been a very effective process in advancing LGBT human rights at the UN”.¹⁶⁰ It has demonstrated itself as valuable in tackling some of the gaps left elsewhere, and whilst not necessarily as a high overall priority, seems to include SOGI issues more readily than other mechanisms. In this regard, the political element hindering development within the political bodies has proven to allow some states to push for issues here. Despite this, disparity and inconsistency remains, and as inclusion is limited largely to the priorities of states, this will likely remain in a state of flux.

Analysis has shown some demonstrable efforts to address SOGI issues within the aforementioned monitoring mechanisms, perhaps surprisingly so considering the extent of development and lack of consensus in section 2. It is precisely because of the disregard shown in authoritatively developing the law that attention in the monitoring mechanisms has been so vitally important; it has proven to keep SOGI issues alive within the UN system, and helped to solidify SOGI issues as a human rights concern. In particular, the work undergone within these monitoring systems in highlighting key issues such as the importance of positive obligations, including anti-discrimination legislation and public awareness, is a significant contribution. In this sense, the monitoring mechanisms are facilitating “the global elaboration of how human rights relate to SOGI”.¹⁶¹ However, it should also be noted that where such progress has occurred, this provides the groundwork for, and is not an alternative to, a more authoritative articulation of SOGI rights.¹⁶²

Multiple problems persist with current monitoring, and a lack of consistent focus on the scope of SOGI issues within the full range of states demonstrates that addressing SOGI rests on discretionary priorities over comprehensive integration. Importantly, gaps remain which ignore even the most flagrant denials of rights, and an over-reliance on information and advocacy from civil society is a demonstrable concern. While UN monitoring mechanisms are often considered ineffective or impotent,¹⁶³ where advocates are unable to challenge laws

159 See above, note 39, p. 348.

160 See above, note 96, p. 7.

161 See above, note 8, p. 11.

162 See above, note 86, p. 366.

163 Mutua, M., “Standard Setting in Human Rights: Critique and Prognosis”, *Human Rights Quarterly*, Vol. 29, 2007, p. 547.

domestically or effectively lobby in politics, these mechanisms may nonetheless remain the best avenue to highlight abuses and effect change, and therefore it remains vital that they mainstream SOGI issues more significantly.

Thus, what section 2 and section 3 have collectively shown is that whilst SOGI rights appear an emerging concern, overall protection afforded in both the development of rights and the extent to which they are monitored for violations does not demonstrate that the necessary room has been made in the international human rights framework. There is a clear need to move towards a broader mainstreaming of SOGI issues throughout the UN, in order to combat the ad-hoc and piecemeal approach to the law and monitoring thus far.

4. Determining a Strategy for the Future of Sexual Orientation and Gender Identity Rights

One principal feature that the SOGI rights movement appears to lack at present is reference to a long term strategy for facilitating progression of SOGI issues within the UN.¹⁶⁴ In order to contribute to this debate, and drawing on the analysis in the preceding sections, this article considers two different options to advance SOGI rights.

a. A Specialised Convention

The creation of a specialised treaty has produced the most active discussion amongst academics,¹⁶⁵ likely as proliferation of similar instruments has generated such palpable precedent. Indeed, Heinze has even suggested that failure to generate one may depict SOGI rights as un-worthy, “[t]he longer sexual minorities fail to get one, the greater the suspicion that there must be some good reason”.¹⁶⁶

The most patent benefit of a treaty is the binding legal status which would be afforded to SOGI rights; though only incumbent on consenting states. In addition, and significantly, elevating SOGI rights offers retort to those opposing their existence merely on the basis of lacking explicit mention within *any* treaty.¹⁶⁷ The legal effects may therefore extend beyond signatories in allowing their steady rise; as Hathaway has noted, “once norms favouring human rights are entrenched, they can be difficult to dislodge”.¹⁶⁸ However, it is also true that

164 Persad, above note 3, p. 362. Persad notes advocates have focussed on encouraging and facilitating the jurisprudential percolation of SOGI rights within states.

165 See above, note 163, p. 628.

166 See above, note 64, p. 297.

167 See above, note 77, p. 890.

168 Hathaway, O.A., “Do Human Rights Treaties Make a Difference?” *The Yale Law Journal*, Vol. 111, 2002, p. 2004.

such a process in itself “may take decades to lead to tangible change”,¹⁶⁹ and provide more shortcomings to SOGI rights protection for non-signatories than benefits. For instance, it may feed opponent states with a sense of choice towards SOGI rights, asserting that failure to accept such binding obligations exonerates them from any respective duties. This argument goes hand in hand with the assertion by Alston and Crawford that treaty bodies stand in increasing isolation from the rest of the UN system,¹⁷⁰ which could then result in SOGI rights being effectively “boxed away”. On the other hand, the provision of a framework articulating SOGI rights, notably absent at present, could be an invaluable gain. This would bear legitimacy from originating strictly within the UN, and prove a constructive tool for advocacy in even non-signatory states.

The collaborative efforts of states in drafting such documents arguably substantiates that “treaties codify cultural standards from the different cultural traditions that make up the UN community”.¹⁷¹ In this regard, it may provide a valuable repository against cultural arguments. However, such a state of agreement would need to be met, and a frequent pattern in treaty drafting is the use of delays in order to block consensus, creating obstacles to its conclusion. This can be seen from previous state actions, including following the draft Brazil Resolution, where hundreds of amendments were threatened to the text in order to paralyse it.¹⁷²

One option for reducing this possibility is to settle for minimalist scope. For instance, Narayan argues for a fundamental focus on violence and state-persecution.¹⁷³ However, to the extent that this might establish a difficult barrier to the achievement of other important SOGI rights, it may represent a thorny compromise for consensus. Indeed, following the reactions within the political bodies to texts concerning basic rights, it is often considered unlikely that a comprehensive treaty may meet success if proposed in the near future.¹⁷⁴ If an all-inclusive articulation did indeed pass the drafting stage, in suffering comparable contention to women’s rights, it may be similarly subject to a high number of reservations, as occurred with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹⁷⁵ Indeed, this is often regarded to have left the Convention somewhat defunct, and Mutua argues “[the] reservations against CEDAW are the clearest sign yet of

169 *Ibid.*, p. 2022.

170 Alston, P. and Crawford, J., *The Future of UN Human Rights Treaty Monitoring*, Cambridge University Press, 2000, p. 175.

171 Addo, M.K., “Practice of the United Nations Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights”, *Human Rights Quarterly*, Vol. 32, 2010, p. 620.

172 See above, note 6, p. 230.

173 See above, note 9, p. 344.

174 See above, note 3, p. 368.

175 Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS, 18 December 1979.

the need to rethink the view that treaties ought to be the preferred method for standard setting in human rights”.¹⁷⁶

In addition, hard legal effect may have limited consequences in practice, as “fundamental to the project of international law is the assumption that legal commitments meaningfully condition the exercise of state power”.¹⁷⁷ This assumption may not always hold true as is shown through instances demonstrating the ineffectiveness of treaty monitoring, such as following the aforementioned decision of *Fedotova*, when Russia responded to a finding that its “homosexual propaganda” laws violated Article 19 by strengthening the laws and providing fines for information sharing to minors of “homosexual propaganda”.¹⁷⁸

Indeed, as usually only a limited number of states sign up for individual communications, this task would be left to state reports, often considered an ineffective means of monitoring and enforcement. In this regard, treaties may be utilised as “a substitute for, rather than a spur to, real improvement in human rights practices”.¹⁷⁹ Such usage could have negative consequences for SOGI, and it has been suggested that declaring rights without securing remedies for those violations “may actually be counterproductive”.¹⁸⁰ To the extent that a treaty may provide any effective monitoring, this would also be limited to signatory states.

It follows from this that even “mooting the idea of a specialised treaty as a means of clarifying and advancing sexual minority rights in the international human rights order, warrants an analysis of this proposal’s prospect for success”.¹⁸¹ Invoking the “naming and shaming” methodology that arguably drives treaty membership¹⁸² may not generate altogether different results than those demonstrated in the political bodies when it comes to endorsing texts. Another perspective is to consider that states are generally unwilling to undertake obligations for which they would be privy to significant attack; and the extent of SOGI violations across the world may provide some useful guidance on the limited potential signatories. Moreover, there appears little to suggest from the analysis in this study that any reasonable consensus would likely be achieved. In light of this uncertainty, Braun notes that failing to reach a majority consensus after the failed attempt of the Brazil Resolution to broadly affirm SOGI rights “could send a negative message to the international community and potentially worsen the treatment of LGBT people around the globe”.¹⁸³

176 See above, note 163, p. 572.

177 Goodman, R. and Jinks, D., “Measuring the Effects of Human Rights Treaties”, *European Journal of International Law*, Vol. 14, 2003, p. 177.

178 See above, note 36, p. 433.

179 See above, note 168, p. 2010.

180 *Ibid.*, p. 2024.

181 See above, note 3, p. 366.

182 See above, note 168, p. 2006.

183 See above, note 77, p. 894.

Thus it must be considered that while a specialised convention holds potential for elevating the status and monitoring of SOGI rights, it does present considerable risks; and importantly, without the promise of an effective result. It is necessary to ensure that any move towards clarification is based on considerable and deliberate research in order to provide the full understanding of rights lacking at present, and to further learn from the Brazil Resolution by undertaking a realistic deliberation of the likelihood of success at the given point in time. Accordingly, it is imperative that any step taken must build on, and not regress, the headway made thus far.

b. A Dedicated Special Procedures Mandate

Within the recent SOGI panel discussion in the Human Rights Council, Helfer highlighted two main obstacles as “a lack of information about the full scope of human rights violations against LGBT persons”, and “persistence of prejudice and stereotypes, leading to misunderstandings about human sexuality”.¹⁸⁴ A dedicated thematic SOGI mandate within the special procedures holds the ability to significantly impact on these concerns and on some of the limitations highlighted previously.

First, it should be noted that the reports generated by such special procedure would continue to have only a persuasive effect, and would not emulate the binding effect of a convention, and in this regard may not be considered as valuable. A dedicated mandate, however, is not without its important symbolic effect. It would undoubtedly elevate SOGI rights by, for the first time, creating a distinct and focussed space within the UN. This indeed holds true to the extent that mandate holders are regarded as “the public face of the UN human rights system”.¹⁸⁵ By providing a concentrated focus on SOGI issues, this will continue to solidify the SOGI norms. As Goodman and Jinks have noted in this regard, “improved human rights documentation and reporting are themselves part of the process of incorporation”.¹⁸⁶ Further, as express inclusion of SOGI can counter claims of over-stepping experienced by other mandates, alongside the fact its creation would stem from agreement in the Human Rights Council, it could significantly heighten the mandate’s persuasive legal effect. In addition to this, reporting directly to the Human Rights Council may effectively accelerate SOGI concerns within the broader UN system, as “the exposure that a particular issue receives may make it a priority within UN circles”.¹⁸⁷

One potential restriction, however, rests on the fact that the most effective monitoring requires the co-operation of states. Although that is not to say that it is incumbent entirely

184 See above, note 138, Para 25.

185 Subedi, S.P., “Protection of Human Rights through the Mechanism of UN Special Rapporteurs”, *Human Rights Quarterly*, Vol. 33, 2011, p. 209.

186 See above, note 177, p. 177.

187 See above, note 163, p. 609.

on this, and even when states are unreceptive, the appointment of mandate holders has proved to put a spotlight on practices, and helped “nudge the government towards adopting a policy more closely in keeping with international human rights norms.”¹⁸⁸ Furthermore, a lack of co-operation would not have the significance of the rejection of a treaty on SOGI rights.

Arguably, the greatest importance stems from garnering the support of more neutral states, as mandate holders exist not only for criticism, but “to offer help to receptive governments”.¹⁸⁹ Saiz has noted in particular that the best response to claims of “western ideals” is the support of southern states, which may be a consequence of this strategy facilitating wider agreement. This approach considers that with contention hampering the development of rights, the power of international law falls not within threatening, but nurturing and amassing consensus towards that protection; and a soft approach through dialogue can be effective towards this in addressing sensitive or controversial issues.¹⁹⁰ When new norms, and particularly those affecting cultural notions, become entrenched, the most imperative task is the development of conversations between local and global worlds.¹⁹¹

Thus, Navi Pillay has remarked that “the first step in overcoming divisions among States is dialogue. But to have an effect, dialogue must be sustained (...) and, equally important, it must be informed”.¹⁹² This is a notion that holds merit for *all* participants in a conversation, as “until those debates are enriched, in a cosmopolitan way, with an awareness of what is to be said about them and around them and against them, from all the variety of cultural and religious and ethical perspectives that there are in the world, they remain parochial”.¹⁹³ This builds on the concept of de-centring rights, and instead attempting to approach them from domestic angles. Flynn has noted in this regard that issues such as uncovering colonial contexts “cannot be fully addressed at theoretical level, but require changes in dominant perceptions and practice”.¹⁹⁴ This could be particularly valuable given the reliance on arguments of culture in warranting disregard for SOGI rights.

188 See above, note 185, p. 209.

189 *Ibid.*, p. 225.

190 See above, note 39, p. 211.

191 Cowan, J.K., Denbour, M. and Wilson, R.A., *Culture and Human Rights: Anthropological Perspectives*, Cambridge University Press, 2001, p. 8.

192 UN High Commissioner for Human Rights Navi Pillay, “Video Message: Oslo Conference on Human Rights Sexual Orientation and Gender Identity”, Oslo, 15–16 April 2013, available at: <http://geneva.usmission.gov/wp-content/uploads/2013/06/SOGI-conference-summary-and-toolkit.pdf>.

193 Waldron, J., “How to Argue for a Universal Claim”, *Columbia Human Rights Law Review*, Vol. 30, 1999, p. 313.

194 Flynn, J., *Reframing the Intercultural Dialogue on Human Rights: A Philosophical Approach*, Routledge, 2014, p. 10.

Some might argue in this sense that such an approach runs risk to a process of chipping away at the concept of universality. However, this need not be the case. Through a better understanding of the obstacles in the advancement of SOGI rights, mandate holders can utilise their efforts towards promoting, and engaging in, a more informed conversation. For instance, Braun has highlighted campaigns towards reducing female genital mutilation, where “receiving information about the violations of human rights through dialogue has led to a major change in attitudes about the practice”.¹⁹⁵ This approach could therefore be used to promote a different understanding of dominant perceptions regarding SOGI. Indeed, this is not only a necessity for state engagement, but the strength of public perception demonstrates an obstacle as equally strong as political will. The case of Malawi, which in 2011 attempted to repeal its sodomy laws but found that public consensus would not allow it, demonstrates that affecting legal reform can prove difficult without undertaking sufficient measures towards mobilising domestic attitudes.¹⁹⁶

Notwithstanding this, the appointment of a mandate holder for SOGI does not necessarily solve the problem of providing a framed articulation of rights. However, research from mandate holders can garner important consequences in understanding rights. The value that such a mechanism can bring can be demonstrated by recent praise towards the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for effectively “addressing the nexus” left in the respective treaty and by its monitoring body.¹⁹⁷ The approach to SOGI rights thus far has been both piecemeal and ad-hoc, and it is partly this inconsistency that has compounded uncertainty.¹⁹⁸ A lack of understanding of the scope of rights, as well as how they play out domestically, warrants uniform in-depth research. This may further provide the groundwork for action towards a UN endorsed framework, in which consistent and articulated delineations can be produced, originating strictly within the UN process and under the auspices of the Human Rights Council or General Assembly, even if it is non-binding.

However, whilst the work of mandate-holders is largely independent of political divides, the creation itself rests on a Human Rights Council vote. Nonetheless, the groundwork for such a mechanism has already been demonstrated, as the OHCHR 2011 report expressly notes that there is a “protection gap”, and that “a pattern of human rights violations emerges that demands a response”.¹⁹⁹ The commission of a follow up 2015 report demonstrates a recog-

195 See above, note 77, p. 901.

196 IGLHRC, “Malawi Suspends Sodomy Laws”, 11 June 2012, available at: <https://iglhrc.org/content/malawi-suspends-sodomy-laws>.

197 International Justice Resource Centre, “UN Special Rapporteur Addresses Possible Torture in Healthcare”, 11 March 2013, available at: <http://www.ijrcenter.org/2013/03/11/un-special-rapporteur-addresses-possible-torture-in-healthcare>.

198 See above, note 5, p. 341.

199 Human Rights Council, *Discriminatory Laws and Practices*, Paras 28 and 82.

nised need for further enquiry into SOGI issues and a further need to alleviate the monitoring gap not yet filled. These findings provide an extremely effective foundation for a movement advocating for such a mechanism, as its creation can be considered somewhat mandated by the previous actions of the Human Rights Council itself.

Whilst such a process may not garner immediate effects, notwithstanding that a treaty offers no guarantees either, it must be agreed that the “progressive recognition of ever more specialized interests must surely promote an overall climate of tolerance and broad-mindedness that will benefit sexual minorities in the long run”.²⁰⁰

Analysis of two options in advancing SOGI rights within the UN has demonstrated that limitations existent within both approaches, and neither may comprehensively tackle all the problems highlighted in sections 2 and 3. However, as SOGI issues currently appear at an impasse regarding their attention and development, it is necessary to look towards more effective mainstreaming of SOGI issues. Where it has been demonstrated that a convention may garner unwarrantable risks to the progress made thus far, advocacy towards a dedicated mechanism may provide a more careful and considered approach to engaging with current hurdles.

Conclusion

This article has demonstrated the inadequacy of the current place afforded to SOGI rights within the UN framework and system. Whilst the very purpose of human rights avowals basic and fundamental rights “for all”, the project of international human rights law remains imperfect; and the deficient protection of SOGI rights may attest to that.

SOGI rights are largely left open to interpretation and do not yet appear authoritatively fully formed, and in turn lack a consistent and comprehensive focus towards such violations. Whilst the authoritative development of the law appears to be stifled by the extent of contention and lack of consensus, the SOGI rights movement has arguably found some real allies in softer monitoring systems of the UN, and particularly the extra-conventional systems. However, focussing on any one area will not achieve the results required, and a more systemic approach is needed.

Where new norms require acknowledgement, and significant obstacles are faced, it requires a re-thinking of the current modes of international rights making and adherence. Facilitating a broader understanding of context and the promotion of different perceptions of SOGI may present a more constructive approach than the risk of polarising the issue further. Notwithstanding this, “[c]are and caution, however, must not be confused with inattention or inaction”,²⁰¹ and it is vital to ensure that SOGI issues are kept alive within the UN forum. One appropriate strategy could be in the form of a dedicated thematic mandate. Increased scru-

200 See above, note 64, p. 298.

201 See above, note 92, p. 29.

tiny and investigation, coupled with consistent research and dialogue, may provide the next crucial step towards a stronger foundation for SOGI rights in the UN.

To the extent that the UN system has failed to make adequate room for SOGI thus far, it has led some to contend that “[w]e can no more than observe that with regard to the plight of members of sexual minorities, the universal enjoyment of human rights remains an elusive and distant goal”.²⁰² However, this notion fails to acknowledge the extent of progress that can be made given the proper approach. Several decades ago the idea of rights for indigenous peoples may have appeared a preposterous ambition but the gradual development of that forum within the UN demonstrates hope for SOGI rights.²⁰³ The recognition of SOGI rights presents a test in itself to the capacity of international human rights but one which justifies only one acceptable outcome.

202 See above, note 5, p. 331.

203 Sanders, D., “Getting Lesbian and Gay Issues on the International Human Rights Agenda”, *Human Rights Quarterly*, Vol. 18, 1996, p. 105.