

BRACKETING SEXUALITY: HUMAN RIGHTS AND SEXUAL ORIENTATION—A DECADE OF  
DEVELOPMENT AND DENIAL AT THE UN

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Health has significantly advanced debates and understandings of sexuality-related rights at the UN, highlighting how discrimination and violence against lesbian, gay, bisexual, and transgender people impedes their enjoyment of sexual and reproductive health and rights.<sup>47</sup> Other Special Rapporteurs have included reference to sexual orientation issues in connection with the right to education, freedom of expression, due process, the right to housing, and the right to a remedy.<sup>48</sup> The Working Group on Arbitrary Detention, which is another important mechanism of the CHR, has condemned the arbitrary detention and torture of 55 men in Egypt in connection with their perceived homosexuality.<sup>49</sup>

<sup>47</sup> United Nations Economic and Social Council, Report of the Special Rapporteur on the Right to Health, E/CN.4/2004/49 (2004), paras 33, 38, and 39. This report is analyzed in the final section of this article.

<sup>48</sup> For the right to education, see United Nations Economic and Social Council, Annual Report of the Special Rapporteur on the Right to Education, E/CN.4/2001/52 (2001), para 75. For freedom of expression, see United Nations Economic and Social Council, Report of the Special Rapporteur on Freedom of Expression, *Mission to Argentina* E/CN.4/2004/75/Add.1 (2004), para 124. For due process, see United Nations Economic and Social Council, Report of the Special Rapporteur on the Independence of Judges and Lawyers, E/CN.4/2003/65 (2003), Annex: Bangalore Principles for Judicial Conduct (sexual orientation is included in their equal treatment provisions). For the right to housing, see United Nations Economic and Social Council, Second Progress Report of the Special Rapporteur on the Right to Housing, E/CN.4/Sub.2/1994/20 (1994), which includes reference to “sexual orientation” discrimination in the draft International Convention on the Right to Housing. For the right to a remedy, see United Nations Economic and Social Council, Final Report of the Special Rapporteur on Right to Restitution, E/CN.4/2000/62 (2000), para 27.

<sup>49</sup> United Nations Economic and Social Council, WGAD Opinion No. 7 (Egypt), E/CN.4/2003/8 (2001). See also Human Rights Watch, *In a Time of Torture: The Assault on Justice in Egypt’s Crackdown on Homosexual Conduct* (New York: HRW, 2004) and S. Long, “When Doctors Torture: The Anus and the State in Egypt and Beyond” in the present issue of *Health and Human Rights*.

The Sub-Commission on Human Rights, despite its mandate to undertake thorough studies on a range of emerging human rights issues, has not taken up calls from NGOs and from its own individual members to study the connections between sexual-orientation discrimination, health, and human rights.<sup>50</sup> Although Sub-Commission studies have occasionally referred to the non-discrimination principle, the Sub-Commission is well placed to carry out a more rigorous and comprehensive analysis of the obstacles that have prevented recognition in practice of the rights affirmed in principle by other parts of the UN system.<sup>51</sup>

### A “Non-Subject”: Reactions at the Political Bodies of the UN

The work of experts appointed by the

<sup>50</sup> The Sub-Commission on the Promotion and Protection of Human Rights consists of 26 independent experts elected by the Commission on Human Rights. Although nominated by governments, they act in their personal capacities. The Sub-Commission’s functions include “to make recommendations to the Commission concerning the prevention of discrimination of any kind” ([www.unhchr.ch/html/menu2/2/sc.htm](http://www.unhchr.ch/html/menu2/2/sc.htm)). For an example of calls by NGOs to study the links between sexual-orientation discrimination, health, and human rights, see the Statement made by Amnesty International to the Sub Commission, 8/14/01 (available at [action.web.ca/home/lgbt](http://action.web.ca/home/lgbt)). One Sub-Commission member, Louis Joinet, proposed a dedicated study in preparation for the World Conference on Racism, noting “it would be unfortunate if the World Conference ignored discrimination against homosexuals, which was a major aspect of discrimination.” United Nations Economic and Social Council, Summary Record of the 17th Meeting of the Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2000/SR.17 (2000).

<sup>51</sup> Sub-Commission references to the non-discrimination principle can be found in, for example, United Nations Economic and Social Council, Report of the Special Rapporteur on Economic, Social and Cultural Rights, E/CN.4/Sub.2/1992 (1992), para 185; United Nations, Working Paper on Further Proposals for the Work of the World Conference on Racism, A/CONF.189/PC.2/19/Add.1 (2001), para 5; United Nations Economic and Social Council, Proposed Draft Human Rights Code of Conduct for Companies, E/CN.4/Sub.2/2000/WG.2/WP.1/Add.1 (2000).

Commission on Human Rights has been enormously significant in applying international human rights protections to those facing discrimination and violence because of their sexual orientation or gender identity. Attempts to place these findings on the agenda of the CHR itself, however, have met with intense resistance. In contrast to the bodies surveyed above, the Commission is made up of government representatives. Politics rather than principle usually determine the outcome of its human rights deliberations, and CHR members have constantly sought to undermine the effectiveness of CHR-appointed human rights experts.<sup>52</sup>

The fate of the draft resolution presented by Brazil to the CHR regarding human rights and sexual orientation exemplifies this pattern.<sup>53</sup> Despite its relatively modest content, the draft resolution tabled in 2003 was described by Pakistan as an insult to the world's 1.2 billion Muslims.<sup>54</sup> Five member states of the Organization of Islamic Conference (OIC) proposed deleting all reference to sexual orientation in the draft, which would have rendered it meaningless.<sup>55</sup> After other blocking and delaying tactics, discussion of the draft resolution was

postponed to the 2004 session.<sup>56</sup> At the 2004 Commission, however, concerted opposition from the OIC and the Holy See and lukewarm support from supposedly sympathetic governments led Brazil to postpone formal discussion of the resolution for yet another year.<sup>57, 58</sup>

The arguments invoked by the Holy See and the Organization of Islamic Conference against the Brazil resolution are typical of the objections raised over the past 10 years whenever sexual-orientation rights have been asserted at the political bodies of the UN. Letters circulated by their representatives in Geneva argued that the principle of nondiscrimination on grounds of sexual orientation cannot be considered as universally recognized as it does not appear in any UN treaty.<sup>59</sup> They argued, furthermore, that sexual orientation, an "undefined term," may be a legitimate basis for discrimination to protect children and the family. It is not a human rights issue but a social and cultural one, best left to each state to address within its own sovereign legal and social systems. Asserting sexual orientation as a source of universal rights is culturally divisive and therefore threatening

<sup>52</sup> See Amnesty International, "Commission on Human Rights: Weakening Commitment to its own Procedures," Amnesty International Press Release, 4/20/04; Amnesty International, "Commission on Human Rights: Where Is the Reform Agenda?," Amnesty International Press Release, 4/22/04.

<sup>53</sup> United Nations Economic and Social Council, Draft Resolution: Human Rights and Sexual Orientation, E/CN.4/2003/L.92 (2003).

<sup>54</sup> Action Canada for Population and Development (see note 11), p. 31. The draft resolution merely expressed "deep concern" at the occurrence of human rights violations all over the world on grounds of sexual orientation and called on states and relevant UN human rights bodies to give due attention to these violations. It did not propose creating any new international standards or mechanisms to protect against sexuality-related abuses.

<sup>55</sup> United Nations Economic and Social Council, Proposed Amendments by Saudi Arabia, Pakistan, Egypt, Libya and Malaysia, E/CN.4/2003/L.106-110 (2003).

<sup>56</sup> United Nations Economic and Social Council, Organization of the Work of the 59th Session of the Commission on Human Rights, E/CN.4/2003/118 (2003).

<sup>57</sup> Although not a UN member state, the Holy See (representing the leadership of the Catholic Church and the inhabitants of the Vatican) has permanent UN observer status. For an analysis of the Holy See's resistance to sexual and reproductive rights at the UN, see Center for Reproductive Rights, *The Holy See at the United Nations, An Obstacle to Women's Reproductive Health And Rights* (New York: Center for Reproductive Law and Policy, 2000). Available at: [www.crlp.org](http://www.crlp.org)

<sup>58</sup> While Brazil professed its continued commitment to the resolution, NGO advocates in Geneva alleged that Brazil had ceded to OIC threats to boycott a forthcoming trade meeting in Brazil unless the resolution was withdrawn. "Homosexual Rights Resolution Withdrawn at United Nations," *The Washington Times*, 3/30/04.

<sup>59</sup> Letter from the Permanent Mission of Pakistan on behalf of the Organization of Islamic Conference, 2/26/04, and Letter from the Permanent Mission of the Holy See, 3/1/04.

to the UN consensus.

Although strikingly out of touch with the human rights developments canvassed earlier, these arguments have a long and successful history, both at the CHR and at other UN forums made up of government representatives.<sup>60</sup> At the series of UN World Conferences since the ICPD in Cairo in 1994, attempts to include even a reference to sexual orientation in draft declarations have systematically met the same fate, the words remaining bracketed before being dropped in the interest of “consensus.”

At the 1995 Fourth World Conference on Women in Beijing, four references to the persecution of women for their sexual orientation in the draft Platform for Action were dropped after the Vatican and some Islamic states, supported by organizations of the Christian right, decried the “hijacking of human rights” by feminist and lesbian rights activists as a major threat to fundamental religious and cultural values.<sup>61</sup> Sexual orientation, they said, was a “non-subject” that would open the floodgates to many

<sup>60</sup> For example, draft CHR resolutions tabled in recent years endorsing the findings of the Special Rapporteur on Extrajudicial, Arbitrary and Summary Executions have prompted controversy over the inclusion of references to “killings based on sexual orientation,” and have often been subjected to a vote following objections by several Islamic countries. In 2001 this resulted in the replacement of the reference with the phrase “all killings committed for any discriminatory reason,” deliberately obscuring the issue. See United Nations Economic and Social Council, Report on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/RES/2000/31 (2000), para 6; United Nations Economic and Social Council, Summary Record of the 72nd Meeting of the Commission on Human Rights, E/CN.4/2001/SR.72 (2001).

<sup>61</sup> See for example the critique by Kathryn Balmforth, Director of the World Family Policy Center, Brigham Young University, that “The UN is being taken over by the radical feminists, population control ideologues, and homosexual rights activists who make up the anti-family movement.... The ongoing takeover of some of the human rights mechanisms of the United Nations ... is a potential threat to the rights of people everywhere to enjoy their own cultures and religions.” K. Balmforth, “Hijacking Human Rights.” Available at: [pwl.netcom.com/~efny/congress%20speech.htm](http://pwl.netcom.com/~efny/congress%20speech.htm)

unacceptable behaviors.<sup>62</sup>

The five-year review conferences held in 1999 and 2000 to evaluate implementation of the Cairo and Beijing commitments saw concerted attempts to reverse the hardfought progress made on sexual and reproductive rights at those conferences.<sup>63</sup> In 1999, the Holy See forged alliances with other theocratic governments in fiercely resisting any language in the ICPD+5 Key Actions Document that could be interpreted as addressing either abortion or homosexuality. At the UN General Assembly Special Session in June 2000 to review implementation of the Beijing Platform for Action, a proposal to add reference in the resolution to measures taken “by a growing number of countries ... to prohibit discrimination on the basis of sexual orientation,” was opposed by delegates from Senegal, Syria, Nicaragua, and Kuwait on grounds that they could not accept “sexual orientation,” an undefined term, as a human right.<sup>64</sup>

Although the UN’s work on HIV/AIDS has helped break taboos about discussing sexual diversity in human rights forums, at the Special Session of the UN General Assembly on HIV/AIDS in June 2001, the bracketed references to “men who have sex with men” as a group vulnerable to infection

<sup>62</sup> For a full account of the sexual orientation debate at Beijing, see G. Careaga Pérez, *Sexual Orientation in Women’s Struggle (El Closet de Sor Juana/ILGA, 2003)*.

<sup>63</sup> While fraught with conflict, the review processes succeeded in reaffirming the Beijing and Cairo commitments and articulating strategies for implementation and evaluation. Center for Reproductive Rights, *ICPD+5: Gains for Women Despite Opposition* (New York: Center for Reproductive Law and Policy, 1999). Available at: [www.crlp.org](http://www.crlp.org)

<sup>64</sup> The reference was deleted after the Pakistani delegate accused Western delegations of “holding the women of the world hostage to one term, ‘sexual orientation,’” when their real needs were clean water and help in overcoming illiteracy. D. Sanders, “Getting Lesbian and Gay Issues on the International Human Rights Agenda,” *Human Rights Quarterly*, 18/1 (1996): pp. 67-106.

were removed from the text of the Declaration of Commitment following heated debate and objections from a number of governments.<sup>65</sup> The same battles over bracketed text were fought in August 2001 at the UN World Conference Against Racism in Durban, South Africa. A proposal by Brazil to recognize sexual orientation as a related form of discrimination remained bracketed in the Conference's draft Program of Action until the last day and was eventually deleted.<sup>66</sup>

Nevertheless, progress at the political forums of the UN cannot be measured solely in terms of textual references to sexual orientation. While sexual orientation may be absent from the instruments adopted at UN World Conferences, sexuality more broadly has had an increasingly tangible presence. The Beijing Declaration and Platform for Action in particular was a milestone in the recognition of sexual and reproductive autonomy as a central plank of women's human rights. One of its paragraphs in the section on health, adopted after heated controversy, builds on Cairo's codification of reproductive rights by affirming women's "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."<sup>67</sup>

If the "bracketing" has consistently muted

<sup>65</sup> Regarding the breaking of taboos see R. Parker, "Sexual Rights: Concepts and Action," *Health and Human Rights* 2/3 (1997): pp. 31-37. See also United Nations Economic and Social Council, The Protection of Human Rights in the Context of HIV/AIDS, E/CN.4/2003/81 (2003), paras 10 and 28. Regarding the change in the text of the Declaration of Commitment see International Gay and Lesbian Human Rights Commission, "Human Rights Activist Banned from Speaking at UNGASS," IGLHRC, 06/22/01.

<sup>66</sup> World Conference against Racism, Draft Program of Action, A/CONF.189/5/Corr.1, 2 September 2001, para 68.

<sup>67</sup> Fourth World Conference on Women, Beijing Declaration and Platform for Action, A/CONF.177/20, 15 September 1995, para 96.

any explicit recognition of sexual orientation rights at the political forums of the UN, those defending these rights have increasingly made their voices heard. Their participation and visibility at UN forums have made these empowering processes, providing a unique opportunity for activists around the world to strategize and exercise rights of political participation denied in their home countries.<sup>68</sup> The 2004 Commission on Human Rights saw an unprecedented number of formal interventions by LGBT rights defenders, as well as their participation in NGO-organized panel discussions.<sup>69</sup>

Over the past decade, an ever-increasing number of governments and mainstream human rights organizations have also sponsored initiatives and spoken powerfully in favor of sexual-orientation rights.<sup>70</sup> This

<sup>68</sup> The Beijing Conference, in particular, marked a turning point in the engagement and visibility of lesbian rights activists with UN processes. See for example the statement made by Palesa Beverlie Ditsie on behalf of the International Gay and Lesbian Human Rights Commission to the Plenary on September 13th, 1995: "If these words [sexual orientation] are omitted from the relevant paragraphs, the Platform for Action will stand as one more symbol of the discrimination that lesbians face and of the lack of recognition of our very existence." See also C. Bunch and C. Hinojosa, "Lesbians Travel the Roads of Feminism Globally" in J. D'Emilio, W. Turner, and U. Vaid (eds.) *Creating Change: Sexuality, Public Policy and Civil Rights* (St. Martin's Press, New York, 2000).

<sup>69</sup> For example, Statement by Dorothy Aken'Ova, International Centre for Reproductive Health and Sexual Rights (INCRESE), Nigeria, "Protecting Sexual Health and Rights of Vulnerable Groups", 4/14/04; Statement by Raquel Caballero, Centre for Global Women's Leadership, "The LGBT Situation in Paraguay with Respect to Torture and Arbitrary Detention." Statement by Wendy Isaack, Lesbian and Gay Equality Project, South Africa, "Violence against Women." Three NGO panels events were organized between March 30th and April 1st, 2004 on human rights violations based on sexual orientation and gender identity, with a focus on the experiences of people from the global South.

<sup>70</sup> For example, among the many governments at Beijing who spoke in favor of including sexual orientation, Switzerland said deleting the reference "would not delete the people it is intended to protect." At the Durban conference, Brazil, Canada, Chile,

has left a minority of governments opposed to these efforts increasingly on the defensive. The vehemence of their resistance is itself a measure of the impact that movements for gender equality and sexual diversity have had across the globe.<sup>71</sup> Nevertheless, this backlash has ensured that, for the moment, sexual orientation stays off the agenda in the name of “consensus.”

### **Confronting Obstacles, Rethinking Strategies**

Events at the 2004 Commission on Human Rights exemplify the dynamic at the UN a decade after *Toonen*. Rights relating to sexual orientation (and sexuality more generally) may be legally well established, but they remain politically contested. Certain governments have intensified their efforts to deny or roll back any recognition of them, using “cultural sovereignty” as a rallying cry and the lack of explicit reference to sexual orientation in international standards as their justification.

This current revisionism may have more to do with geopolitics than the finer points of international human rights law. Yet these arguments point to some of the challenges that future advocacy strategies need to confront: defending universality against cultural relativist attacks; overcoming barriers to the participation of human rights defenders working on sexuality in UN processes; and confronting limitations and biases in the way human rights law is interpreted and applied.

### **Challenging “Cultural” Justifications**

Sexuality remains one of the arenas where

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Ecuador, and Guatemala stated that sexual orientation was a human rights issue which could no longer be ignored at the UN and called for “more in-depth analysis, discussion and debate to contribute to the development of worldwide consensus on this matter” (Joint statement by Brazil, Canada, Chile, Ecuador and Guatemala, 9/7/01).

<sup>71</sup> M. Castells, *The Power of Identity* (Oxford: Blackwells, 1998), p. 242.

the universality of human rights has come under the most sustained attack and around which governments most often seek to erect protective barriers of cultural and national sovereignty to evade their internationally recognized rights obligations.<sup>72</sup> Sexuality figures prominently in the construction of narratives around state sovereignty, national identity and non-interference.<sup>73</sup> The appeal to “cultural sovereignty” and “traditional values” as a justification for denying sexual orientation (alongside other sexual-rights) claims, has become all the more prevalent in response to the processes of economic globalization and global cultural homogenization.<sup>74</sup>

As in the context of women’s rights, this is often based on highly dubious misrepresentations of history and on fixed and selective notions of culture.<sup>75</sup> Some

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<sup>72</sup> See for example the amendments proposed by Saudi Arabia, Pakistan, Egypt, Libya, and Malaysia to the Brazilian resolution to the CHR in 2003 on human rights and sexual orientation, which delete all references to sexual orientation and insert language affirming respect for “cultural diversity,” “cultural pluralism,” and the preservation of “cultural heritage and traditions.” United Nations Economic and Social Council (see note 55).

<sup>73</sup> The discourses structuring these narratives often identify the state as heterosexual and homosexuality as the foreign “other.” Within societies, homophobia is stoked and inflamed for political reasons in order to demarcate boundaries of citizenship and national belonging. Such discourses are an integral part of the justifications currently invoked by governments in international human rights forums that there are “compelling state interests” for denying equal rights to lesbian, gay, bisexual and transgender people. See C. Stychin, *A Nation by Rights: National Cultures, Sexual Identity Politics and the Discourse of Rights* (Philadelphia: Temple University Press, 1998).

<sup>74</sup> For an extensive analysis of how states have used claims of sovereignty to marginalize and attack organizing around sexuality-related rights, including at the Beijing World Conference on Women, see C. Rothschild and S. Long, *Written Out: How Sexuality is Used to Attack Women’s Organizing* (New York: IGLHRC and Center for Women’s Global Leadership, 2000).

<sup>75</sup> A. Rao, “The Politics of Gender and Culture in International Human Rights Discourse” in J. Peters and A. Wolper (eds.) *Women’s Rights as Human*

governments in Asia, Africa, and the Middle East, for example, have sought to bolster their domestic authority through nationalist rhetorics, portraying homosexuality as a foreign imposition and a manifestation of western decadence.<sup>76</sup> Nor is this appeal to mythical traditional cultural values limited to governments of the South. The US has been at the forefront of recent “fundamentalist” attempts at the UN to rollback sexual and reproductive rights in the name of defending traditional forms of family.<sup>77</sup> While UN consensus documents have stressed that national and regional cultural and religious values cannot trump fundamental human rights, in practice states are still afforded a wide margin of discretion within the UN human rights system when it comes to matters of sexuality.<sup>78</sup> A vigorous defense of the universality of rights related to sexual orientation has generally been

lacking at the UN.<sup>79</sup>

A dilemma for rights advocates is how to formulate claims to universal rights in language that recognizes the significance of cross-cultural constructions of sexuality. Labels and perceptions attached to same-sex sexual identity and behavior vary enormously from culture to culture.<sup>80</sup> Advocacy strategies that appear to globalize essentialist and culturally specific notions of “lesbian/gay identity” may be seriously counter-productive.<sup>81</sup> The increasingly central role being played by rights activists from the South in UN processes around sexuality is the most eloquent response to those governments that seek to claim that sexual rights are an exclusively Northern concern. The obstacles that many of them face both domestically and internationally, however, have constrained their potential role as protagonists in UN lobbying. In many countries, they are denied legal status, resources, and recognition of their status as human rights defenders, all of which hampers their capacity to engage with international organizations.<sup>82</sup> Moreover, activists from all parts of the globe have consistently faced attempts by governments to exclude them from UN forums, particularly through denial of

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*Rights: International Feminist Perspectives* (New York: Routledge, 1995).

<sup>76</sup> For example, some Southern African leaders have defended their country’s “sodomy” laws on grounds that homosexuality is a foreign disease alien to local norms and traditions. Ironically, it is not same-sex behavior, but the laws prohibiting it that are the colonial imposition, as well as the social and scientific construct of “homo/hetero-sexuality” that such laws enshrine. The ways in which homophobia has been manipulated for political purposes by some Southern African governments is analyzed in Human Rights Watch, *More Than a Name: State-sponsored Homophobia and its Consequences in Southern Africa* (New York: Human Rights Watch, 2003).

<sup>77</sup> F. Girard, *Global Implications of U.S. Domestic and International Policies on Sexuality*. (International Working Group on Sexuality and Social Policy, Working Papers No. 1, June 2004, available at [www.mailman.hs.columbia.edu/sms/cgsh/iwgssp\\_english.pdf](http://www.mailman.hs.columbia.edu/sms/cgsh/iwgssp_english.pdf)); R. Petchesky, *Reproductive and Sexual Rights: Charting the Course of Transnational Women’s NGOs* (United Nations Research Institute for Social Development, 2000), p. 15; International Women’s Health Coalition, *Bush’s Other War*, IWHC Fact Sheet, 2002. Available at: [www.iwhc.org](http://www.iwhc.org)

<sup>78</sup> “While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.” United Nations, Vienna Declaration and Program of Action, A/CONF.157/23 (1993), para 5.

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<sup>79</sup> E. Heinze, “Sexual Orientation and International Law: A Study in the Manufacture of Cross-Cultural ‘Sensitivity,’” *Michigan Journal of International Law* 22 (2001): p. 284. Heinze criticizes the “cross-cultural sensitivity game” played by sympathetic governments who refrain from advancing issues of sexual orientation on the UN agenda for fear jeopardizing the UN consensus.

<sup>80</sup> G. Herdt, *Same Sex, Different Cultures* (Oxford: Westview Press, 1997).

<sup>81</sup> S. Katyal, “Exporting Identity,” *Yale Journal of Law and Feminism*, 14/1 (2002): pp. 97-176; O. Phillips, “Constituting the Global Gay” in D. Herman and C. Stychin (eds.) *Sexuality in the Legal Arena* (London: Athlone, 2000); B. Adam, J. Duyvendak, and A. Krouwel (eds.) *The Global Emergence of Gay and Lesbian Politics* (Philadelphia: Temple University Press, 1998).

<sup>82</sup> Amnesty International, *Crimes of Hate, Conspiracy of Silence* (New York: Amnesty International, 2001), pp. 53-58.

accreditation.<sup>83</sup>

As the UN Special Representative on Human Rights Defenders has suggested, the obstacles and risks facing those defending rights of sexuality across the globe merit greater attention and sensitivity from both UN human rights bodies and others within the human rights movement.<sup>84</sup>

### ***Confronting Limitations and Biases in International Human Rights Law***

For all the progress made at the UN over the past decade, sexual orientation is still not mentioned in any binding UN human rights treaty, nor is it in any final political commitment document resulting from a UN world conference. The decisions and interpretations of the treaty bodies are authoritative, but most states hold that they are not legally binding. Instruments such as the Beijing Declaration and Platform for Action contain extensive reservations by states on the provisions relating to sexuality and contain no text on sexual orientation. Although the prohibition of sexual-orientation discrimination has been unequivocally recognized by the UN treaty bodies and other international human rights bodies, reactions by governments at the UN indicate that in political venues it is not wholly accepted by the full community of states.<sup>85</sup>

<sup>83</sup> For example, at the Special Session of the UN General Assembly on HIV/AIDS in June 2001, the General Assembly spent almost three hours and cast three separate votes to decide whether to accredit a representative of the International Gay and Lesbian Human Rights Commission (IGLHRC) to deliver a three-minute speech at a human rights round-table discussion. International Gay and Lesbian Human Rights Commission (see note 65). At the Durban Conference, a decision on whether to grant accreditation to the International Lesbian and Gay Association was, exceptionally, put to a vote and narrowly defeated.

<sup>84</sup> United Nations Economic and Social Council (see note 46).

<sup>85</sup> The fate of the Brazil resolution is only one recent indication of some governments' reluctance to recognize the principle. See, for example, the failure of the Consultative Meeting on the Draft Basic

The lack of explicit reference to a right to be free from discrimination on grounds of sexual orientation, or a broader right to sexual autonomy, has meant a reliance on progressive "reading into" existing human rights provisions, typically the right to privacy, rights to physical integrity (freedom from torture and the right to life), and freedom from discrimination on grounds of sex.<sup>86</sup> While rights claims based on these approaches have achieved important victories, each has its limitations and has proven insufficient on its own.<sup>87</sup>

The boundaries of the right to privacy have proven highly mutable, and respect for privacy can co-exist with moral disapproval or mere tolerance of homosexuality, as long as it is confined to the private sphere of the closet.<sup>88</sup> Similarly, focusing on rights of physical integrity limits the scope of concern to the most egregious violations, such as the torture of lesbians through forced psychiatric treatment or "social cleansing" killings of transgender sex workers.<sup>89</sup>

While claims based on the principles of non-discrimination and equal protection of the law have been increasingly successful at the UN, as well as in many national jurisdictions, the UN expert bodies have

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Principles on the Right to a Remedy to agree on the inclusion of the term "sexual orientation" as a recognized category for protection against discrimination. United Nations Economic and Social Council, Report of the Consultative Meeting, E/CN.4/2003/63 (2002), paras 65 and 66.

<sup>86</sup> For an overview of relevant international case-law beyond the UN, see Human Rights Watch, *Resource Library for International Jurisprudence on Sexual Orientation and Gender Identity*. Available at: [www.hrw.org](http://www.hrw.org)

<sup>87</sup> For a more detailed analysis of the shortcomings of "privacy" and "non-discrimination" based approaches, see N. Bamforth, *Sexuality Morals and Justice* (London: Cassell, 1997), chapter 6.

<sup>88</sup> For example, in finding that laws criminalizing homosexual sex breached the right to privacy in the case of *Dudgeon v. UK*, the European Court of Human Rights argued that "decriminalization did not imply approval." *Dudgeon v. UK* (see note 13), para 61.

<sup>89</sup> For example, Amnesty International (see note 82).

been virtually silent regarding the basis for locating “sexual orientation” in the non-discrimination provisions of international standards.<sup>90</sup> This is significant because legal strategies in a number of jurisdictions have foundered on the question of whether sexual-orientation claims can be argued as sex discrimination.<sup>91</sup>

The jurisprudence to date betrays other limitations of the non-discrimination approach. Human rights doctrine on non-discrimination allows considerable leeway for subjective interpretation regarding what circumstances may justify unequal treatment.<sup>92</sup> Differential treatment is not considered discrimination if the criteria for differentiation are “reasonable and objective,” and if the aim is to achieve a purpose deemed “legitimate” under international standards.<sup>93</sup>

As seen in the cases of *Joslin* and *Young* before the Human Rights Committee, the treaty bodies have shown themselves willing to tolerate discrimination in partnership

rights in the name of “protection of the family,” a legitimate interest invoked in an unduly restrictive way which denies the diversity of contemporary forms of family. Non-discrimination arguments will have only limited success if the basic concepts underpinning human rights law, such as “marriage,” the “family,” and “state sovereignty” continue to be interpreted in heterosexist ways. As feminist legal scholars have pointed out, a non-discrimination approach is inadequate without addressing the structural biases of international human rights law.<sup>94</sup>

While some have argued for a new UN declaration or convention prohibiting sexual-orientation discrimination, such a project is not only hopelessly unattainable in the current climate, it also lays bare the problem of naming the categories to be protected.<sup>95</sup> The binary categories inherent to non-discrimination norms (“men/women,” “homo/heterosexual”) can also serve to subtly reinforce the subordination of one by the other.<sup>96</sup> Volatile and culturally specific concepts such as “lesbian and gay” and “sexual minorities” defy the kind of fixed universally applicable categorization that is necessary for codification in anti-discrimination instruments.<sup>97</sup>

<sup>90</sup> While it is perhaps fortunate that the treaty bodies have not followed the example of the concurring opinion in *Toonen*, which wades dubiously into explanations that sexual orientation is an “immutable status,” the lack of clarification about the reasoning for reading “sexual orientation” into “sex” (or “other status” as the CESCR General Comments appear to do) fuels the perception that the non-discrimination norm is not well established.

<sup>91</sup> See, for example *Grant v. South West Trains*, European Court of Justice, ECR C-249/96 (February 1996), cited by New Zealand in the case of *Juliet Joslin et al. v. New Zealand* (see note 33) as authority for the argument that denying benefits to same-sex partners was not sex discrimination. The drafters of the South African Constitution argued that a specific provision on sexual-orientation discrimination was necessary so as to acknowledge the historic injustices suffered by sexual minorities under apartheid and to promote understanding that sexual orientation is a characteristic analogous to race or gender. Constitutional Court of South Africa, *NCGLE v. Minister of Justice*, May 1998.

<sup>92</sup> See A. Bayefsky, “The Principle of Equality or Non-Discrimination in International Law,” *Human Rights Law Journal* 11 (1990): pp. 1-34.

<sup>93</sup> Human Rights Committee, General Comment 18: Non-Discrimination (1989), para 13.

<sup>94</sup> See C. Chinkin and H. Charlesworth, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000), p. 49.

<sup>95</sup> For the argument that there should be a new UN declaration or convention, see E. Heinze, (see note 79), p. 300.

<sup>96</sup> E. Heinze, (see note 79), p. 300. The homo/hetero binary has its roots in 19th century science which pathologized homosexuality in contrast to healthy heterosexuality.

<sup>97</sup> The particular difficulty of naming sexual dissidents as subjects of international standards has reinforced their invisibility and lack of protection. The seemingly impossible task is to deconstruct identity labels while at the same time defining them. However, the problem of defining and 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.” See A. Miller, “Sexual But Not Reproductive: Exploring the Junction and Disjunction of Sexual and Reproductive Rights,” *Health and*



### ***The Promise of “Gender Integration” at the UN***

The obstacles canvassed above—including deference to cultural justifications, exclusion from UN processes, and biased interpretation of international standards—are the very same obstacles that have historically hampered progress in advancing women’s rights internationally.<sup>98</sup> This is not surprising, given the inextricable link between sexuality and gender.<sup>99</sup> The process of “gender-mainstreaming” underway at the UN since the 1990s aimed to overcome these gender biases in its work. However, its progress has, at best, been mixed. Moreover, there is little evidence that those at the forefront are willing to make the conceptual links to sexual orientation—perhaps out of fear that this would compromise the broader process of gender integration by alienating governments.<sup>100</sup>

In regard to sexual-orientation claims, norms and mechanisms created to combat gender

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*Human Rights 4/2* (2000): pp. 71-75; E. Heinze, “The Construction and Contingency of Minority Groups” in D. Fottrell and B. Bowring (eds.) *Minority and Group Rights in the New Millennium* (The Hague: Kluwer Law International, 1999).

<sup>98</sup> C. Chinkin and H. Charlesworth (see note 94); A. Gallagher, “Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System,” *Human Rights Quarterly* 19/2 (1997): pp. 283-333.

<sup>99</sup> Violence and discrimination against lesbian, gay, bisexual, and transgender people are “gender-based” in that they are inflicted to enforce a rigid separation between the socially constructed roles of women and men. See J. Willets, “Conceptualizing Private Violence against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective,” *Albany Law Review* 60/3 (1997).

<sup>100</sup> On the aims of “gender mainstreaming,” see United Nations Economic and Social Council, *The Question of Integrating the Human Rights of Women throughout the UN System*, E/CN.4/1998/49 (1998). For a critique of its effectiveness, see A. Miller, “Women’s Human Rights NGOs and the Treaty Bodies: Some Case Studies in Using the Treaty Bodies to Protect the Human Rights of Women” in A. Bayefsky (ed.) *The UN HR Treaty System in the 21st Century* (The Hague: Kluwer Law International, 2000).

discrimination have been disappointingly underused within the UN system.<sup>101</sup> The Beijing Platform for Action represented an important acknowledgement of women’s right to decide on matters of sexuality free of violence or coercion, but women’s rights advocates have sought a more comprehensive and affirmative vision of women’s right to sexual autonomy, de-linked from reproductive rights.

Of all the mechanisms created within the UN system to enhance gender perspectives on human rights, only in the work of the Special Rapporteur on Violence against Women does one see a comprehensive linkage of gender and sexuality, including sexual orientation. The previous Rapporteur was the first UN human rights expert to explicitly articulate a concept of sexual rights. While speaking of these as part of a “fourth generation” of women’s rights, she has described sexual rights as a constellation of existing rights, including “the right to information, based upon which one can make informed decisions about sexuality; the rights to dignity, to privacy and to physical, mental and moral integrity in realizing a sexual choice; and the right to the highest standard of sexual health.”<sup>102, 103</sup>

### ***Sexual Rights: A Broader Palette***

The discourse of sexual rights offers new conceptual and strategic tools for future work within the UN system. This discourse is the product of increasing dialogue and collaboration between activists and social movements working on sexuality from a number of different perspectives, including women’s rights, population and

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<sup>101</sup> As described above, the work of CEDAW and the Beijing process have focused on women’s sexuality almost exclusively in the context of reproductive health. See A. Miller (see note 97).

<sup>102</sup> R. Coomaraswamy, “Reinventing International Law: Women’s Rights as Human Rights in the International Community,” Edward A. Smith Visiting Lecture, Harvard Law School, 1997.

<sup>103</sup> United Nations Economic and Social Council (see note 40), 1999, para 5.

development, reproductive health, HIV/AIDS, and lesbian, gay, bisexual, and transgender rights.<sup>104</sup> This dialogue across disciplines has led to attempts to situate sexuality within a more comprehensive human rights framework and to explore commonalities between disparate struggles.

The sexual rights discourse builds on the limited articulation of sexual rights at Cairo and Beijing, as well as on existing case law on sexual orientation and standards regarding. It embraces a more affirmative and emancipatory vision of sexuality, seen not just as something to be protected from violence or other interference, but also as a social good to be respected, protected, and fulfilled. The principles underpinning these rights have variously been identified as “autonomy,” “empowerment,” bodily integrity,” and “respect for sexual and family diversity.”<sup>105</sup>

The concept of sexual rights enables us to address the intersections between sexual-orientation discrimination and other sexuality issues—such as restrictions on all sexual expression outside marriage or abuses against sex workers—and to identify root causes of different forms of oppression. It also offers strategic possibilities for building bridges and coalitions between diverse movements so as to confront common obstacles more effectively (such as religious fundamentalism) and explore how different discourses of subordination work together.

Sexual rights make a strong claim to universality, since they relate to an element of the self common to all humans: their sexuality. The concept therefore avoids the

complex task of identifying a fixed sub-category of humanity to whom these rights apply. It proposes an affirmative vision of sexuality as a fundamental aspect of being human, as central to the full development of human health and personality as one’s freedom of conscience and physical integrity. Sexual rights offer enormous transformational potential, not just for society’s “sexual minorities” but for its “sexual majorities” as well.<sup>106</sup>

### *Exploring the Right to Sexual Health As a Sexual Right*

The many dimensions of human sexuality—physical, mental, spiritual, social, associational—intersect with a multiplicity of rights. Developments in early 2004 indicate that a particularly fruitful avenue for sexual-rights advocacy—and a major area of contestation—in the coming years will be around the right to sexual health.

Within the UN system, the Special Rapporteur on the Right to Health, Paul Hunt, has significantly advanced the thinking on the links between sexuality, health, and rights. His report to the Commission on Human Rights in 2004 includes a particular focus on sexual and reproductive health, as a contribution to the 10th anniversary of the ICPD in Cairo.<sup>107</sup> It is groundbreaking in its attention to issues of sexual orientation and health, its analysis of what a human rights perspective can bring to sexual-health policy, and its call for greater attention to sexual rights.<sup>108</sup>

<sup>106</sup> R. Petchesky (see note 105).

<sup>107</sup> United Nations Economic and Social Council, (see note 47).

<sup>108</sup> The Special Rapporteur cites the harmful health consequences for lesbian, gay, bisexual, and transgender people of legal prohibitions on same-sex relations and the widespread lack of protection against violence and discrimination, as an example of how discrimination and stigma can be “underlying determinants” bearing upon health status. Citing *Toonen*, he reminds states that they must ensure that sexual and other health information and services are available to lesbian, gay, bisexual and transgender

<sup>104</sup> R. Parker (see note 65); A. Miller, “Human Rights and Sexuality: First Steps towards Articulating a Rights Framework for Claims to Sexual Rights and Freedoms,” American Society of International Law Proceedings, 1999.

<sup>105</sup> R. Petchesky, “Sexual Rights: Inventing a Concept, Mapping an International Practice” in M. Blasius (ed.) *Sexual Identities, Queer Politics* (Princeton, NJ: Princeton University Press, 2001).

The Rapporteur posits a rights-based approach to sexual health that transcends the medicalizing and moralizing approaches of much social policy in areas of sexuality. His report suggests a more comprehensive rights-based definition of sexual health than that included in the Cairo and Beijing instruments: sexual health is “a state of physical, emotional, mental and social well-being related to sexuality, not merely the absence of disease, dysfunction or infirmity.”<sup>109</sup>

A rights-based approach to sexual health “requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination, and violence.”<sup>110</sup> Human rights also impose clear and measurable obligations on relevant authorities and can empower individuals and communities to see their health needs as legitimate entitlements to be claimed from service providers.

Affirming that “sexuality is a characteristic of all human beings [and] a fundamental aspect of an individual’s identity,” he concludes that “the correct understanding of fundamental human rights principles, as well as existing human rights norms, leads ineluctably to the recognition of sexual rights as human rights. Sexual rights include the right of all persons to express their sexual orientation, with due regard for the well-being and rights of others, without fear of persecution, denial of liberty or social interference.”<sup>111</sup>

Although the Rapporteur’s focus on sexual and reproductive health and rights drew criticism from several governments at the

Commission on Human Rights, including the U.S., Pakistan, Saudi Arabia, and Egypt, these rights received another important re-affirmation by the Commission in a resolution on violence against women—a resolution that echoed the sexual rights language of the Beijing Platform for Action.<sup>112</sup> The 2004 Commission can therefore be recognized as a turning point in the struggle to link rights, health, and sexuality.

Nevertheless, a measure of the battles ahead lies in the fact that the March 2004 meeting of the Conference on Population and Development to mark the 10th anniversary of the Cairo Platform for Action was unable to agree on a resolution reaffirming the Cairo commitments following concerns raised by the United States and others that these might endorse same-sex marriage and abortion.<sup>113</sup> The next stages of the Cairo and Beijing review processes will be important fronts on which to defend and promote the right to sexual health as part of the broader struggle for sexual rights.

## Conclusion

It is clear that, 10 years on from *Toonen*, the momentum at the UN for addressing issues of sexual orientation within a broader framework of sexual rights is unstoppable. Both the emergence of a global movement of human rights defenders working on these issues and the increasing support of governments from the North and South suggest that we are at a crucial turning point in the recognition of sexual rights at the UN. But sexual rights can be expected to remain a contested area of human rights as sexuality increasingly becomes a site of struggle between traditionalist and modernizing forces, both within and across cultures.<sup>114</sup>

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people. United Nations Economic and Social Council (see note 47), para 39.

<sup>109</sup> United Nations Economic and Social Council (see note 47), para 53.

<sup>110</sup> United Nations Economic and Social Council (see note 47), para 53.

<sup>111</sup> United Nations Economic and Social Council (see note 47), para 54.

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<sup>112</sup> Commission on Human Rights, Resolution on Violence against Women, E/CN.4/2004/L.63 (2004), para 8.

<sup>113</sup> CPD Briefing Note, 37th Session, 22-26 March 2004, Population Action International.

<sup>114</sup> For a global overview of the political impact of social transformations in the area of sexuality and the

The promotion and defense of these rights will therefore demand priority attention on the human rights and health agendas over the next 10 years.

There are a number of immediate steps that the UN's expert human rights bodies could take to ensure that their findings are no longer ignored or dismissed by recalcitrant states. These include: undertaking specific studies on human rights and sexuality; considering the desirability of a dedicated thematic mandate; using all available mechanisms to hold governments to their obligations under the range of human rights treaties; factoring sexuality into the on-going process of gender integration and sharing best practices among different bodies; and strengthening contacts with human rights defenders working on sexuality issues while eliminating barriers to their effective participation in the UN system.

Despite persistent attempts to roll back the gains, *Toonen's* anniversary should be marked as the year in which sexuality broke free of the brackets that have contained and silenced it for more than a decade.

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family, see A. Giddens, *Runaway World: How Globalization is Reshaping our Lives* (London: Profile Books, 2002), Chapters 3-4.