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STUDENT'S NAME: SEBASTIAN AGUILAR BETANCURT

SUPERVISORS'S NAME: EMILY JONES

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COMMENTS: (PLEASE WRITE BELOW YOUR COMMENTS)

MARK:

SIGNATURE:

DATE:

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Supervisor:
EMILY JONES

DISSERTATION

HETERONORMATIVITY IN INTERNATIONAL HUMAN RIGHTS LAW

Name: Sebastián Aguilar Betancurt
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How can I tell you. How can I convince you, brother; sister that your life is in danger. That every day you wake up alive, relatively happy, and a functioning human being, you are committing a rebellious act. You as an alive and functioning queer are a revolutionary. There is nothing on this planet that validates, protects or encourages your existence.

-The Queer Nation Manifesto

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LIST OF ACRONYMS AND TERMINOLOGY

LIST OF ACRONYMS

CEDAW = Convention on the Elimination of Discrimination Against Women /Committee on the Elimination of Discrimination Against Women

CESCR = Committee on Economic, Social and Cultural Rights

CPED = Convention for the Protection of All Persons from Enforced Disappearances

CRC = Committee on the Rights of the Child

CRPD = Convention on the Rights of Persons with Disabilities

ECOSOC = Economic and Social Council

ICCPR = International Covenant on Civil and Political Rights

ICESCR = International Covenant on Economic, Social and Cultural Rights

IHRL = International Human Rights Law

LGBT = Lesbian, Gay, Bisexual and Transgender/Transsexual persons

LGBTI+ = Lesbian, Gay, Bisexual, Transgender/Transsexual, Intersex, Queer and Asexual

LBT = Lesbian, Bisexual and/or Transgender women

SOGI = Sexual Orientation and Gender Identity

SOGIESC= Sexual Orientation, Gender Identity and Expression and Sexual Characteristics

SR = Special Rapporteur

UDHR = Universal Declaration of Human Rights

UN = United Nations

WHO = World Health Organization

TERMINOLOGY

Cisgender/cis: someone whose gender identity/expression is aligned with the sex they were assigned at birth.

Transgender/trans: someone who has a gender identity/expression that differs from the sex they were assigned at birth.

Transsexuals: someone who has modified or transitioned from one sex to the other through medical methods.

The acronym LGBTI+ will be preferred when referring to individuals who identify or are perceived as such.

The term 'people/persons who experience sexual orientation and gender identity/expression in diverse and non-normative ways' will be preferred when referring to persons who deviate from the heteronorm, not only those who identify as LGBTI+.

HETERONORMATIVITY IN INTERNATIONAL HUMAN RIGHTS LAW

INTRODUCTION

The promise of universality in which international human rights law (IHRL) was founded is certainly one that has yet to be fulfilled. The most recent developments of IHRL have proven that this is particularly true in the case of women and other individuals whose sexual orientation and/or gender identity/expression and/or sexual characteristics fall outside of the narrow and socially constructed conceptions of 'normality', or better put, of the heteronorm.

Universality has been said to be the cornerstone of human rights.¹ This principle was drawn from the idea that said rights apply to everyone simply because everyone is human² and as such, everyone is equal in terms of rights because being or not being human is an 'inalterable fact of nature.'³ It is also believed that the universal quality of human rights does not necessarily entail universal enforcement, and that this is the explanation of why even though everyone is entitled to these rights, enjoying them is a matter that is left almost entirely to the discretion of sovereign states.⁴

However, and as I will argue in the rest of this document, the invention of human rights articulated in itself a strict classification of what it means to be human, one that was first based on the experiences of cisgender men and later -thanks to the hard work of many feminists in the international arena- evolved to consider, not even fully include, those of cisgender women, resulting in turn into an extremely binary classification that limits who gets to be perceived as a human under international human rights law. Thus, undermining its very own predicate of universality and turning invisible the human rights violations suffered by LGBTI+ persons and others who do not necessarily fit into any fix categories of 'gender identity'.

¹ Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (Cambridge University Press, 2013) 37

² Jack Donnelly, *International Human Rights* (Dilemmas in World Policies, 1993) 19

³ Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly* 281

⁴ *ibid.* 283

Drawing mostly on feminist and queer theories and the current status of IHRL at the United Nations (UN) level, this paper will provide a review of literature that will help to frame the discussion on how the universality of international human rights is based on normative notions of sexuality and gender that are, and have been, predominantly heterosexual. Moving forward from the literature review, this research will present an overview of the current scenario of LGBTI+ rights in the international sphere, providing an insight of what has been achieved in the last years in terms of sexual orientation, gender identity/expression and sexual characteristics (SOGIESC) rights and analyzing the outcomes of such advancements. Subsequently, an examination on how IHRL has failed people who experience sexual orientation, gender identity/expression and sexual characteristics in diverse and non-normative ways will be provided. The following and final section before concluding will evaluate the feasibility behind the development of an international instrument addressing the violence and discrimination that LGBTI+ persons, and others who refuse to adopt labels and take part on the binary system of gender identity, suffer, taking as a comparative example the case of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

LITERATURE REVIEW

'One is not born, but rather becomes, woman',⁵ said once the French feminist writer, philosopher and activist, Simone de Beauvoir in her acclaimed book, the *Second Sex*. With this formulation, Beauvoir conceived gender -in this case 'woman'- as some sort of quality that could be progressively achieved. Such constructivist approach to the category of gender contrasted the marked tendency of the era to think of gender as something that was almost exclusively determined by biological factors.

Beauvoir's conception of gender acknowledges the existence of an underlying expectancy to become gendered; one that, according to her, is clearly dictated by others and perpetuated through some cultural compulsion.⁶ Nonetheless, her understanding of gender also recognizes a *pre-gender* agent; one that, whether passively or actively, has the ability to appropriate or adopt gender.⁷

This formulation, however, does not *per se* specify if the narrative of construction gives place to any type of choice. In other words, it does not respond to the question of whether or not the agent could potentially adopt a different gender, or no gender at all.⁸

It is not surprising that by the time Beauvoir wrote the *Second Sex*, such possibilities were not yet fully contemplated. In spite of that, her questioning of gender as something innate and biologically determined helped pave the way for the development of more comprehensive approaches to the category of gender. These dualistic normative notions of sexuality and gender that recognize it as socially constructed but that do not challenge its binarism and its predominantly heterosexual conceptualization were, nevertheless, the ones that became an integral part of most of the modern fights for the expansion of rights, and so they became institutionalized and codified in many contexts that regulate life,⁹ one of which, I will argue in this paper, is the international set of human rights.

⁵ Simone de Beauvoir, *The Second Sex* (Vintage books, 1949) 330

⁶ Judith Butler, *Gender Trouble* (Routledge, 1990) 8

⁷ *ibid*

⁸ *ibid*

⁹ Mary Evans and Carolyn H. Williams, *Gender: The Key Concepts* (Routledge, 2013) 13

The incorporation of gender, in the form of the recognition of equality for women, in the human rights languages did not arrive without a struggle.¹⁰ The word 'gender' is barely mentioned in the provisions of the core international human rights instruments, and is not once mentioned in the provisions of CEDAW. Instead, the archaic and equivocal use of 'sex' as a way of differentiating between men and women in the social context was preferred. This is of course a reflection of the reality of the time in which the Universal Declaration of Human Rights (UDHR) was adopted. However it seems as if this heritage from the early developments of IHRL has not been sufficiently contested in the drafting of more recent covenants, given that only the International Convention for the Protection of All Persons from Enforced Disappearance (CPED) and the Convention on the Rights of Persons with Disabilities (CRPD) make any direct references to the notion of gender in their provisions, and only the latter distinguishes this category from the biological differences between males and females by actually addressing issues of a gender nature.

This insufficient development to capture the essence of the differences experienced by cismen and ciswomen, and to make ciswomen part of the IHRL system, installed in turn a biological determinism which only reinforced the heteronormativity that so strongly influences international law. Biological determinism has historically been used to assert that certain groups (ethnic groups and sexual minorities among others), are intellectually, morally and socially inferior to others (e.g. cismen).¹¹ This androcentric view argues that there is a direct and causal relationship between some biological properties of human beings and their behaviors.¹² From this perspective, the social differences between human groups were interpreted as a natural reflection of innate and immutable genetic traits.¹³ Such formulation has been used by groups in power to maintain a discourse that normalizes

¹⁰ Johannes Morsink, 'Women's Rights in the Universal Declaration' (1991) 13:2 Human Rights Quarterly 230

¹¹ Lee Ann Martinez, 'Biological determinism' (Salem Press Encyclopedia of Health, 2019) available at: <<http://0-search.ebscohost.com.serlib0.essex.ac.uk/login.aspx?direct=true&db=ers&AN=94416381&site=eds-live>> Accessed August 5, 2019.

¹² *ibid*

¹³ *ibid*

the multiple inequalities that exist, and that validates the order established by the male dominance.¹⁴ It is through said dominance that the pervasiveness of heteronormativity finds its legitimacy.

In her book, *Gender Trouble*, Judith Butler coined the term 'heterosexual matrix'¹⁵ to what was later denominated as heteronormativity. For Butler, this matrix designated the 'grid of cultural intelligibility through which bodies, genders, and desires are naturalized within the hegemonic context of heterosexuality.'¹⁶ Heteronormativity, on the other hand, has been defined as a regulatory practice of sex/gender/desire that alters or sometimes sets the conditions of possibility and impossibility for gender intelligibility'.¹⁷ Such possibilities have been based on the assumption that biological sex, sexual orientation and gender/gender identity, are always aligned.

More recent understandings of heteronormativity have described this concept as the 'assumption that heterosexuality is the default, preferred, 'normal' state for human beings because of the belief that people fall into one or other category of a strict gender binary'.¹⁸ This definition is for the most part accurate. However, it fails to give an account of how entrenched heteronormativity is within the different social and political processes of human life, how related it is with the patriarchal system of beliefs¹⁹ and how violent it is for people with diverse sexual orientations, gender identities/expressions and/or for people whose sexual characteristics do not fit the stereotypical notions of male or female bodies.

As mentioned before, the early inclusion of a gender approach -based on a biological determinist perspective rather than in the actual constructivist understanding of gender- in the IHRL system,

¹⁴ *ibid*

¹⁵ Butler (n 6) 6

¹⁶ *ibid* p.151

¹⁷ Samuel E. Chambers, 'An Incalculable Effect: Subversions of Heteronormativity' (2007) 55 *Political Studies* 656, 679

¹⁸ John Harris and Vicky White, *A Dictionary of Social Work and Social Care* (Oxford University Press, 2018) 335

¹⁹ Giddens takes patriarchy to be a reference to male dominance. The patriarchal system of belief is therefore a reflection of how embedded patriarchy is in most conditions of life, including ideologies and forms of social control. See Anthony Giddens, *Sociology* (2nd edition, Polity Press, 1993) 173

reinstalled the heterosexual matrix in a new form.²⁰ This may have been what was necessary at the moment for women's rights to be recognized within a system created almost entirely by men. But such fight for the expansion of rights, grounded in the aspiration to have the same rights as cismen within the patriarchal order, resulted in the perpetuation of women's secondary status and the legitimization of men's power and authority²¹ -by setting the experiences of these latter as the universal standard that should be followed to have rights-.²² In addition to this, other identities and experiences such as the ones from persons who experience sexual orientation and gender identity/expression in diverse and non-normative ways were turned invisible.

Gender as a social construction has, however, been included in other instruments of soft law and in several campaigns of the UN. The gender mainstreaming strategy for the promotion of gender equality was endorsed by the 189 countries who attended the Fourth World Conference on Women in Beijing in 1994.²³ The UN as well as other international organization were invested with the responsibility to implement said strategy in their work supporting the efforts of Member States.²⁴ In 1997, the Economic and Social Council (ECOSOC), through its agreed conclusions, provided some guidelines on how the Organization should work to incorporate gender perspectives when carrying out its work.²⁵ The mainstreaming of gender was defined as the 'process of assessing the implications for women and men of any planned action, including legislation, policies or programs, in all areas and at all levels'.²⁶

²⁰ Dianne Otto, 'Queering Gender [identity] in International Law' (2015) 33:4 Nordic Journal of Human Rights 299 - 318

²¹ Dianne Otto, 'International Human Rights Law: Towards Rethinking Sex/Gender Dualism' in Margaret Davies and Vanessa E. Munro (Eds), *The Ashgate Research Companion to Feminist Legal Theory* (Routledge, 2013) 197

²² *ibid*

²³ United Nations, 'Gender mainstreaming - a strategy for promoting gender equality: with particular focus on HIV/AIDs and racism' (UN, 2001) available at:

<<https://www.un.org/womenwatch/osagi/pdf/gmstrategyhiv aids.PDF>> accessed August 16, 2019

²⁴ *ibid*

²⁵ *ibid*

²⁶ UN Economic and Social Council (ECOSOC), 'UN Economic and Social Council Resolution 1997/2: Agreed Conclusions' (1997), UN Doc E/CN.9/1997/7

In an effort to combat gender-based discrimination and aiming to achieve gender equality, the UN adopted a constructivist definition of gender in the framework of this strategy. This definition recognized that the differences and inequalities experienced by women all over the world have to do with the gender roles commonly assigned to them. In this regard the Expert group meeting on the development of guidelines for the integration of gender perspectives into human rights activities and programs stressed that:

'The term "gender" refers to the ways in which roles, attitudes, values and relationships regarding women and men are constructed by all societies all over the world. Therefore, while the sex of a person is determined by nature, the gender of that person is socially constructed.'²⁷

This way of approaching gender as a social category is in line with most of the feminist standard definitions of gender. Nevertheless, it is very evident that this definition still anchors gender to a dualistic biological base (male/female),²⁸ and it is far from moving on from the binary conceptualization of gender (women/men). As a result of this, subjectivities that challenge the normative conceptions of gender are excluded, and some of them are placed in a different category, usually denominated as gender identity.

Gender identity has been understood almost as a contraposition to the category of gender, but for the most part it has been framed in a way that does not completely challenge the common interpretation of the gender binary (woman/man). Instead, this 'new' category of gender has been treated as something that only applies to transgender people (and sometimes to intersex people.)²⁹

This tendency of using gender identity in a binary way and as a feature that only exclusively defines

²⁷ Commission on Human Rights, 'Report of the Expert Group Meeting on the Development of Guidelines for the Integration of Gender Perspectives into United Nations Human Rights Activities and Programmes', (1995) UN Doc E/CN.4/1996/105 6 para. 13

²⁸ Otto (n 20) 313

²⁹ *ibid* 300

trans binary identities (transwoman/transman) should be resisted -while still recognizing the specific challenges and human rights abuses suffered by those who are, or are perceived as, transgender.-³⁰

Understanding gender identity in binary terms and conceiving it is a category that only applies to transgender people marginalizes the experiences of other people whose identities are constructed outside the binary spectrum, or even inside of it.³¹ Moreover, and as expressed by Diane Otto, most people have a gender identity, including those who identify as cisgender.³²

Gender in itself is just one of many identity marks. Some have even argued that there is no gender identity behind the expressions of gender because the identity itself is constructed performatively by the expression that are supposed to be its results.³³

Whether a result of its own expressions or as an identity based on a social construct, the truth is that 'we need a more liberatory and inclusive conception of gender in international law.'³⁴ The limiting ways in which human rights law is gendered and the narrow conception of gender identity as a concept that reinforces the binary division of gender has discriminatory effects on people who deviate from the heteronorm. As a result of this, only those who can successfully frame their aggrievances as human rights issues with the current gender related language in which IHRL is codified get to be recognized as 'humans'. Thus, dismantling the promise of universality in which IHRL was founded.

Universality is an important concept in the discussion of gender and human rights. This term is usually 'used to denote the nature and validity of rights that are common to all human beings by virtue of their humanity'.³⁵ However, when referring to human rights, most people do not usually mean this abstract

³⁰ *ibid*

³¹ *ibid*

³² *ibid*

³³ Judith Butler, 'Gender Trouble: Feminism and the Subversion of Identity', in Mary Evans and Carolyn H. Williams (Eds), *Gender: The Key Concepts* (2013) 109

³⁴ Otto (n 20) 300

³⁵ Bantekas and Oette (n 1) 38

concept but rather the norms contained in the UDHR or the International Bill of Rights.³⁶³⁷ All three instruments set out fundamental rights that are supposed to be universally protected and that aim at protecting the human person.

Human rights were originally conceived to pertain to everyone, everywhere and under any circumstance.³⁸ Nevertheless, their universal aspiration has been deemed to be the embodiment of ethnocentric, politically biased and narrow conceptions by some.³⁹

Critics have argued that the human rights regime as a whole constitutes a new form of imperialism.⁴⁰ The most prominent expression of such allegation is based on a defense of certain cultural values that are in stark contrast to the promise of universality. This is how, at the other side of the debate, cultural relativism is found.

In her book *Gender and Culture*, Anne Phillips takes cultural relativism to be the 'view that norms of justice are always relative to the society in which they are formed, such view reflects values and practices that may vary enormously from one society to another.'⁴¹ This is the reason why for critics who are more in favor of cultural relativism is inappropriate to measure the norms that emerge within one society as the measure against which to assess the practices of another.⁴² Moreover, they argue that the human rights paradigm presents a western discourse that generates a prejudicial narrative of non-western others, and that its conceptualization does not take into account their own conceptions of rights and human dignity. As stated by An-Na'im the main argument against the cultural legitimacy of the present internationally recognized standards of human rights in general, is often made on the ground that the basic conception and major principles expressed in these standards emerged from

³⁶ Annette Forster, 'The Concept of Human Rights - Dissolving the Universality-Plurality Puzzle' (2016) 10 HR&ILD 186

³⁷ The International Bill of Rights is comprised by the UDHR (1948), the International Covenant on Civil and Political Rights (ICCPR, 1996) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966).

³⁸ Jack Donnelly, 'Human Rights' in John S. Dryzek, Bonnie Honig, and Anne Phillips (Eds), *The Oxford Handbook of Political Theory* (The Oxford Handbook of Political Science 2008) 601

³⁹ Bantekas and Oette (n 1) 37

⁴⁰ Forster (n 36) 196

⁴¹ Anne Phillips, *Gender and Culture* (Polity Press, 2010) 16

⁴² *ibid*

western philosophical and political developments and have little representation from non-western societies, their values and the particular challenges that they face.⁴³

Cultural relativism presents a dilemma to the universality of human rights, and it does even more to the rights of women and people who experience sexual orientation and gender identity in diverse and non-normative ways. Even though the universal human rights regime serve male-defined interests and turn invisible the different challenges faced by different women and LGBTI+ persons across the globe,⁴⁴ cultural relativism has proven to make moral agents indifferent to immoral situations most of the times,⁴⁵ and has provided a perspective where culture can easily become an excuse for abuse.⁴⁶

An example of this can be easily found in one of the regional and third world approaches to international human rights law, the Cairo Declaration on Human Rights in Islam (CDHRI). Although this instrument gives account of a consensus over certain universal human rights norms that are deemed to be fundamental for the development of the human life, even those rights are subjected to the dictates of the Shari'a law,⁴⁷ which clearly condemns same-sex relationships, labeling them as sodomy, and usually punishing them with flogging or death by stoning.⁴⁸

Excusing the disadvantages and violent practices that women and LGBTI+ persons have to face by appealing to cultural or religious differences is in fact protecting the abuses and inequalities experienced by these groups. The truth is that culture, as a social phenomenon, has the ability to change overtime, it is not immutable, and it should stop being conceived as such in detriment of people's rights. Deconstructing violence against women and LGBTI+ persons necessarily involves changing the prejudicial attitudes that culture often preserves and reproduces. Rao had a similar

⁴³ Abdullahi Ahmed An-Na'im, 'State Responsibility Under International Human Rights Law to Change Religious and Customary Laws' in Rebecca J. Cook, *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, 1994) 171

⁴⁴ Niamh Reilly, *Women's Human Rights* (Polity, 2009) 3

⁴⁵ Jane K. Cowan, Marie-Benedicte Dembour and Richard A. Wilson, *Culture and Rights* (Cambridge University Press, 2001) 59

⁴⁶ *ibid*

⁴⁷ Article 24 of the CDHRI states that 'all the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'a.'

⁴⁸ Sabine Schmidtke, 'Homoeroticism and Homosexuality in Islam: A Review Article' (1999), *Bulletin of the School of Oriental and African Studies, University of London* 260

position in this matter when she shared her concerns that women's human rights cannot be realized as long as 'falsely rigid, ahistorical, and selectively chosen' definitions of culture persist in the human rights thinking and practice.⁴⁹ Relying on cultural tradition to legitimate these abuses and types of violence against women and LGBTI+ persons only reinforces the patriarchal power and heteronormativity embedded in IHRL.⁵⁰

Returning to the discussion on the normative conception of gender and its discriminatory effects on LGBTI+ persons and people who are out of the binary spectrum, and having a better understanding of what universality and its critiques are, is time to delve into the realm of queer theories and the necessity of implementing a queer approach in IHRL.

What are queer theories and how can they contribute to a more inclusive understanding of IHRL? It is hard to find a standard definition of what queer theories are given that is in their very nature to challenge any normative and fix definitions. However it is fair to asseverate that their genesis is related to some of the most progressist feminist theories.⁵¹ In fact, and to be more precise, this theoretical model was developed out of lesbian and gay studies.⁵² Some of its main characteristics are that it challenges/resists normative conventions and models, and it refuses to define itself in the name of its indeterminacy and elasticity.⁵³

The term 'queer' has also been used to encompass anyone whose sexuality or gender falls outside the heteronorm, 'whether they are asexual, gender-nonconforming, kinky, polyamorous or LGBT.'⁵⁴

⁴⁹ Arati Rao, 'The Politics of Gender and Culture in International Human Rights Discourse', in Reilly Niamh, *Women's Human Rights* (Polity, 2009) 7

⁵⁰ Phillips (n 41)

⁵¹ Diane Richardson, 'Bordering Theory', in Diane Richardson, Janice McLaughlin and Mark E. Casey (Eds), *Intersections Between Feminist and Queer Theory* (Palgrave Macmillan, 2006) 19

⁵² Annamarie Jagose, *Queer Theory: An Introduction* (New York University Press, 1996) 1

⁵³ *ibid*

⁵⁴ Ray Simon, 'Stirring up the origin of the 'alphabet soup' (*Philadelphia Gay News*, October 18, 2017) available at: < <http://www.epgn.com/special-editions/219-lgbt-history-month-2017/12651-stirring-up-the-origin-of-the-alphabet-soup>> Accessed August 09 2019

Taking these two premises into consideration and for the purposes of this paper, I take queer theories to be the set of radical theories that question the dominant and normative order in which IHRL was first conceived, in order to offer an emancipatory understanding of it, one that focus specially on issues of sexualities and identities that do not conform to the mandates of conservative and heternormal perspectives of gender.

The queer theories deconstructionist approaches to gender aim to disrupt and denaturalize sexual and gender categories in order to recognize the fluidity, instability and fragmentation of identities.⁵⁵ They recognize as well that the current categories of gender exist with the particular political utility that is to contest material inequalities.⁵⁶ However, they stress that such categories 'rather than a stable marker of identity are in fact a fundamentally unreliable and inconsistent measure through which gender variant and gender non-conforming subjects are policed in and through increasingly violent and oppressive practices of securitization.'⁵⁷

They also acknowledge that the 'legitimacy of the gendered social order can be subverted at the level of its underlying discourse – its biological assumptions, its binarism and its socially constructed gender differences.'⁵⁸ They sustain that this order can be challenged by non-gendered practices in ordinary interaction such as in language and in the formulation of the law.⁵⁹

Finally, in the light of queer theories, I argue that the invention of human rights and more particularly the inclusion of a heteronormative conception of gender that focuses primarily on the male/female division, has created a new classification of what it means to be human or better yet of who gets to be perceived as one under international human rights law. As a result of this, male subjectivities have been privileged by being conceived as fully human; and gender identities, mostly the ones of women

⁵⁵ Richardson (n 51)

⁵⁶ *ibid* 22

⁵⁷ Silvia Posocco, 'Gender Identity', in Mary Evans and Carolyn H. Williams (Eds), *Gender: The Key Concepts* (2013) 112

⁵⁸ Judith Lorber, 'Using gender to undo gender: a feminist degendering movement' [2000] *Feminist Theory* 79, 95

⁵⁹ *ibid*

and to a lesser extent the ones of trans persons, have been progressively naturalized but placed into a secondary status.⁶⁰ Simply put, these developments in the field of gender have reaffirmed that 'human rights do not belong to humans and do not follow the dictates of humanity; they construct humans. A human being is someone who can successfully claim human rights.'⁶¹ Thus, deviating from the heteronormativity in which human rights is codified means that one is less human under IHRL.

⁶⁰ Otto (n 21) 197

⁶¹ Douzinas Costas '*Critique and Comment: The End(s) Of Human Rights*' (Melbourne University Law Review, 2002) available at: <<http://www5.austlii.edu.au/au/journals/MelbULawRw/2002/23.html#fn18>> Accessed August 13, 2019

OVERVIEW OF THE SITUATION OF SOGIESC RIGHTS

LGBTI+ persons, and others who do not necessarily fit into any fix categories of gender, are subjected to human rights violations all over the world. In many places, states and societies continue to impose gender and sexual orientation norms on individuals through violent and oppressive practices that find their expression in customs and laws, which in most cases aim at controlling how people experience personal relationships and how they identify themselves.⁶²

The types of violations experienced vary from country to country and take many different forms.

They range from:

[T]he denial of the right to life, freedom from torture and security of the person to discrimination in accessing economic, social and cultural rights such as health, housing, education and the right to work, from non-recognition of personal and family relationships to pervasive interferences with personal dignity, suppression of diverse sexual identities, attempts to impose heterosexual norms, and pressure to remain silent and invisible.⁶³

Despite a shared feeling of progress in most of the Global North and a few countries from the Global South, those who transgress the heteronormative understandings of gender and sexual orientation continue to face criminalization, discrimination, hatred, violence and other types of rights violation worldwide.

As of 2019, 70 UN Member States -which comprise 35% of all Member States of the Organization- criminalize consensual same-sex relationships and/or acts.⁶⁴ Out of these, 68 have laws in place that

⁶² Introduction of *the Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation so Sexual Orientation and Gender Identity* (2007) available at:

<<https://yogyakartaprinciples.org/principles-en/>> Accessed 24 August 2019

⁶³ Michael O'Flaherty and John Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles', (2008) 8:2 HRLR 207-48

⁶⁴ International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA): Lucas Ramon Mendos, 'State Sponsored Homophobia' (*ILGA WORLD*, 2019) 15

explicitly criminalize said relations or acts and in the remaining 2 the criminalization occurs *de facto*. In addition to this, other countries which are not members of the UN also criminalize such relations/acts (Gaza, the Cook Islands and certain provinces in Indonesia).⁶⁵ 26 of these 70 countries, criminalize such acts committed only by men; the other 44 criminalize them among all genders.⁶⁶

6 UN Member States punish these acts with the death penalty. Additionally, said penalty remains a possibility in another 5 Member States.⁶⁷

In regard to freedom of expression and association, 32 UN Member States have provisions that restrict freedom of expression in relation to SOGI issues.⁶⁸ 'This includes laws and regulations that prohibit media or web content as well as propaganda laws that prohibit the promotion of "homosexuality" or "nontraditional" sexual relations.'⁶⁹ 41 countries have laws in place that limit the chances of registering or running NGOs that work on SOGIESC issues.⁷⁰

In most of these countries, the laws that criminalize same-sex relations are portrayed as laws against 'public scandals', 'immorality', 'sodomy' and 'indecent behavior'.⁷¹ Other excuses are also used to penalise people for their diverse or non-normative sexual orientations, gender identities/expressions or for simply deviating from the constricted social norms. Even when criminal sanctions are not actively enforced, these laws are still used to arbitrarily harass or detain LGBTI+ persons, sex advocates and others, because of their actual or perceived sexual orientation or gender identity/expression.⁷²

⁶⁵ *ibid*

⁶⁶ *ibid*

⁶⁷ ILGA, Sexual Orientation Laws in the World (ILGA WORLD, 2019) available at: <<https://ilga.org/maps-sexual-orientation-laws>> Accessed 25 August 2019

⁶⁸ ILGA (n 64) 16

⁶⁹ *ibid*

⁷⁰ *ibid*

⁷¹ O'Flaherty and Fisher (n 63) 210

⁷² *ibid*

Sexual orientation, gender identity/expression and sexual characteristics have always been controversial issues in the international arena and throughout most of the human history. Homosexuality and other forms of same-sex desire and non-conforming identities have been stigmatized and treated as mental disorders or diseases. The World Health Organization (WHO) published in 1948 its 6th issue of the International Classification of Diseases and Related Health Problems (ICD), which was the first version to include mental disorders.⁷³ This document classified homosexuality as a sexual deviation that was presumed to result from a personality disorder.⁷⁴ It was not until 1990 that this prejudiced view was voted off the ICD.⁷⁵ The fact that the WHO considered homosexuality as a mental illness contributed greatly to the stigmatization of non-heteronormative sexual orientations and gender identities/expressions, and amounted to the violence and discrimination that LGBTI+ persons had to endure.

Fairly recently, in 2018, the WHO announced that they planned to remove 'gender incongruence' - the term coined by the Organization to refer to people whose gender identity is different from the gender they were assigned at birth- from the 11th edition of the ICD.⁷⁶ Such pathologization of trans identities translated into more challenges and barriers for trans persons that were soon transferred to the legal realm (making harder for trans persons to change their legal name or gender, and to access health services without previously presenting a psychiatric evaluation).

The case is still the same as it was decades ago for intersex people. In its ICD 11, the WHO not only did not remove the classification of intersex as a disorder but added a new diagnoses focusing on the

⁷³ World Health Organization (WHO), 'Proposed declassification of disease categories related to sexual orientation in the International Statistical Classification of Diseases and Related Health Problems (ICD-11)', (2014) available at: <<https://www.who.int/bulletin/volumes/92/9/14-135541/en/>> Accessed 25 August 2019

⁷⁴ *ibid*

⁷⁵ Blake Linder, 'Today in History: WHO removed homosexuality from its list of mental illnesses' (*Roodepoort Record*, 2018) available at: <<https://roodepoortrecord.co.za/2018/05/17/today-in-history-who-removed-homosexuality-from-its-list-of-mental-illnesses-web/>> Accessed 25 August 2019

⁷⁶ Ben Pickman and Brandon Griggs, 'The World Health Organization will stop classifying transgender people as mentally ill', (CNN, 2018) available at: <<https://edition.cnn.com/2018/06/20/health/transgender-people-no-longer-considered-mentally-ill-trnd/index.html>> Accessed 25 August 2019

treatment of intersex children.⁷⁷ This new diagnosis called 'gender incongruence of childhood' was strongly opposed by trans and intersex advocates.⁷⁸ Every year intersex children are subjected to non-emergency invasive and irreversible surgeries and similar medical treatments that violate their rights, among which are the rights of the child, the right to physical and bodily integrity and the right to the highest attainable standard of health.⁷⁹

As for people who do not fit into binary understandings of gender or who are not abided by any gender categories, such as gender non-conforming, agenders, gender fluids, among others; the mainstream conversations of gender do not usually include them and turn their experiences invisible to a greater extent than those who identify as LGBTI+. On top of the discrimination that they receive for being perceived as LGBTI+, they must face having their identities not recognized or being labeled as 'fictitious' in major conversations around sexual orientation and gender identity/expressions, mostly by government and some religious actors and institutions.⁸⁰

Going back to the situation of LGBTI+ persons in the WHO context: in 2013 the Organization's Secretariat made its first report regarding health issues related to LGBTI+ persons. Nevertheless, many member states strongly opposed this development and successfully removed the item from the Executive Board meeting agenda in which was supposed to be presented.⁸¹ In regards to the opposition, 'some states argued that "non-heteronormative behaviors are by themselves a risky choice of an unhealthy lifestyle that should be discouraged and altered."⁸²

⁷⁷ Jess Glass, 'The World Health Organisation might have just made things worse for intersex people', (*Pink News* 2018) available at: <<https://www.pinknews.co.uk/2018/06/20/who-intersex-world-health-organisation-lgbt-rights-health/>> Accessed 25 August 2019

⁷⁸ *ibid*

⁷⁹ Amnesty International, 'Europe: First, Do No Harm: Ensuring the Rights of Children with Variations of Sex Characteristics in Denmark and Germany' (AI, 2017) available at: <<https://www.amnesty.org/en/documents/eur01/6086/2017/en/>> Accessed 25 August 2019

⁸⁰ See Julia Hollingsworth, 'Vatican calls non-binary gender 'fictitious' in report tackling 'education crisis' over sexuality' (*CNN*, 2019) available at: <<https://edition.cnn.com/2019/06/10/europe/vatican-gender-theory-intl-hnk/index.html>> Accessed 26 August 2019

⁸¹ Jonathan Kluczynski, 'The World Health Organization's Ambivalence Toward Global LGBT Health' (*George Washington University*, 2018) available at: <<https://globalhealth.georgetown.edu/posts/the-world-health-organization-s-ambivalence-toward-global-lgbt-health/>> Accessed 25 August 2019

⁸² *ibid*

It is not new nor rare that states try to impede the inclusion of LGBTI+ issues in international discussions. However, it is at this level that efforts to incorporate SOGIESC concerns are most necessary and have proven to be extremely beneficial.

Despite all of the challenges and barriers that LGBTI+ persons still have to face all over the world, some positive developments have been achieved at the international, regional and domestic levels.

In terms of protections from discrimination, 9 UN Member States constitutionally prohibit discrimination on SOGI grounds.⁸³ A total of 74 countries have laws in place that prohibit employment discrimination on the ground of sexual orientation. 52 of these countries count with broad legal protections on the basis of sexual orientation -usually applicable in regards to goods and services- health related issues and education.⁸⁴ 39 of them enacted laws to punish hate crimes, discrimination and other types of violence based on sexual orientation.⁸⁵ 28 countries now allow for same-sex marriage.⁸⁶⁸⁷

Moreover, at the international and regional levels, developments such as the Yogyakarta Principles, the appointment of an Independent Expert on Sexual Orientation and Gender Identity at the UN, the creation of a Core Group on the Rights of Lesbian, Gay, Bisexual, Trans, and Intersex Persons (LGBTI) at the Organization of American States (OAS), the Recommendation *CM/Rec(2010)5* of the Committee of Ministers of the Council of Europe to its member states on measures to combat discrimination on grounds of sexual orientation or gender identity, are some of the milestones in the history of the expansion of SOGIESC rights in IHRL.

⁸³ ILGA (n 64) 16

⁸⁴ *ibid*

⁸⁵ *ibid*

⁸⁶ *ibid*

⁸⁷ Two more countries have legally recognized same sex marriage since the report was drafted, although one of them is not a UN Member State (Taiwan and Ecuador).

YOGYAKARTA PRINCIPLES

The Yogyakarta Principles represented an important step in the international arena for LGBTI+ activists. They are a set of 29 principles that were compiled at an experts meeting in Yogyakarta, Indonesia in 2007. That year, the International Commission of Jurists (ICJ) and the International Service for Human Rights (ISHR), on behalf of a coalition of human rights organizations, decided to undertake the project of drafting these principles in order to redress the inconsistencies and close the gaps that existed in IHRL when addressing SOGIESC issues.⁸⁸ The principles, therefore, deal with the application of human rights law in the context of SOGIESC rights, and set forth the obligations States are required to take to make sure LGBTI+ persons are able to enjoy their rights.⁸⁹

This instrument is of a non-binding nature, and it does not create new rights as much as it articulates the rights that all humans already hold. All 29 principles are 'based on international human rights law as reflected in international and regional treaties; the jurisprudence of human rights treaty bodies and specialised courts and commissions; authoritative interpretation by the special rapporteurs and working groups of the UN; expert opinion; and state practice.'⁹⁰

The Principles sought to be comprehensive in their scope, 'both in terms of the rights covered by the law and also in relation to the actual lived experience of LGBTI people.'⁹¹ This was accomplished thanks to the combined expertise of the 29 drafters, some of which had either first-hand experience of rights violations or deep knowledge of the evolution of human rights law to address such violations.⁹²

⁸⁸ An Activist's Guide to the Yogyakarta Principles (2010) 22 available at <http://ypinaction.org/wp-content/uploads/2016/10/Activists_Guide_English_nov_14_2010.pdf> Accessed 24 August 2019

⁸⁹ *ibid*

⁹⁰ *ibid* 18

⁹¹ *ibid*

⁹² *ibid*

There is also an order to the Principles, the first three set out the Principles of the universality of human rights and of non-discrimination, as well as the right of all people to equal recognition before the law.⁹³ The following eight Principles (4 to 11) address the fundamental rights to life, freedom from violence and torture, privacy, access to justice and freedom from arbitrary detention.⁹⁴ The next set of Principles (12 to 18) highlight the importance of non-discrimination in the enjoyment of economic, social and cultural rights.⁹⁵ Principles 19 to 21 are related to the rights of freedom of expression, opinion and association. They stress the 'importance of the freedom to express oneself, one's identity and one's sexuality, without State interference',⁹⁶ and they include the rights to participate in public assemblies and to associate in community with others. Principles 22 and 23 are related to the freedom of movement and asylum in cases of persecution based on sexual orientation and gender identity.⁹⁷ Principles 24 to 26 'address the rights of persons to participate in family life, public affairs and the cultural life of their community, without discrimination based on sexual orientation or gender identity.'⁹⁸ Principle 27 recognizes the rights of human rights defenders to defend and promote human rights without discrimination. Finally, Principles 28 and 29 are the rights to redress and accountability, meaning the right to hold human rights violators accountable for their acts and the right to ensure redress for those who experienced rights violations.⁹⁹

All of these Principles are to be enjoyed by everyone and should not be considered to apply only to a particular or unique group.¹⁰⁰ The right to be treated with humanity while in detention, for example, applies to all people, but particular claims seeking this right can be different depending on who makes the claim (heterosexual, lesbian, gay, bisexual, transgender, intersex, etc.) and the way in which the right was violated.¹⁰¹

⁹³ O'Flaherty and Fisher (n 63) 234

⁹⁴ *ibid*

⁹⁵ *ibid*

⁹⁶ *ibid* 235

⁹⁷ *ibid*

⁹⁸ *ibid*

⁹⁹ *ibid*

¹⁰⁰ An Activist's Guide to the Yogyakarta Principles (n 88) 22

¹⁰¹ *ibid* 30

It is also important to remark that the language of the Yogyakarta Principles was intentionally phrased in a neutral way. Some have argued that this has the potential to exclude the experiences of certain groups.¹⁰² However, it allows for a broader understanding of the applicability of the Principles without referencing the binary gender framework, which in turn enables people who choose an identity outside the binary spectrum to be abided by them.¹⁰³

The Principles represented the state of IHRL at the time they were produced. Therefore the drafters anticipated that they would need to be updated regularly.¹⁰⁴ The first update came in September 2017, when a group of experts met in Geneva and created a set of 10 supplemental Principles, which were named the *Yogyakarta Principles Plus 10*.¹⁰⁵ These new Principles recognize gender identity and sex characteristics as additional bases for rights violations in their preamble.¹⁰⁶ Thus, they have a more comprehensive approach to SOGIESC issues. The 9 Principles that follow the preamble include each a list of recommendations for States.¹⁰⁷ The first Principle -numbered 30 so as to take up from where the previous Principles left off- focuses on the right to State protection from Violence and Discrimination.¹⁰⁸ Principle 31 deals with the right to legal recognition and the right to change gender information when this requirement is included. The following Principle (32) highlights the importance of bodily and mental integrity, autonomy and self-determination, and sets out the 'right to be free from torture and cruel, inhuman and degrading treatment or punishment on the basis of sexual orientation, gender identity, gender expression and sex characteristics.'¹⁰⁹ In terms of sex characteristics, this Principle also states that 'no one shall be subjected to invasive or irreversible medical procedures that modify sex characteristics without their free, prior and informed consent, unless necessary to avoid serious, urgent and irreparable harm to the concerned person.'¹¹⁰

¹⁰² *ibid* 25

¹⁰³ *ibid*

¹⁰⁴ Andrew Park, 'Yogyakarta Plus 10: A Demand for Recognition of SOGIESC' (2019) 44:2 North Carolina Journal of International Law & Commercial Regulation 223-72

¹⁰⁵ *ibid* 227

¹⁰⁶ *ibid*

¹⁰⁷ *ibid* 228

¹⁰⁸ *ibid*

¹⁰⁹ Principle 32 of the Yogyakarta Principles +10 (2017) available at <<http://yogyakartaprinciples.org/principle-32-yp10/>> Accessed 26 August 2019

¹¹⁰ *ibid*

Principles 33, 34 and 35, address the rights to freedom from criminalization, protection from poverty and the rights to sanitation respectively. The following Principle (36) focuses on the issue of human rights in regard to information and communication technologies. Finally, the last two Principles deal with the rights to truth (37) and the rights to cultural diversity (38).¹¹¹ The supplementary Principles also include State recommendations in relation to the implementation of the first Principles.

Ever since the creation of the Principles, activists all over the world have used them as a tool to enhance the effectiveness of their fight for the expansion of rights.¹¹² They have contributed to challenge oppressive legal standards in countries such as India and Nepal; to develop new and more comprehensive government policies with a SOGIESC perspective in Brazil, Sweden and Colombia; to educate the public in general about the legal standards to protect LGBTI+ persons; and to build a movement by equipping activists with knowledge about SOGIESC rights.¹¹³

UNITED NATIONS

The first time a consideration was made in regards to SOGIESC issues at the UN level was in 1982, in *Hertzberg v Finland*¹¹⁴ at the Human Rights Committee (HRC).¹¹⁵ At that moment, the HRC dismissed a claim made by five individuals, represented by the Finnish organization, SETA (Organization for Sexual Equality) in regards to Article 19 of the International Covenant on Civil and Political Rights (ICCPR).¹¹⁶ It was not until 1994, however, that real progress was made in this Committee in relation to sexual orientation.¹¹⁷ That year, in the case of *Toonen v Australia*,¹¹⁸ the HRC agreed that Tasmania's sodomy laws, which prohibited same-sex consensual acts, were in

¹¹¹ *ibid*

¹¹² An Activist's Guide to the Yogyakarta Principles (n 88) 87

¹¹³ *ibid*

¹¹⁴ UN Human Rights Committee (HRC), 'Hertzberg et al v Finland, Communication No. 61/1979' (2 April 1982) UN Doc.CCPR/C/OP/1

¹¹⁵ Gemma MacArthur, 'Securing Sexual Orientation and Gender Identity Rights within the United Nations Framework and System: Past, Present and Future' (2015) 15 *The Equal Rights Review* 25 - 54

¹¹⁶ *ibid*

¹¹⁷ *ibid*

¹¹⁸ HRC, 'Toonen v Australia, Communication No. 488/1992', (25 December 1992) UN Doc. CCPR/C/50D/488

violation of Article 17 of the Covenant, which set out the right to privacy.¹¹⁹ This decision by the HRC was deemed to be the first 'juridical recognition of gay rights on a universal level.'¹²⁰

Since *Toonen v Australia*, there has been a growing jurisprudence and other developments in different UN bodies that identify a significant application of IHRL in matters related to SOGIESC issues.¹²¹

The Committee on Economic, Social and Cultural Rights (CESCR), for example, has addressed the issue of non-discrimination on the bases of SOGI in its General Comments.¹²²¹²³ The Committee on the Rights of the Child (CRC) has also dealt with this same issue through General Comments, where it has covered sexual orientation by locating it in the category of 'other status.'¹²⁴ The Committee Against Torture (CAT) has expressed concern about the torture of homosexuals through its concluding observations.¹²⁵¹²⁶ The CEDAW Committee, in its General Recommendation No.28 on the core obligations of States parties under Article 2 of the CEDAW Convention also included sexual orientation and gender identity as factors that amount to the intersectionality of the discrimination faced by women.¹²⁷ The Working Group on Arbitrary Detention has repeatedly used the case of *Toonen* as a basis for its findings of arbitrary detention of LGBTI+ persons.¹²⁸

Some Special Procedures that have also engaged with issues of SOGIESC include the Special Rapporteur (SP) on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the SP on extrajudicial, summary or arbitrary executions; torture and other cruel,

¹¹⁹ *ibid* para 8.3

¹²⁰ Joseph, S., 'Toonen v Australia: Gay Rights under the ICCPR', cited in MacArthur (n 115) 30 footnote 34

¹²¹ O'Flaherty and Fisher (n 63) 214

¹²² *ibid*

¹²³ See for example: UN, Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 18: The right to work' (24 November 2005) E/C.12/GC/18; Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 15: The right to water' (26 November 2002) E/C.12/2002/11; Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 14: The right to the highest attainable standard of health' (11 August 2000) E/C.12/2000/4

¹²⁴ O'Flaherty and Fisher (n 63) 214

¹²⁵ *ibid*

¹²⁶ See for example: Committee Against Torture (CAT), 'Concluding Observations of the Committee against Torture regarding Argentina', (10 December 2004) CAT/C/CR/33/1, para. 6(g).

¹²⁷ UN, Committee on the Elimination of Discrimination against Women (CEDAW), 'General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women', (16 December 2010) CEDAW/C/GC/28, para 18

¹²⁸ O'Flaherty and Fisher (n 63) 214

inhuman or degrading treatment or punishment; freedom of religion; violence against women; among others.¹²⁹

There have also been important developments within the political bodies of the UN. The first significant effort to affirm broad protection for sexual orientation occurred in the former Commission on Human Rights, when in 2003 the government of Brazil pushed for a resolution on human rights and sexual orientation.¹³⁰ This resolution stressed that the application of the rights contained in the foundational documents of IHRL also applied to people who experience sexual orientation in diverse ways. Such document sparked an important wave of criticism.¹³¹ The States that opposed feared that new rights regarding SOGI would be created. Finally, after much postponement, Brazil dropped the resolution.¹³² However, this unsuccessful effort resulted in a joint statement supported by 54 states, which stated that violations of human rights based on SOGI should not be ignored. Despite the little value and strength this statement had, it was the first one ever to include concerns related to SOGI.¹³³

5 years later, in 2008, a significant discussion on SOGI would take place again but in the framework of the 63rd session of the General Assembly. This time the Netherlands and France would present a document titled '*UN Declaration on Sexual Orientation and Gender Identity*'.¹³⁴ Said instrument 'affirmed the application of non-discrimination principles, and condemned a number of abuses such as the criminalization of same-sex relations, and violence and torture'.¹³⁵ However it was not until 2011 that a substantial milestone would be reached in terms of advancing SOGI rights. That year the Human Rights Council adopted resolution 17/19, which expressed concern for the discriminatory and

¹²⁹ *ibid*

¹³⁰ MacArthur (n 115) 33

¹³¹ *ibid*

¹³² *ibid*

¹³³ *ibid*

¹³⁴ 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', (18 December 2008) UN Doc. A/63/635

¹³⁵ MacArthur (n 115) 34

violent acts that LGBTI+ persons faced worldwide.¹³⁶ Following this advancement, the Office of the High Commissioner for Human Rights (OHCHR) was requested to conduct a study on SOGI abuses.¹³⁷ This important step would pave the way for the development of the most important specialized mechanism of the UN for the promotion and protection of SOGI rights up until now. Resolution 32/2 adopted by the Human Rights Council in 2016 created the mandate for an Independent Expert on Sexual Orientation and Gender Identity.¹³⁸ The mandate holder, who works as part of the UN Special Procedures, was appointed to 'assess the implementation of existing international human rights instruments, with regard to ways to overcome violence and discrimination against persons on the basis of their sexual orientation or gender identity, and to identify and address the root causes of violence and discrimination.'¹³⁹ Additionally, the Independent Expert (IE) must raise awareness on violence and discrimination against LGBTI+ persons; transmit urgent appeals and letters of allegation to States regarding cases of violence and discrimination based on SOGI; undertake fact-finding country visits; submit annual reports to the HRC and the General Assembly on the situation of SOGI issues and on other activities carried out in this regard, among other tasks.¹⁴⁰ In July 2019, the mandate of the Independent Expert on SOGI was renewed during the 41st session of the Human Rights Council, through a resolution adopted by a vote of 27 States in favour, 12 against and 7 abstentions.¹⁴¹

¹³⁶ Human Rights Council, 'Resolution 17/19, Human Rights, Sexual Orientation and Gender Identity', (14 July 2011) UN Doc.A/HRC/RES/17/19

¹³⁷ MacArthur (n 115) 34

¹³⁸ Human Rights Council, 'Resolution 32/2, Human Rights, Protection against violence and discrimination based on sexual orientation and gender identity', (15 July 2016) UN Doc.A/HRC/RES/32/2

¹³⁹ UN OHCHR, 'Independent Expert on sexual orientation and gender identity' (*OHCHR*, 2019) available at <<https://www.ohchr.org/en/issues/sexualorientationgender/pages/index.aspx>> Accessed 26 August 2019

¹⁴⁰ *ibid*

¹⁴¹ Human Rights Campaign, 'U.N. Human Rights Council Votes in Favor of Independent Expert to Protect LGBTQ People Worldwide' (12 July 2019) available at <<https://www.hrc.org/blog/u.n.-human-rights-council-votes-in-favor-of-lgbtq-independent-expert>> Accessed 26 August 2019

INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

The Organization of American States (OAS) is the world's oldest regional organization. It came into being in 1948 after the signing of the OAS Charter in Bogota, Colombia.¹⁴² The adoption of the Charter and the American Declaration on the Rights and Duties of Man also in 1948, which predates the UDHR, marks the first steps of the Organization towards the consolidation of the Inter-American Human Rights System. Following the Declaration, the American Convention on Human Rights (ACHR) -or the Pact of San José, Costa Rica- was adopted in 1969. By then, the Inter-American Commission of Human Rights was already in place. However, it was with the adoption of the ACHR that the Inter-American Court of Human Rights was established.¹⁴³

The Inter-American System of Human Rights is comprised by these two organs (the Commission and the Court) which have competence with respect to matters relating to the fulfillment of the commitments made by the states to the ACHR. The Commission became a consultative organ after the adoption of the Convention, and it undertakes a number of activities for the promotion and protection of human rights in the Americas, which include carrying out country visits and country reports and creating publications of specially commissioned studies.¹⁴⁴ The Court on the other hand has contentious jurisdiction over the states that have ratified the Convention and have explicitly accepted its jurisdiction. It rules on cases submitted to it by the Commission or State Parties and is the last resort within the system.¹⁴⁵

In regards to issues of SOGIESC, the Commission has received ample information on the situation of LGBTI+ persons in the Americas, particularly regarding the discrimination and violence that these

¹⁴² Organization of American States, 'Who We Are', available at http://www.oas.org/en/about/who_we_are.asp Accessed 27 August 2019

¹⁴³ Organization of American States (OAS), 'American Convention on Human Rights' (1969), available at <https://www.refworld.org/docid/3ae6b36510.html> Accessed 27 August 2019

¹⁴⁴ An Activist's Guide to the Yogyakarta Principles (n 88) 26

¹⁴⁵ Clara Sandoval, *The Inter-American System of Human Rights and Approach* (Routledge Handbook of International Human Rights Law, 2013) 427

persons have to face in many countries of the American continent on the basis of sexual orientation, gender identity/expression and sexual characteristics.¹⁴⁶ The first case lodged to the Commission on sexual orientation came in 1996, when Maria Lucia Alvarez petitioned this organ alleging that prison authorities in Colombia discriminated against her by refusing her conjugal visits with her same-sex partner. Ultimately, the Commission ruled in 1999 that the case was admissible, and a friendly settlement was reached.¹⁴⁷ In addition to this, a number of petitions on SOGIESC issues have been submitted to the Commission and two cases have been ruled by the Court related to sexual orientation.¹⁴⁸¹⁴⁹

In terms of resolutions, the General Assembly of the OAS -the supreme organ of the Organization- has issued 9 documents focusing on human rights, sexual orientation and gender identity.¹⁵⁰ A core group on LGBTI issues was formed in 2016 to support the implementation of mandates contained in said resolutions. The group is comprised by Argentina, Brazil, Canada, Chile, Colombia, Mexico, the United States, and Uruguay.¹⁵¹

Additionally, the Inter-American Commission counts with a Rapporteur on the Rights of LGBTI Persons. Such advancement was achieved in 2011 in the framework of the 143rd Period of Sessions of the Commission, when a specialized unit was created within the Executive Secretariat of this organ.¹⁵²

¹⁴⁶ OAS, 'IACHR Creates Unit on the Rights of Lesbian, Gay, Bisexual, Trans, and Intersex Persons' (2011) available at <http://www.oas.org/en/iachr/media_center/PReleases/2011/115.asp> Accessed 26 August 2019

¹⁴⁷ An Activist's Guide to the Yogyakarta Principles (n 88) 26

¹⁴⁸ Inter-American Commission on Human Rights (IACHR), 'Reports on Petitions and Cases', available at: <<https://www.oas.org/en/iachr/lgtbi/decisions/iachr.asp>> Accessed 26 August 2019

¹⁴⁹ See also *Case of Atala Riffo and Daughter v. Chile: Merits, Reparations and Costs*. Inter-American Court of Human Rights Series C No 239 (February 24, 2012)

<http://corteidh.or.cr/docs/casos/articulos/seriec_239_ing.pdf> Accessed 27 August 2019; *Caso Duque Vs. Colombia: Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 26 de febrero de 2016. Serie C No. 310. available in Spanish at:

<http://www.corteidh.or.cr/docs/casos/articulos/seriec_310_esp.pdf>

¹⁵⁰ OAS, 'Rapporteurship on the Rights of LGBTI Persons', available at

<<http://www.oas.org/en/iachr/lgtbi/links/>> Accessed 27 August 2019

¹⁵¹ OAS, 'IACHR Welcomes Creation of LGBTI Core Group at the OAS' available at:

<https://www.oas.org/en/iachr/media_center/preleases/2016/097.asp> Accessed 27 August 2019

¹⁵² OAS, 'Rapporteurship on the Rights of LGBTI Persons', available at <<https://www.oas.org/en/iachr/lgtbi/>> Accessed 27 August 2019

So far, the Rapporteurship on LGBTI persons has produced two comprehensive reports about the situation of SOGIESC rights in the Americas. The first one, titled *Violence Against LGBTI Persons in the Americas* focuses on ‘the acts of physical violence committed against persons with non-normative sexual orientations, identities and gender expressions, or whose bodies vary from the standard for female and male bodies in the Americas.’¹⁵³ The second and most recent report was launched in 2018, and it examines the progress made in the Member States of the OAS to guarantee that LGBTI+ persons can lead fulfilling lives with full autonomy and respect for their own will and free from all forms of violence.¹⁵⁴ This report is more comprehensive in its scope and it also contains guidelines ‘for building a more just and inclusive society, with respect for sexual orientation, gender identity -real or perceived- and body diversity, based on the recognition of specific rights.’¹⁵⁵

EUROPEAN SYSTEM OF HUMAN RIGHTS

The major human rights instruments in the European System of Human Rights are the European Convention on Human Rights and Fundamental Freedoms, which was adopted by the Council of Europe (CoE) in 1950, and the European Social Charter, adopted in 1965.¹⁵⁶ The Charter deals with economic, social and cultural rights while the Convention sets out civil and political rights. The CoE has adopted many conventions on issues such as torture, gender equality, national minorities, etc.¹⁵⁷ Much like the Inter-American System, the CoE has established a Court that rules on cases that deal with violations of human rights. However, there is a more robust and developed jurisprudence in the European System in regard to sexual orientation and gender identity.

¹⁵³ Inter-American Commission of Human Rights, *Violence Against LGBTI Persons* (IACHR, 2015) 11

¹⁵⁴ IACHR, ‘IACHR Publishes Report on Progress and Challenges toward Recognition of the Rights of LGBTI Persons in the Americas’ (22 May 2019) available at:

<https://www.oas.org/en/iachr/media_center/PReleases/2019/126.asp> Accessed 27 August 2019

¹⁵⁵ IACHR, *Recognition of the Rights of LGBTI Persons* (2018) 9

¹⁵⁶ An Activist’s Guide to the Yogyakarta Principles (n 88) 28

¹⁵⁷ *ibid*

Substantial progress on SOGIESC rights at the CoE was achieved in 2010 when the Committee of Ministers -the statutory decision-making body of the organization- issued a recommendation to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity.¹⁵⁸ The Secretary General of the CoE described this development as the ‘first legal instrument anywhere to deal specifically with this area.’¹⁵⁹ This instrument sets out the applicability of a range of human rights to ensure the equal dignity of persons of diverse sexual orientations and gender identities.¹⁶⁰ It also incorporates a number of measures that Member States must take in order to guarantee the enjoyment of all human rights over time.¹⁶¹ The status of implementation of this recommendation was reviewed three years after its adoption and in regular intervals after that time.¹⁶²

AFRICAN SYSTEM OF HUMAN RIGHTS

The African Union (AU) -formerly known as the Organization of African Unity (OAU)- is the regional organization of the African continent.¹⁶³ This continental body is comprised by all 55 states that make up the countries of the African Continent.¹⁶⁴

The African Charter on Human and Peoples’ Rights is the main instrument of the African Human Rights System, it was adopted in 1981 and entered into force five years later in 1986.¹⁶⁵ Article 30 of the Charter established the African Commission on Human Rights, the main body tasked with the promotion and protection of the rights contained in the Charter which was inaugurated in 1987.¹⁶⁶

¹⁵⁸ Council of Europe Committee of Ministers, Recommendation No. CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity (Adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers’ Deputies)

¹⁵⁹ An Activist’s Guide to the Yogyakarta Principles (n 88) 28

¹⁶⁰ *ibid*

¹⁶¹ *ibid*

¹⁶² *ibid*

¹⁶³ African Union (AU), ‘About the African Union’, available at <<https://au.int/en/overview>> Accessed 27 August 2019

¹⁶⁴ *ibid*

¹⁶⁵ An Activist’s Guide to the Yogyakarta Principles (n 88) 29

¹⁶⁶ *ibid*

The Commission also has the power to interpret the provisions of the Charter. The African Court on Human Rights came into being years later in 2004, by virtue of a Protocol to the Charter.¹⁶⁷

Of the three regional systems referenced in this paper, the African system is the least developed in handling issues of SOGIESC rights. The most important development in this regard was the adoption of Resolution 275 on the Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity, during the 55th Ordinary Session of the African Commission on Human and Peoples' Rights in Luanda, Angola, in 2014.¹⁶⁸ Said resolution condemns the increasing violence and other human rights violations that LGBTI+ persons experience in most of the African continent, it calls on State Parties to ensure that human rights defenders can work in an environment free of stigma, reprisal, prosecution and discrimination and urges states to end all acts of violence and other abuses against LGBTI+ persons. This instrument was also a pivotal rejection to the claims of some that LGBTI+ rights were incompatible with the African values and culture.¹⁶⁹

¹⁶⁷ *ibid*

¹⁶⁸ African Commission on Human and Peoples' Rights, 'Resolution 275: Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity' (2014)

¹⁶⁹ The Observatory on the Universality of Rights, 'Resolution on the Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity', available at: <<https://www.oursplatform.org/resource/african-commission-275/>> Accessed 27 August 2019

HOW IHRL HAS FAILED PEOPLE WHO DEVIATE FROM THE HETERONORM

In September 2015, the Heads of State and Government and High Representatives meeting at the UN Headquarters in New York, in the framework of the 70th General Assembly of the Organization, adopted resolution 70/1 *Transforming Our World: The 2030 Agenda for Sustainable Development*. This resolution was a plan of action for people, planet and prosperity that sought to strengthen universal peace in larger freedom.¹⁷⁰ As the ambitious title suggests, the 2030 agenda promised a 'transformative' plan of action.¹⁷¹ In its preamble and introduction, the world leaders and stakeholders pledged that no one would be left behind.¹⁷²

As utopian as this seems, the truth is that the Sustainable Development Goals (SDGs) did not explicitly call for equality for all but were unsurprisingly another reproduction of heteronormativity in the international arena. Goal number 5, which was set out to achieve gender equality, conceived this goal as a matter that applies only to ciswomen and girls. Although this in itself is a progress for the advancement and expansion of rights, its limiting scope only installed the heterosexual matrix in a new way and reinforced the prejudicial idea of women and girls' secondary status while maintaining the privileged status of cismen as the only other gender recognized.¹⁷³ It is not surprising, however, that the SDGs did not raise any direct concerns on SOGIESC issues, given that heteronormativity is as embedded in the approaches to development as it is in the approaches to IHRL.¹⁷⁴

While there have been some valuable developments in IHRL around SOGIESC issues -as exposed in the previous section- they have not been entirely adequate to address the needs of people who

¹⁷⁰ Preamble of the Resolution adopted by the UN General Assembly in its seventieth session, *Transforming our world: the 2030 Agenda for Sustainable Development* (25 September 2015) A/RES/70/1

¹⁷¹ Sakiko Fukuda-Parr, *Sustainable Development Goals* in Thomas G. Weiss and Sam Daws (Eds), *The Oxford Handbook on the United Nations* (Oxford University Press, 2018) <<https://0-www-oxfordhandbooks-com.serlib0.essex.ac.uk/view/10.1093/oxfordhb/9780198803164.001.0001/oxfordhb-9780198803164-e-42>> Accessed 24 August 2019

¹⁷² *ibid*

¹⁷³ Otto in Dvies and Munro (Eds) (n 21) 197

¹⁷⁴ See for example: Rafia Zakaria, 'The Myth of Women's 'Empowerment' (*New York Times*, 2017) available at: <<https://www.nytimes.com/2017/10/05/opinion/the-myth-of-womens-empowerment.html>> Accessed 28 August 2019

experience sexual orientation and gender identity in diverse or non-normative ways. Most of the progress achieved has focused on the application of the principles of universality and non-discrimination to LGBT persons.¹⁷⁵ Fairly recently issues of sexual characteristics or bodily diversity have started to gain attention at the international level. Meanwhile non-conforming identities are still marginalized and sometimes even labeled as fictitious. The binarism underlying the conceptions of gender/gender identity have not been sufficiently challenged and heterosexuality remains the norm in the human rights paradigm.

The former High Commissioner for Human Rights, Louise Arbour, had expressed concern about the inconsistency of approach in law and practice to SOGI issues. In an address to a LGBT forum she conveyed the need for a more comprehensive articulation of these rights in international law.¹⁷⁶ Some commentators had also suggested that IHRL was not consistent in the terminology used to refer to SOGIESC issues. While this was especially true in past years before the more agreed use of the terms 'SOGI' and 'SOGIESC'. there is still a marked inconsistency and multiple gaps in the way IHRL treats categories of gender. One example of this can be found in the context of the interpretation and application of the 1951 Convention relating to the Status of Refugees in regard to gender related issues.

The Refugee Convention was originally adopted in 1951 in Geneva, Switzerland.¹⁷⁷ However, this important instrument resulted from previous developments that took place in the aftermath of World Wars I and II, such as guidelines, laws and other international agreements set out to ensure the adequate treatment of refugees and to protect their human rights.¹⁷⁸ The Convention spells out who is a refugee and defines refugees obligations to their host countries, it also specifies some categories of people who do not qualify for refugee status, such a war criminals.¹⁷⁹ In the way it was first conceived, the Convention was more or less limited to protecting European refugees who were

¹⁷⁵ O'Flaherty and Fisher (n 63) 232

¹⁷⁶ *ibid*

¹⁷⁷ UNHCR, 'The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol' (*UNHCR*, 2011) 1

¹⁷⁸ *ibid*

¹⁷⁹ *ibid*

victims of World War II, nevertheless, it was amended over a decade later with the 1967 Protocol.¹⁸⁰ The Protocol broadened the applicability of the 1951 Convention by removing the geographical and time limits set out in the Convention, which only contemplated the persons who became refugees due to the events occurring in Europe before 1st January 1951.¹⁸¹

As most of the documents of the time in which the Convention was adopted, the language used in its creation was entirely masculine, narrating only the experiences of the cis, straight and white males who wrote it. There were no mentions to the particular ways in which women and people who experience sexual orientation and gender identity in diverse and non-normative ways were specifically affected by such events. Gay men who fought the wars had no protections whatsoever, and they were usually prosecuted and jailed by military authorities when returning to their home countries,¹⁸² LBT persons faced the same destiny. As for women, the way in which the Convention and its Protocol availed them was mostly by virtue of their relationship to men (as part of their families).¹⁸³ The Convention, as most of IHRL, was interpreted as an instrument that protects citizens from abuses by their states, an arena that was dominated by men, and that ignored women's persecutory experiences which mostly take place at the hands of non-state actors.¹⁸⁴ All of this was of course a reflection of the androcentric concerns of the male European drafters that were already embedded in much of IHRL at that time and that universalized such concerns as 'human' concerns.¹⁸⁵

With the passing of years and due to changes in state practice, among other factors, gender-based violence made its way to the scope of the Convention. In 1993 Canada adopted the first guidelines to deal with asylum cases based on gender related issues.¹⁸⁶ Other countries in the Global North

¹⁸⁰ *ibid*

¹⁸¹ *ibid* 4

¹⁸² BBC, 'An Archive of World War II Memories', (2014) available at:

<<https://www.bbc.co.uk/history/ww2peopleswar/stories/36/a2688636.shtml>> Accessed 29 August 2019

¹⁸³ The ad hoc Committee on Statelessness and Related Problems drafted an official commentary (E/1618 p.40) where they stated that the rights granted to a refugee were extended to his family. See UNHCR, 'Convention and Protocol Relating to the Status of Refugees' (2010) 10

¹⁸⁴ Nahla Valji, 'Women and the 1951 Convention: Fifty Years of Seeking Visibility' (2001) 19:5 *Canada's Journal on Refugees*, 25-35. available at:

<<https://refuge.journals.yorku.ca/index.php/refuge/article/view/21227>> Accessed 29 August 2019

¹⁸⁵ *ibid* 27

¹⁸⁶ *ibid* 32

followed, and, as predicted by Valji, the foundation for an international norm that recognized gender as a nexus to persecution was established.¹⁸⁷

In October 1999 the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) noted in its General Conclusion on International Protection the efforts made by states to incorporate gender perspectives into asylum policies, regulations and practice; and encouraged States and the UNHCR Office to develop, promote and implement guidelines, codes of conduct and training programs on gender-related refugee issues.¹⁸⁸

In 2000 the UNHCR published a Position Paper on Gender-Related Persecution. This interpretative instrument offered a distinction between the categories of gender and sex, and defined the former as 'the relationship between women and men based on socially defined roles that are assigned to one sex or another.'¹⁸⁹ The paper stressed that gender-related persecution -the term commonly used in refugee law to address claims based on gender violence- 'encompassed acts of sexual violence, family violence, coerced family planning, female genital mutilation, punishment for transgression of social mores, and homosexuality.'¹⁹⁰

Only two years later after the publication of the Position Paper, the UNHCR adopted a set of guidelines on gender-related persecution within the context of Article 1A (2) of the 1951 Convention and its 1967 Protocol relating to the Status of Refugees. These guidelines replaced the previously released Position Paper. However, they still maintained some of its essential features. The guidelines recognized that the definition of refugee had been historically interpreted through a framework of male experiences.¹⁹¹ They also provided a more comprehensive definition of gender, which recognized the

¹⁸⁷ *ibid*

¹⁸⁸ UNHCR, 'General Conclusion on International Protection No. 87' (08 October 1999) Contained in United Nations General Assembly document A/AC.96/928 et document no.12A (A/54/12/Add.1) available at: <https://www.unhcr.org/excom/exconc/3ae68c6ec/general-conclusion-international-protection.html> Accessed 31 August 1999

¹⁸⁹ UNHCR, 'Position Paper on Gender-Related Persecution' (January 2000) 1

¹⁹⁰ *ibid*

¹⁹¹ UNHCR, 'GUIDELINES ON INTERNATIONAL PROTECTION No. 1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' (07 May 2002) HCR/GIP/02/01

social and cultural factors that influence its construction and understood it as non-static nor innate characteristic.¹⁹²

The guidelines make reference to sexual orientation as a possible ground for establishing a valid claim if homosexuals, transsexuals or transvestites have faced 'extreme public hostility, violence, abuse, or severe or cumulative discrimination.' or if homosexuality is illegal in a particular society.¹⁹³ Nonetheless they proved to be insufficient in addressing SOGIESC issues because of their limiting understanding of both sexual orientation and gender identity.

These guidelines, as efficient as they could have been conceived to be, fail -when analyzed under a queer perspective- to challenge the heteronormativity of IHRL. Instead, they reaffirm the dualistic notions of gender even when referring to non-normative expressions of it (as in the case of trans persons) and try to assimilate diverse sexual orientations into a grid of intelligibility that has predominantly been male dominated and heterosexual. However, an asset of this development is its treatment of the category of gender as something that is both socially constructed and mutable.

In 2012, ten years after the adoption of the Gender Guidelines, a new set of guidelines focusing particularly on sexual orientation and gender identity were issued by the UNHCR. The Guidelines on International Protection No.9 deal with claims to Refugee Status based on SOGI grounds within the context of Article 1(A) of the Refugee Convention and its 1967 Protocol. This interpretative instrument resulted from, and replaced, the UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, that was issued in 2008. The SOGI Guidelines, recognize that in 'many parts of the world, individuals experience serious human rights abuses and other forms of

¹⁹² The following is the definition provided by the UNHCR Guidelines on International Protection No.1: 'Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination. Gender is not static or innate but acquires socially and culturally constructed meaning over time.'

¹⁹³ UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION No. 1 (n 191)

persecution due to their actual or perceived sexual orientation and/or gender identity.’¹⁹⁴ In this sense, they start by referencing the existing instruments and provision of IHRL that can provide protection to LGBTI+ persons. The first of these are Articles 1 and 2 of the UDHR, which state that “all human beings are born free and equal in dignity and rights” and set out the principle of non-discrimination. They then continue by mentioning the Yogyakarta Principles and their relevance in the context of seeking asylum, in particular they reference Principle 23, which outlines the right to seek and enjoy asylum from persecution related to sexual orientation and/or gender identity. They soon follow by providing a definition of both sexual orientation and gender identity and the acronym ‘LGBTI’. In this section one of the first flaws in regard to the way the instrument addresses issues of gender can be found. The guidelines state that ‘gender identity and its expression also take many forms, with some individuals identifying neither as male nor female, or as both.’ This statement presents a clear confusion between the concept of gender as a social category and of sex as biologically determined. Male and female are both attributes related to the category of sex and treating them as categories of identity in relation to gender is rather imprecise. Nevertheless, this mixing of terminology is not the biggest inconsistency nor the most troublesome aspect of the guidelines.

In their introduction, the guidelines express that the experiences of LGBTI persons vary greatly and are strongly influenced by many factors such as culture, economy, family, political views, religion, and social environment. They also stress the importance that ‘decisions on LGBTI refugee claims are not based on superficial understandings of the experiences of LGBTI persons, or on erroneous, culturally inappropriate or stereotypical assumptions.’¹⁹⁵ However, in practice, asylum seekers are more likely to be granted refugee status if they act up to flamboyant stereotypes.¹⁹⁶ Very recently, in August 2019, a middle eastern man seeking asylum in the UK got his claim rejected by a judge because he

¹⁹⁴ UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION NO. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (23 October 2012) HCR/GIP/12/09

¹⁹⁵ *ibid*

¹⁹⁶ Tom Batchelor, ‘LGBT+ refugees more likely to be granted asylum if they act up to ‘flamboyant’ stereotype, study finds’ (*Independent*, 26 July 2019) available at: <<https://www.independent.co.uk/news/uk/home-news/gay-refugee-asylum-lgbt-stereotype-research-home-office-a9020291.html>> Accessed 01 September 2019

was not 'effeminate' enough to be gay.¹⁹⁷ In another case, an Iraqi gay man was denied asylum in Austria because he was too girlish, and was labeled as a 'fake gay.'¹⁹⁸ Furthermore, and despite their own statement, the guidelines themselves may amount to the stereotyping of non-normative sexual orientations and gender identities.

Section IV of the guidelines give a substantial analysis of SOGIESC concerns. Paragraph 12 goes on to say that both sexual orientation and gender identity, as affirmed by a number of jurisdictions, are fundamental aspects of human identity that are either immutable and innate or that a person should not be required to give up or conceal. While the latter affirmation is completely adequate, stating that sexual orientation and gender identity are inherent and unchangeable traits of human personality is in stark contrast with the understanding of gender as a socially constructed category. Understanding gender identity as a monolithic entity and in binary concepts that apply only to men or women (whether cis or trans) should be resisted, since is without a doubt an exercise that circumscribes progress on SOGIESC to the dominancy of the heteronorm. Otto had already expressed a similar view in this regard when stating that 'simply trying to press diverse gender (and sexuality) subjectivities into the dominant grid of binary gender and heterosexual normativity as reflected in mainstream international law, merely installs the heterosexual matrix in a particular new form.'¹⁹⁹

Moreover, the views that any sexual orientation is by nature 'innate' is neither verifiable nor quantifiable. There is no consensus across a wide range of scientific disciplines that this quality is the sole product of neither social conditions or that is innate nor fixed at an early age.²⁰⁰

¹⁹⁷ May Bulman, 'Asylum seeker told by judge he was not 'effeminate' enough to be gay' (Independent, 20 August 2019) available at: <<https://www.independent.co.uk/news/uk/home-news/asylum-seeker-gay-judge-immigration-a9064511.html>> Accessed 01 September 2019

¹⁹⁸ Tom Batchelor, 'Fake gay': Iraqi man denied asylum in Austria because he was 'too girlish' (Independent, 24 August 2018) available at: <<https://www.independent.co.uk/news/world/europe/austria-gay-man-asylum-application-denied-girlish-lgbt-iraq-a8506091.html>> Accessed 01 September 2019

¹⁹⁹ Otto, 'Queering Gender [identity] in International Law'(n 21) p.315

²⁰⁰ International Commission of Jurists (ICJ), 'Refugee Status Claims Based on Sexual Orientation and Gender Identity' (*ICJ*, 2016) 30

The conception of these attributes as innate and immutable, responds to the imperative need of IHRL to normalize all phenomena that deviates from the heteronorm. IHRL has historically taken the abuses of those who assert difference and colonized their experiences in order to make them comfortable to its own structures, or better said, the structures of the nation states.²⁰¹

This need of IHRL to normalize has in turn created very fix understandings of SOGIESC issues that stereotype the experiences of persons with diverse and/or non-normative sexual orientations and gender identities, and impact negatively their efforts to escape situations of human rights violations. In the case *Lipdjio v. Canada*,²⁰² a woman from Cameroon who was seeking asylum in the country and who was raped when she was 17 years old claimed that the trauma from this violent event had led her to her lesbian sexual orientation. The Immigration and Refugee Board did not believe that the claimant could be a lesbian because she had discovered her sexual orientation after the assault rather than admitting it was innate.²⁰³ However, the Federal Court stated that the conclusion of the Board was not verifiable nor quantifiable and it held that the Board had therefore erred when manifesting that it had specialized knowledge that 'homosexuality is innate.'²⁰⁴ The Court thus concluded that the Board's view on homosexuality as something innate had affected the assessment of the claimant's credibility and ultimately her claim.²⁰⁵

This instrument contains another problematic factor related to non-normative gender identities, one that is deeply rooted in the binary and heteronormative conceptions of gender. In paragraph 47, the guidelines state that 'where the identity of the applicant is still evolving, they may describe their sexual orientation and/or gender identity as fluid or they may express confusion or uncertainty about their sexuality and/or identity.'²⁰⁶ Understanding gender fluidity and other non-conforming gender identities as transitory or unevolved phases rather than actual, valid and complete identity marks because they

²⁰¹ Wayne Morgan, 'Queering International Human Rights Law', in Carl Stychin and Didi Herman (Eds), *Sexuality in the Legal Arena* (2000) 212

²⁰² *Lipdjio v. Canada* (Citizenship and Immigration), 2011 FC 28, 12 January 2011 in ICJ (n 27)

²⁰³ *ibid*

²⁰⁴ *ibid*

²⁰⁵ *ibid*

²⁰⁶ UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION No. 9 (n 194)

reject, deconstruct or fluctuate between the dualistic and normative notions of gender is another way to pathologize people who identify as non-binary, non-conforming, gender fluid, agender, etc. Moreover, is one more proof that the binary gender divisions deeply bifurcate the structure of modern society and undergird the continually reappearing instances of gender inequality.²⁰⁷

Another instrument that has failed to respond to the specificity of the needs of people who experience sexual orientation and gender identity in diverse or non-normative ways is the Yogyakarta Principles. As valuable as these Principles have been in the fight for the expansion of SOGIESC rights, they are still circumscribed within the framework of the heteronorm.

While the Principles were envisioned for the purpose of seeking a response to stigma, violence and discrimination faced by people due to biased perceptions of their sexual orientations and/or gender identities/expressions and/or sex characteristics, their goal is far from being achieved.²⁰⁸ Given that the Principles were created to reflect the current state of IHRL, their signatories were bound by international law in the drafting process.²⁰⁹ This, rather than contesting the shortcomings of IHRL in regards to SOGIESC issues, meant that the Principles were written assuming that LGBTI+ persons are just like heterosexual cisgender people.²¹⁰

In the core dialogues during the genesis of the Yogyakarta Principles, the drafters considered whether to mainstream LGBTI issues already in place under current IHRL or to push for a new human rights instrument specifically tailored to the needs of LGBTI persons.²¹¹ Following the outcome of the “Brazilian Resolution”, the drafters decided that it was best to settle and seek recognition of a mainstreamed set of rights based on the existing rights contemplated in the IHRL system.²¹² With this decision, the Principles successfully accomplished some of their underlying purposes, they offered a

²⁰⁷ Judith Lorber, ‘Using gender to undo gender: a feminist degendering movement’ [2000] *Feminist Theory* 79, 95

²⁰⁸ Andrew Park, ‘Yogyakarta Plus 10: A Demand for Recognition of SOGIES’ (2019) 44:2 *N.C. J. Int’l L.* 223-72

²⁰⁹ *ibid* 225

²¹⁰ *ibid* 251

²¹¹ *ibid* 235

²¹² *ibid* 236

tool for LGBTI advocates, they offered a guide for governments about the compliance of human rights standards and they changed the language that was used at the time to refer to issues relevant to LGBTI people by adopting the terms SOGI and later SOGIESC.²¹³ The fact that the Principles did not aspire for the creation of a new specialized instrument such as a declaration or a convention, facilitated their uptake by governments. This also offered governments an approach to these issues that was based on legal expertise unattached to any political or advocacy platform.²¹⁴ However, it was precisely by making them too conformable to the considerations of the states that the effectiveness of the Principles was compromised, and that they became a normalizing tool rather than an emancipatory one.

The first set of Principles demanded equal inclusion. In this sense, they ‘anchored themselves in the assumption that sexuality and gender is a universal characteristic of all people.’²¹⁵ Similarly, they did little to recognize and draw attention to the different challenges experienced by different groups, such as the variations of the kinds of stigma and oppression that each of them face.²¹⁶ As mentioned by Park, this emphasis on sameness is also found in the definitions provided for sexual orientation and gender identity, ‘the first Principles were drafted so as to create images of LGBTI people that would minimize deviations from prevailing heteronormative perspectives.’²¹⁷

The introduction to the Yogyakarta Principles defines sexual orientation as ‘each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.’ This definition includes two important elements: sexual behavior and sexual attraction, which the Principles qualify by using terms that offer non-threatening and highly heteronormative understandings of sexual orientation as necessarily related to love and emotion.²¹⁸ Sexual orientation in itself is an attribute that refers to the sexuality of a person, experiencing said sexuality does not necessarily entail the existence of

²¹³ *ibid* 239

²¹⁴ *ibid* 240

²¹⁵ *ibid* 242

²¹⁶ *ibid* 250

²¹⁷ *ibid* 251

²¹⁸ *ibid*

'profound, emotional and affectional' attraction. This way of framing sexual orientation only serves to portrait a sexuality that conforms to heteronormative conceptions of love and that strives for acceptability.²¹⁹

Something similar happens to the Principle's conception of gender identity. The YP offer the following definition of gender identity:

Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.²²⁰

While the recognition of any bodily modification as something that must be freely chosen is an important step towards a transformative understanding of gender identity, the definition's attempt to be inclusive falls short by insinuating that everyone has a gender identity.²²¹ This framing of gender identity certainly excludes the experiences of persons who do not experience gender as an identity (e.g., agender, gender neutral, etc.)²²² In addition to this, stating that gender identity is a 'deeply felt internal experience' responds to the normalizing need of IHRL to suggest that this is a inherent characteristic, both innate and unitary.²²³ This is again in stark contrast to the constructivist conception of gender and in turn supports a heteronormative notion that indicates that gender is stable and that therefore everyone can be categorized by it.²²⁴

The definition of gender identity also recognizes two components of gender, one of identity (the awareness and acceptance of one's gender) and one of expression (through dress, speech and mannerism). However, the way gender identity is expressed in the YP's definition denotes a confusing

²¹⁹ *ibid*

²²⁰ Yogyakarta Principles (n 62) Introduction

²²¹ Otto, 'Queering Gender in International Law' (n 20) 312

²²² *ibid*

²²³ *ibid*

²²⁴ Park, 'Yogyakarta Plus 10: A Demand for Recognition of SOGIES' (n 104) 252

conjointment between the two, which implies that both identity and expression should correspond to each other.²²⁵ This is clearly not the case for people who, for a variety of reasons, are not allowed or choose not to express the gender that they identify with. Thus, understanding gender identity as such excludes people whose gender identity is not aligned with their gender expression.

The supplement Principles (YP Plus 10), which instead of seeking equal inclusion strive for actual recognition of SOGIESC unique needs and differences, provided a solution for this dilemma. They presented a different definition for gender expression which recognized that these two components are not necessarily always aligned.²²⁶

However, the YP Plus 10 did not expand the understanding of sexual orientation in the same way they did with gender expression and sex characteristics. The two important elements of sexual orientation as defined by the YP remained sexual behavior and sexual attraction. The definition overlooked completely the pivotal component of identity and it maintained the heteronormative conception of sexual orientation as linked to love and emotion.²²⁷

To talk about identity is to talk about self-determination. While some people may identify as LGBTI, others may seek for more cultural-specific terms such as 'metis' (Nepali) or 'hirja' (Hindi). In this same way, people who engage in same-sex acts, and who do not necessarily experience any strong affections may identify as heterosexuals (some examples include exploratory sex, hook-up sex, transactional sex, etc.)²²⁸

Not including identity in the way of understanding sexual orientation has the potential to impact negatively legal protections. Many people worldwide face discrimination and violence simply because identifying as LGBT for example. If sexual orientation is only based on the attributes of attraction and behavior, then such identification is not in itself an indication of a sexual orientation.²²⁹ In this sense 'an individual who was subjected to ill-treatment because of their identity would not receive human

²²⁵ ibid 261

²²⁶ ibid 263

²²⁷ ibid 265

²²⁸ ibid

²²⁹ ibid 269

rights protections tied to sexual orientation, because identity does not fall within the definition of sexual orientation.²³⁰

As an issue of human rights, simply manifesting one's identity in regard to sexual orientation should be 'explicitly protected under international human rights norms.' Additionally, limiting the types of behaviors and affections that qualify as sexual orientation in order to conform them to a more normative and comfortable view of sexual orientation should be resisted. It is important to recognize that sexual behaviors and attractions do not necessarily need to be meaningful, they may be superficial for whatever reason and that should also be protected against any human rights abuse related to sex.²³¹

If states want to truly fulfill their promise not to leave anyone behind, these understandings should permeate the current state of international law, and to do that would mean that more substantial changes that touch on the structures underlying IHRL, need to be achieved, not only in terms of equal inclusion of SOGIESC concerns, but in terms of actual recognition of the different challenges faced by different people who experience sexual orientation, gender identity and sexual characteristics in diverse and non-normative ways.

²³⁰ *ibid*

²³¹ *ibid* 271

AIMING TOWARDS A NEW INSTRUMENT

The drafting process of the Yogyakarta Principles raised two important questions that changed the way in which the human rights of persons who deviate from the heteronorm are conceived: what are human rights for LGBTI+ persons? And should a new treaty addressing these rights be pursued?

To answer the first question the drafters decided to draw exclusively from the already existing rights set out in IHRL.²³² More specifically, their efforts focused on the application of the principles of universality and non-discrimination in regards to LGBTI+ persons,²³³ not minding that the human rights system was built entirely on androcentric and heteronormative concerns, and that it did not respond adequately to the different needs of each of the groups of persons who experience sexual orientation and/or gender identity/expression and/or sexual characteristics in diverse and non-normative ways.

Regarding the second question, the drafters agreed that pursuing a new treaty tailored to the life experiences of LGBTI+ persons would not be feasible given the lack of states' support to previous attempts to include sexual orientation and gender identity in the IHRL agenda.²³⁴ Thus, the SOGIESC rights conceived by the YP, were anchored to the heteronormative paradigm of the human rights regime without even being part of a concrete system of human rights that would monitor and evaluate their implementation; and the future of a new treaty specialized in SOGIESC issues at the UN level became stalled.

While the YP marked an important milestone for the expansion of the applicability of rights, to conform to this instrument, that sought mostly equality of inclusion, is to limit the emancipatory power that a treaty addressing SOGIESC rights would have. If such treaty was ever to be developed, it should recognize and challenge the fact that the human rights, universalized through international law, were

²³² Park, Yogyakarta Plus 10 (n 104) 236

²³³ O'Flaherty and Fisher (n 63) 232

²³⁴ Park, Yogyakarta Plus 10 (n 104) 236

formulated to respond to the needs of certain types of humans that have predominantly been male and heterosexual and not of all humans who do not possess these and other characteristics.

With this, I do not mean to say that IHRL must be rejected as a whole, or that the current rights recognized in it do not necessarily apply to people who deviate from the heteronorm. What I suggest is that even though these rights are important to all human beings, not all human beings have the same needs, desires and certainly they all do not face the same challenges. Therefore, not all human beings are able to have these basic rights fulfilled in the same way. And since these rights cannot be detached from a whole system that was based on heterosexual understandings of gender and sexuality, a new instrument addressing SOGIESC rights should also seek to challenge this heteronormativity, and its understandings of the needs, desires and challenges that people who experience sexual orientation and/or gender identity/expression and/or sexual characteristics in diverse and non-normative ways have.

To illustrate the first part of this reasoning I will take the example of the right to marriage and family. This right is set out in Articles 16 of the UDHR and CEDAW, Article 23 of the ICCPR and Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The provisions on these instruments conceive the right to marriage and family as pertaining exclusively to people who identify and are perceived as heterosexual men and women. They also assume that this particular type of family is the natural and fundamental group unit of society and should therefore be entitled to protection by society and the States.

The Yogyakarta Principles on its Principle 24 recognize the right to found a family regardless of sexual orientation or gender identity. However, despite their queer background, the YP threatens to embrace a heteronormative conception of family form, stepping away from social constructivism.²³⁵ While this instrument recognizes that families exist in diverse forms,²³⁶ the list of state obligations that it sets out

²³⁵ Otto, 'Queering Gender [identity] in International Law' (n 20) 301

²³⁶ Yogyakarta Principles (n 62) Principle 24

as necessary for the implementation of the right, merely reconfigures rather than challenge the heteronormative family model.²³⁷ It assumes, for example, that 'the primary purpose of the family is to procreate, that the foundational family relationship is a monogamous couple and that the interests of children will be a primary concern.'²³⁸

Moreover, the obligations do not contest enough the fact that governments have used marriage as a tool of social control to regulate sexuality and the formation of families by establishing a favored form that is rewarded, while stigmatizing and criminalizing other -queer- forms of family, relationships, and sexual behaviors.²³⁹

Such conception of what the right to marriage and family should be when applied to people who deviate from the heteronorm can ultimately force some of them to 'normalize' their behaviors in order to be able to access some benefits that should not be awarded through the heteronormative and coercive dynamic of marriage (e.g., immigration and health care).²⁴⁰ This is a clear evidence that simply striving for inclusion and equality is not enough to actually recognize and alleviate some of the inequities that people who experience sexual orientation and/or gender identity/expression and/or sexual characteristics in diverse and non-normative ways continue to endure.

The idea that the right to marriage and to found a family should apply the same way indistinctly of sexual orientation or gender identity, and that such expansion of the applicability of rights comprises a fight for freedom and equality, has been considered absurd by some queer theorists and human rights activists.²⁴¹ Spade and Willse, for example, express that the mere existence of legal marriage as a form of coercive regulation in which achieving or not marital status is linked to the access of vital

²³⁷ Otto, 'Queering Gender [identity] in International Law' (n 20) 315

²³⁸ *ibid*

²³⁹ Dean Spade and Craig Willse, 'Marriage Will Never Set Us Free' (*Organizing Upgrade*, 2013) available at: <<http://archive.organizingupgrade.com/index.php/modules-menu/beyond-capitalism/item/1002-marriage-will-never-set-us-free>> Accessed 05 September 2019

²⁴⁰ *ibid*

²⁴¹ *ibid*

resources such as health care and paths to legalized migration is not equalizing nor freeing and should be resisted.²⁴²

Marriage is undeniably part of a system where governments choose an idea of how relationships, families and sexual behaviors should be, and reward those who participate in it while punishing those who do not.²⁴³ One way in which this negatively impacts people is by making them engage in the dynamic of marriage and sometimes making them stay in abusive relationships because their immigration status depends on it.²⁴⁴

Some people have also argued that the fight to expand the right to marriage and to found a family to cover same sex couples has contributed to improve popular opinion about LGBTI+ persons by portraying them in a role similar to the heteronormative model, that is as 'members of families, parents, ordinary couples rather than through hyper-sexualized or pathologizing stereotypes.'²⁴⁵ While this in itself is not an issue if people freely choose to fulfill such roles, to limit the protections and validation to only them and not to others who are not members of normative couples, fosters the stigmatization of people who engage in non-normative consented practices.²⁴⁶

In previous chapters the point has been made that simply adding queer people to roles that have been traditionally exclusive of heterosexual persons (e.g., police forces, military, marriage)²⁴⁷ only installs the heterosexual matrix in a new way.²⁴⁸ Furthermore, it does not change the negative aspects of those roles or the institutions that rely on them. A comprehensive approach to these issues, that a treaty on SOGIESC rights should contemplate, should question why 'marital status is tied to immigration and health care access, how queer and trans people are impacted by immigration imprisonment and deportation, and how homophobia and transphobia create negative health

²⁴² *ibid*

²⁴³ *ibid*

²⁴⁴ *ibid*

²⁴⁵ *ibid*

²⁴⁶ *ibid*

²⁴⁷ *ibid*

²⁴⁸ Butler, 'Gender Trouble' (n 6)

outcomes and block health care access.²⁴⁹ In other words, a treaty addressing SOGIESC issues should aim to deconstruct the normalizing effect of marriage and should seek to de-link marital status from essential benefits.²⁵⁰

However, an instrument of this sort should not be taken lightly. Its development should involve the use of a more liberatory language that not only challenges the binary and heteronormative understandings of gender in IHRL, but that reflects the different, and also the most urgent, needs of persons who experience sexual orientation and/or gender identity/expression and/or sexual characteristics in diverse and non-normative ways. Its main purpose must be to condemn and eradicate violence based on the actual or perceived sexual orientation, gender identity/expression, or sexual characteristics of a person, while contesting the inequities that the heteronormative conceptions of IHRL has caused to people who deviate from them.

In order to evaluate the feasibility behind the creation of a treaty that addresses SOGIESC rights, previous experiences on the drafting, implementation, and monitoring of similar instruments should be taken into consideration. In particular, the cases of the Yogyakarta Principles and the Convention on the Elimination of Discrimination against Women (CEDAW), as specialized instruments on gender and sexuality related issues in the international sphere, should serve as the basis of such evaluation. This exercise would allow for a better understanding of the challenges and critiques that a treaty on SOGIESC would face and need to overcome. It would provide as well an overview of how such instruments have positively impacted the lives of women and LGBTI+ persons. Other best practices and initiatives adopted by states and civil society in their own efforts to address SOGIESC rights should also be considered, especially those coming from the Global South.²⁵¹ Having already

²⁴⁹ *ibid*

²⁵⁰ *ibid*

²⁵¹ Uruguay for example has developed comprehensive legislation in regard to SOGIESC rights. Other examples include India and Nepal, who since 2005 and 2007 respectively included a third gender option in their national identification documents; and Argentina who in 2018 allowed two non-binary people to issue national documents without indication of sex, and in 2019 allowed a trans activist to change their official sex to their own personal denomination. For more info see: Ley N° 19684 Ley Integral para Personas Trans, available at: <<http://www.impo.com.uy/bases/leyes/19684-2018>>; Kile Knight, 'Nepal's Third Gender and the Recognition of Gender Identity' (Huffpost, 2016), available at: <https://www.huffpost.com/entry/nepal-third-gender_b_1447982>; Pagina 12, 'DNI sin indicación de sexo y como un trámite' (Pagina12, 2018), available

reviewed some of the shortcomings and positive outcomes of the YP, the following pages will briefly delve into the case of CEDAW.

The Convention on the Elimination of Discrimination against Women (CEDAW) was adopted by the UN General Assembly in 1979.²⁵² This treaty has been referred to as the 'landmark treaty in the struggle for women's rights', and as the international 'bill of rights for women.'²⁵³ The idea behind the creation of a binding instrument that addressed the rights of women came from the First World Conference on Women that was held in Mexico City in 1975. Until the treaty was adopted in 1979, there was no other significant document that comprehensively addressed the basic human rights of women in the political, cultural, economic, social, and family spheres.²⁵⁴ Even before the adoption of the ICCPR and the ICESCR, women realized the shortcomings of general equality and non-discrimination provisions and sought for an instrument that identified and condemned the multiple types of discrimination they faced all over the world.²⁵⁵

The text of the Convention is comprised by a preamble and thirty provisions divided in six parts.²⁵⁶ To date, 189 countries have ratified it.²⁵⁷

The Convention provides a broader definition of discrimination compared to earlier treaties. It covers both equality of opportunity and equality of outcome.²⁵⁸ This instrument takes discrimination against women to be:

at: <<https://www.pagina12.com.ar/152857-dni-sin-indicacion-de-sexo-y-como-un-tramite>>; Marina Iglesias, 'Ni femenino ni masculino: su documento dirá "femineidad travesti"' (Clarín, 2019) available at: <https://www.clarin.com/sociedad/femenino-masculino-documento-dira-femineidad-travesti_0_H3cOBVH-U.html> Accessed 09 September 2019

²⁵² Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000) 217

²⁵³ Marsha A. Freeman, Christine Chinkin and Beate Rudolf (Eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 2

²⁵⁴ FAWCO, 'CEDAW and Background Information' available at: <<https://www.fawco.org/component/content/article?id=188&Itemid=0>> Accessed 09 September 2019

²⁵⁵ Freeman, Chinkin and Rudolf (n 253)

²⁵⁶ UN, Convention on the Elimination of Discrimination against Women (CEDAW, 18 December 1979)

²⁵⁷ OHCHR, 'Status of Ratification Interactive Dashboard' (*OHCHR*, 2019) available at:

<<http://indicators.ohchr.org/>> Accessed 09 September 2019

²⁵⁸ Charlesworth and Chinkin (n 252) 217

'Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.'²⁵⁹

The Convention references a multiplicity of arenas where State Parties take legal and other measures to eliminate discrimination against women; these include: 'the political and public life, international organizations, education, employment, healthcare, financial credit, cultural life, the rural sector and the law.'²⁶⁰ It also contemplates the use of temporary special measures to accelerate equality of outcome between men and women and aims at overcoming the dichotomy between the public and private divide commonly observed in international law.²⁶¹

Similarly to the reasoning I exposed in previous sections, CEDAW was born out of the idea that 'one is less than human when one's violation does not violate the human rights that are recognized.'²⁶² In this sense, the Convention had the opportunity to become a transformative instrument that recognized women's experiences of human rights violations. However, as a reflection of the limited understandings of gender and sex of the time in which the Convention was drafted, it failed to fully and explicitly recognize the gendered dimension of women's experiences of abuse by anchoring its understanding of this issue to the biological determinism of the 'sex' category.²⁶³

The Convention has been the subject of many criticism. Others, however, have praised its positive effects and have highlighted its influence on the change of states' behavior towards women's political

²⁵⁹ Article 1 of the Convention on the Elimination of Discrimination against Women (n 256)

²⁶⁰ Charlesworth and Chinkin (n 252) 217

²⁶¹ *ibid*

²⁶² MacKinnon Catharine, 'Are Women Human?: And Other International Dialogues' (2006) in Tom Dreyfus, *The 'Half-Invention' of Gender Identity in International Human Rights Law: from Cedaw to the Yogyakarta Principles* (Australian Feminist Law Journal, 2012) 35

²⁶³ *ibid* 15

and social rights.²⁶⁴ I will briefly focus on three important critiques of this instrument that should be taken into account before a treaty on SOGIESC rights is considered.

The first one is related to the shortcomings of the framing of CEDAW by only focusing on discrimination against women, leaving behind women's experiences of violence and other abuses.

Violence against women has been recognized as 'the most pervasive yet least recognized human rights violation in the world.'²⁶⁵ However, because of the Convention's focus on 'public life, the economy, the legal system and education',²⁶⁶ the male-centered view of equality offered in international law was reinforced, limiting the recognition of the oppression that women face in the private sphere as an issue of inequality. In this sense, CEDAW fails to explicitly prohibit violence against women, most likely due to the difficulty of 'compressing a harm characterized as private into the public frame of the Convention, or perhaps because it does not fit into the equality model.'²⁶⁷ The Convention has nonetheless been interpreted as to prohibit violence against women as sex discrimination.²⁶⁸ General Recommendation No.19, which states that 'gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men', gives an account of this. However, given the non-binding nature of this type of recommendations, no state has yet proven capable to recognize such interpretation.²⁶⁹ The inefficiency of the Convention to capture the issue of violence against women shows that by granting women equality in gender-neutral terms, women's needs are limited to what men need,²⁷⁰ and also

²⁶⁴ Neil A. Englehart & Melissa K. Miller, 'The CEDAW Effect: International Law's Impact on Women's Rights', (2014) 13:1 *Journal of Human Rights* 22-47

²⁶⁵ Statement by Hajija Zainab Maina, Minister of Women Affairs and Social Development of Nigeria at the 57th Session of the Commission on the Status of Women (2013) available at: <<http://www.un.org/womenwatch/daw/csw/csw57/generaldiscussion/memberstates/nigeria.pdf>> Accessed 11 September 2019

²⁶⁶ Charlesworth and Chinkin (n 252) 217

²⁶⁷ *ibid*

²⁶⁸ Catharina A. MacKinnon, *Are Women Human* (Harvard University Press, 2007) 8

²⁶⁹ *ibid*

²⁷⁰ *ibid*

that 'a special treatment approach is needed, as opposed to formal equality, to recognize that women exist in concrete contexts.'²⁷¹

The discrimination and violence suffered by both women and people who deviate from the heteronorm reveals their position as marginalized subjects of international human rights law.²⁷² Many forms of violence directed against the latter are 'based on the desire of the to "punish" those identities, expressions, behaviors or bodies that transgress traditional gender norms and roles, or that run contrary to the binary system of male/female.'²⁷³ However, although some jurisprudence has been developed and decisions have been made by international and regional human rights bodies in regards to discrimination based on sexual orientation and gender identity, a comprehensive definition of prejudiced-based violence regarding sexual orientation, gender identity, or bodily diversity is still lacking.²⁷⁴ Additionally, in the light of the current situation of LGBT rights in the world, where in 70 UN Member States consensual same-sex relationships and/or acts are still criminalized,²⁷⁵ and violence against LGBTI+ persons is sometimes encouraged, a treaty on SOGIESC should make of eradicating violence based on SOGIESC its main purpose.

The second reason why CEDAW has been subjected to criticism has to do with its enforcement and implementation. Some authors argue that the ineffective implementation of provisions relating to women's rights has 'reduced the force of international legal regulation.'²⁷⁶ According to Charlesworth and Chinkin, the implementation of CEDAW is affected by its weak language, the reservations entered by states parties to the convention and by the insufficient monitoring methods provided for the Convention itself.

²⁷¹ Rebecca J. Cook (Ed.), 'Women's International Human Rights Law' in Rebecca J. Cook, *Human Rights of Women* (University of Pennsylvania Press, 1994) 21

²⁷² Tom Dreyfus, *The 'Half-Invention' of Gender Identity in International Human Rights Law: from Cedaw to the Yogyakarta Principles* (Australian Feminist Law Journal, 2012) 35

²⁷³ IACHR, *Violence Against LGBTI Persons* (2015) 33

²⁷⁴ *ibid*

²⁷⁵ ILGA (n 64) 16

²⁷⁶ Charlesworth and Chinkin (n 252) 220

It is true that the Convention is one of the most ratified yet most reserved UN treaties,²⁷⁷ and that its operative language is weaker than other treaties, such as the Race Convention.²⁷⁸ However, even though the situation for the enforcement mechanisms of CEDAW was comparatively weak at the outset, it has definitely improved in recent years, essentially mirroring the enforcement mechanisms of other human rights treaties,²⁷⁹ especially since the adoption of its Optional Protocol.²⁸⁰ Nonetheless, the fact remains that the Women's Convention had less enforcement power than its UN human rights treaty counterparts, and that despite its improvements, its enforcement mechanisms are still no stronger than those found in the rest of IHRL.²⁸¹

Regarding the reservations, there is no provision in the text of CEDAW that explicitly prohibits them as long as they do not go against the object and purpose of the Convention. This is problematic, however, to the extent that states are the ones who determine where a particular reservation is against the object and purpose of the Convention. States, who are the ones that enter obligations following the ratification of a treaty and the ones who can breach them, should not be placed in the position to decide whether a reservation to a treaty is or nor in line with the object and purpose of the document, such power and responsibility, some have argued, should be passed to the Human Rights Committee.²⁸²

The third significant critique of CEDAW to take into account for the conception of a treaty on SOGIESC rights is related to its language and framing. In particular, with the way it has been said to reinforce the subordination of women and exclude -as most of IHRL- the experiences of people who experience sexual orientation and/or gender identity/expression and/or sexual characteristics in diverse and non-normative ways. Although a different language was necessary in CEDAW to address women's rights due to the androcentric focus of IHRL in general -which tends to reproduce the male

²⁷⁷ Bantekas and Oette (n 1) 457

²⁷⁸ Charlesworth and Chinkin (n 252) 220

²⁷⁹ Englehart and Miller (n 264) 23

²⁸⁰ UN Women, 'What is the Optional Protocol', available at: <<https://asiapacific.unwomen.org/en/focus-areas/cedaw-human-rights/faq>> Accessed 11 September 2019

²⁸¹ Englehart and Miller (n 264) 23

²⁸² Meiraf Girma, 'Violence against Women: Inadequate Remedies under CEDAW' (2009) 3(2) Mizan Law Review 353

norm masqueraded as neutral while systematically disadvantaging women²⁸³ the framing of the Convention was insufficient because it only recognized men as the only other gender contemplated to compare and measure women's equality and inequality.²⁸⁴ Such arrangement, paradoxically, 'whereby men's experience sets the universal standard for everyone, reaffirms the tradition of both gender duality and hierarchy in an instrument that seeks to promote women's full humanity.'²⁸⁵

As it was previously mentioned, in spite of the fact that the genesis of IHRL in 1945 made it possible to contest the hierarchies of the binary gender categories, the understanding of both sex and gender as dualistic conceptions remained unquestioned.²⁸⁶ Furthermore, CEDAW, being the specialized instrument and Committee that addresses gender based discrimination has ultimately reinforced the gender binary approach of IHRL, turning invisible the experiences of sex and gender related discrimination and violence that some men, in particular gay men, trans persons, and other people who do not fit the dualistic conception of gender, experience.²⁸⁷ A broader and more comprehensive approach on this type of discrimination, that is undoubtedly rooted in the patriarchal system of beliefs and its heteronormativity, could have contributed to attenuate the adverse effects that the treatment of the gender binary -which always works asymmetrically to women's disadvantage- had.²⁸⁸

As a result of this inadequate and dualistic way of framing the Convention, 'protective responses to women's disadvantage have continued to proliferate where women's experience is not directly comparable with men's, with extra intensity in relation to women from the Global South.'²⁸⁹ This is especially notable in the fields of reproductive health and employment.²⁹⁰ Additionally, the binarism of CEDAW's framework, which is founded on the biological determinism of the 'sex' category, does

²⁸³ Emanuela Lombardo, 'Gender Mainstreaming', in Mary Evans and Carolyn H. Williams (Eds), *Gender: The Key Concepts* (2013) 112

²⁸⁴ Otto, 'Queering Gender [identity] in International Law' (n 20) 302

²⁸⁵ *ibid*

²⁸⁶ *ibid*

²⁸⁷ Otto in Dvies and Munro (Eds) (n 21) 198

²⁸⁸ Otto, 'Queering Gender [identity] in International Law' (n 20) 302

²⁸⁹ *ibid* 303

²⁹⁰ *ibid*

not specify whether or not a transwoman would qualify as a “woman” who can therefore be a victim of ‘sex’ discrimination.’²⁹¹

In the same way that CEDAW was created to place women’s rights within the male-centered system that is IHRL, a more substantial approach to SOGIESC rights in the human rights paradigm is not only needed but long overdue. A Convention on SOGIESC rights would not be the only solution for the abuses that persons who experience sexual orientation and/or gender identity/expression and/or sexual characteristics in diverse and non-normative ways face, but it is definitely a way forward.

Considering the experiences of the YP and the CEDAW Convention, said treaty would need to expand its conceptions of gender and sexuality to finally break from the restrictive notions of these categories that have been set by the heteronorm in IHRL. In addition to this, issues of sexual characteristics must also be included to compensate for decades and decades of exclusion. Gender identity should also be contemplated as a broader identity mark; one that not only pertains to trans people but to everyone who decides to define their identities in terms of gender categories. However, the different challenges and abuses that trans persons and others whose gender identities deviate from the heteronorm should undoubtedly be taken into account with urgent attention. At the same, the experiences of people whose identities challenge any category of gender (e.g. non-binary persons, agenders, etc.) must also be considered and codified as IHRL concerns.

CONCLUSION

The international human rights system was originally conceived to protect everyone, everywhere and under any circumstances.²⁹² However, this purported universality in which IHRL was founded has proven to be purely aspirational rather than a fact.²⁹³ This system imposed a strict classification of

²⁹¹ *ibid*

²⁹² Donnelly in John S. Dryzek, Bonnie Honig, and Anne Phillips (Eds) (n 38)

²⁹³ Tom Dreyfus, *The ‘Half-Invention’ of Gender Identity in International Human Rights Law: from Cedaw to the Yogyakarta Principles* (Australian Feminist Law Journal, 2012) 35

what it means to be human, one that has been, and continues to be, enrooted in heteronormative conceptions of sexuality, gender, and sexual characteristics. From its genesis, the human rights paradigm installed a biological determinism in IHRL that has remained almost untouched, excluding from its 'universal' embrace people who experience sexual orientation and/or gender identities, and/or sexual characteristics in diverse and non-normative ways.

Some developments in the international arena have tried to include issues of sexual orientation and gender identity into their scope, some others have even been developed exclusively to cover SOGIESC concerns. While these efforts for the expansion of the applicability of rights are valuable and have, to some extent, been beneficial; they are still inconsistent and anchored to binary or biological conceptions of sex and gender; and, in most cases, they continue to reproduce the heterosexual matrix in new ways. The normalizing effect that said developments have in the lives of people who deviate from the heteronorm must be resisted. Instead, IHRL must seek to recognize and protect the different experiences of identity, sexuality, physical integrity and bodily autonomy of everyone, especially the ones from those who have been historically marginalized. In this sense, IHRL could benefit from the emancipatory effect that queer theories have to offer, which aims at challenging all that is dominant and normative and at dismantling all the sexual and gender hierarchies.²⁹⁴ Maybe once this is accomplished, the human rights paradigm can acknowledge that the relationships between bodies and identities are dynamic and can give rise to multiple possible alignments that can change over time;²⁹⁵ and that is not possible to actually achieve freedom from oppression until wider questions of sexual freedom are addressed and the general patterns of dominance and subordination that form part of IHRL are challenged and changed.²⁹⁶

It is clear that the heteronormativity of the human rights system must be challenged, but until that can actually be resolved, the responsibility remains to include the experiences of all human beings in the

²⁹⁴ Spade and Willse (n 239)

²⁹⁵ Otto, 'Queering Gender [identity] in International Law' (n 20) 300

²⁹⁶ Wayne Morgan, 'Queering International Human Rights Law', in Carl Stychin and Didi Herman (Eds), *Sexuality in the Legal Arena* (2000) 215

human rights regime. Principally, taking into account the different and urgent types of human rights abuses that people who experience sexual orientation and/or gender identities, and/or sexual characteristics in diverse and non-normative ways continue to face all over the world. In this regard, a new treaty on SOGIESC may be one salient way to portray such abuses as human rights issues, thus providing opportunities for people who have experienced violations to find support in the international sphere.²⁹⁷ Moreover, said treaty could be instrumental to start filling the gaps that the absence of a broader and more liberatory understanding of gender in IHRL has caused, and it can also be an important tool to guarantee consistency in the regional and international approaches to SOGIESC issues.

²⁹⁷ Clifford Bob, 'Fighting for New Rights', in Clifford Bob (Ed.) *The International Struggle for New Rights* (University of Pennsylvania Press, 2009) 1

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