

*Title:*

**ACKNOWLEDGING THE SOGI NORM:  
THE POLITICS *OF* ITS RECOGNITION IN THE HRC  
AND THE POLITICS *FOR* ITS RECOGNITION THROUGH THE UPR**

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*Statement:*

This paper is entirely my own work without plagiarism  
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## **Abbreviations**

AF	African Group
AS+PAC	Asia-Pacific Group
CAT	Committee Against Torture
CCPR	Committee on Civil and Political Rights
CEDAW	Committee on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CHR	Commission on Human Rights
CRC	Committee on the Rights of the Child
CSO	Civil Society Organisation
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEG	Eastern European Group
GRULAC	Latin American and Caribbean Group
HRC	Human Rights Council
HRD	Human Rights Defender
HRV	Human Rights Violation
ICCPR	International Covenant on Civil and Political Rights
IHRL	International Human Rights Law
INGO	International Non-Governmental Organisation
LGBT	Lesbian, Gay, Bisexual, Transgender
LGBTIQ	Lesbian, Gay, Bisexual, Transgender, Intersex, Queer.
NGO	Non-Governmental Organisation
OHCHR	Office of the High Commissioner for Human Rights
OIC	Organisation of Islamic Cooperation
RS	Responding State
SOGI	Sexual Orientation and Gender Identity
SuR	State under Review
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme
UPR	Universal Periodic Review
WEOG	Western European and Others Group

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## **Acknowledging the SOGI norm: the politics *of* its recognition in the HRC and the politics *for* its recognition through the UPR**

### **Introduction**

As the progenitor of the United Nations' human rights system, the current Human Rights Council (hereafter HRC) finds itself at an interesting impasse regarding the recognition of sexual orientation and gender identity (hereafter SOGI) as data, jurisprudence and legal practice on the subject expands. A decades-old argument about the interaction of cultural values (and the supposed protection, or maintenance, of 'public morality' therein) and the universality of human rights inheres the debate, leading some States to adamantly refuse SOGI a cognisable status in the mandate of the HRC. Their stance, in effect, questions the meaning and content of the human rights framework's ability to accommodate all humans, particularly those overtly discriminated against because of some perceived 'feature' or *status*. This then resonates with hefty issues of how binding international human rights law (hereafter IHRL) and State sovereignty interact. Yet, this paper posits, one mechanism of the HRC, the Universal Periodic Review (UPR), offers real potential for SOGI advocates to propel demonstrable change at national levels, and concurrently strengthen the case for SOGI norm recognition at the HRC.

This essay is primarily concerned with the conjoined processes of norm production regarding SOGI both in the HRC and in national settings, and the dynamics through which these processes inform each other. It posits that the introduction of the Universal Periodic Review offers a significant chance for that production to be



realised, even in the face of considerable State intransigence because it brings the politics *for* human rights directly into the arena of those doing the politics *of* human rights, to paraphrase Baxi.<sup>1</sup> The first section of this paper examines the *politics of* human rights at the HRC regarding SOGI, and the universalist/relativist forces that inhere conflicting notions of the reach of sovereignty regarding State duties under international human rights law (hereafter IRHL). The second part of the paper is more concerned with exploring the *politics for* human rights from an activist perspective, through asking about the efficacy of the dialogic process that is the Universal Periodic Review (hereafter UPR) in terms of noticeable change in country settings relating to the recognition or ongoing negation of SOGI status.

Stemming from the correlative ideas that understandings of how human rights law applies are continually being elaborated (norm production), conceptions of what limits or defines sovereignty are in constant transformation, and cultures and traditions do not stand still (as attested to in civil society inputs), this paper posits that the modalities of the UPR mechanism facilitate a broader conception of SOGI, and human rights more generally, because it amplifies how the actualities within each of these inhere. However, those elaborations elicit a strong and unambiguous backlash in various States, and, as they resound through the advocacy of ‘friendly States’ at the HRC, they also contribute to the political polarisation in operation at the HRC. However, this paper posits that the UPR offers the best structured opportunity to ensure that SOGI is a recognised status within the mandate of the HRC, and by eventual extension, at national levels. The sheer diversity of anthropological, legal

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<sup>1</sup> U. Baxi “Too Many, Or Too Few Human Rights?” 1(1) *Hum. Rts. L. Rev.* [2001] 1 at 8 [speaking about the “titanic clash of two cultures: the cultures of the politics *of* human rights and those of politics *for* human rights” in regard to the production of rights).

and individual testimony coming from within most of the world's cultures regarding SOGI is eloquent confirmation of the scope of its status.

Firstly, as it is governments who violate the very rights that only they have the capacity to protect, they run a fine balance managing current domestic and regional political and 'moral' concerns (including being seen domestically and regionally to be upholding the primacy of their sovereignty) against their obligations in international human rights law. As many nationally-dominant conservative religions and cultures reject sexual and gender diversity, it is in this sense that the politics *of* human rights is exemplified in the HRC space. Section 1 of this paper looks at how the forces acting within the HRC have debated State duties and the reach of human rights obligations and standards in regard to SOGI to date. This necessitates an insight into some significant sources of law that inform positive SOGI advocacy, as well as reference to the values and conceptions underpinning the language used in criminalising legislations, and in those HRC dialogues. This section then considers the content and articulations around the concept of the "traditional values of humankind", the latest cooperative initiative of States opposed to the recognition of the status of SOGI within the mandate of the HRC.

Secondly, the subject of the politics of speaking *for* human rights is one that concerns a wider range of stakeholders than just the States themselves. Besides being able to submit reports to various United Nations (hereafter UN) human rights mechanisms, civil society organisations (hereafter CSOs) have been traditionally denied access to the politics *of* human rights. However, the UPR mechanism of the HRC somewhat changes this dynamic – it is a structured and legitimised space where CSOs report on

how their States are treating or violating individual rights-holders, and have some chance to dialogue on the issues over a year-long process, and importantly, monitor progress in the intervening period between UPR cycles. Implicit in the claims of SOGI advocates to the UPR is *their right* to define themselves and their culture from their own, albeit minority, standpoint and in terminology they themselves identify with. In so doing, they challenge the *exclusive right* of States, legally constituted and recognised as the primary duty-holders, to fully determine that State's normative meaning. Section 2 looks at the UPR process itself and how SOGI appears within it, and speaks of some of the implications of the data generated in terms of norm production, and efficacy or otherwise, of the review process *on the ground*. The paper then goes on to examine how engagement with the UPR has played out at the national level in terms of IHRL in three countries that have consistently asserted rejection of SOGI at the HRC – Cameroon, Bangladesh and Russia.

This essay argues, despite majoritarian values as presented by States at the HRC, failure to encompass SOGI as a status without exception threatens the stability of the entire human rights framework. Further, it concludes that engagement with the UPR process is worthwhile for two reasons in relation to the production of a SOGI norm: firstly, albeit with some terrible effects of backlash, at the national level dialogues are increasingly being framed in human rights terms, and in new alliances. Secondly, at the HRC level the aggregate import afforded to SOGI through the UPR, in all of its diversity, demonstrates its legitimacy for cognition as status in terms of human rights. Through it, the politics *for* human rights are structurally strengthened to inform the forces that do the politics *of* human rights.

## SECTION 1

### THE *POLITICS OF HUMAN RIGHTS*: STATE PRACTICE AT THE HRC

The first section of this paper examines some of the central issues that surround the establishment of a SOGI norm at the HRC. At the core of the argument being put forward in this section is that failing to recognise SOGI as a basis for human rights violation, and hence protection, negatively implicates the entire human rights framework. By looking at four elements: a short review of SOGI in the HRC and how State sovereignty is evoked to evade IHRL obligations (1.1); an overview of some of the central sources of law that, under IHRL, States must use to determine SOGI status in the absence of any UN mechanism that does so (1.2); some observations on developing an universal language to speak of matters related to sexual and gender diversity in term of human rights, away from the logic implicit in penal codes (1.3): and the final subsection provides a chronicle of the recent forces against SOGI-inclusion in the mandate of the HRC through a series of resolutions on what is framed as ‘traditional values of humankind’ (1.4). Collectively these elements can fall under a rubric of the *politics of human rights*, as they demonstrate the State-centric perspective of limiting liability within a conception of sovereignty that defends particularised versions of tradition over human rights obligations.

#### Section 1.1

##### Recognition of SOGI at the HRC

In regards to the question of how the non-recognition of SOGI can be said to implicate the human rights framework, the first part of this section (1.1.1) describes the tension between cultural relativism and universalism found around this subject at

United Nations (UN) fora, and mentions a theme that runs through this paper - who exactly is it that finds voice when a 'State' speaks. The next part (1.1.2) follows how this tension played out over a series of SOGI Statements and Resolutions at the HRC resulting in eventual, but heavily contested, recognition at the HRC. The final part of this subsection (1.1.3) considers how conceptions of sovereignty interact with Treaty obligations, and in this light how important subsidiary sources of law are to establishing SOGI as a cognisable status within the HRC's mandate.

### **1.1.1 Finding endorsement for the SOGI voice at the UN**

One of the earliest concerted attempts at getting SOGI recognised at an UN-convened meeting met the same refusal repeatedly directed at women's rights advocates since the 1970s at the UN:<sup>2</sup> namely, certain moral values embedded in tradition are sovereign and beyond the reach and purchase of international human rights law (IHRL) imperatives in national legal and policy settings.<sup>3</sup> At the Beijing 1995 World Conference on Women, SOGI issues proved particularly contentious with States' justifying their negative responses by evoking a presentation of public opinion from their own countries as rejecting "imported" or "western" notions that offend their indigenous or religious moral codes and values.<sup>4</sup> Although the four sole references to "sexual orientation" in the draft were deleted from final Beijing Platform for Action amidst unprecedented acrimony, for many advocates present it was an enormous

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<sup>2</sup> See generally R.E. Howard Hassmann "Universal Women's Rights Since 1970: The Centrality of Autonomy and Agency" *Journal of Human Rights*, 10 (2011) 433; W. Nowicka "Sexual and Reproductive Rights and the Human Rights Agenda: Controversial and Contested Reproductive Health Matters 19(38) (2011) 119, at 120.

<sup>3</sup> For example, regarding the entire human rights framework, in 1981 the Iranian representative at the UN General Assembly declared the UDHR "a secular interpretation of the Judeo-Christian tradition, which could not be implemented by Muslims": see D. Littman "Human Rights and Human Wrongs" in *National Review* (19 January 2003): <http://www.nationalreview.com/articles/205577/human-rights-and-human-wrongs/david-g-littman> (date accessed: 13 July 2013).

<sup>4</sup> United Nations *Report of Fourth World Conference on Women, Beijing, 4-15 September 1995* A/CONF.177/20, 17 October 1995.

victory that it was discussed *at all*; described by one as “a central success of the conference”.<sup>5</sup>

That success – that the viewpoints of NGO advocates even got their voices ‘through’ to the point of discussion – anticipates a central dynamic informing all dialogues at the UN Human Rights Council regarding the global recognition of SOGI as a status *already* included in the ambit of IHRL and norms. SOGI advocates and international NGOs (hereafter INGOs) working out of Geneva and New York have been channeling to ‘friendly States’<sup>6</sup> credible data drawn from human rights monitoring in national settings, Treaty Bodies’ practice and academic scholarship demonstrating this position. These data singly and collectively demonstrate the myriad of ways the non-recognition of SOGI under particularised cultural traditions discriminate against sexual and gender minorities in national settings.

Cultural relativists argue that understandings of right and wrong vary along cultural lines, and thus, definitions of human rights should vary accordingly.<sup>7</sup> Donnelly notes that, “... cultures are complex, variable, multi-vocal, and above all contested. Rather than static things, ‘cultures’ are fluid complexes of inter-subjective meanings and

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<sup>5</sup> C. Rothschild *Written Out: How Sexuality is Used to Attack Women’s Organising* (International Gay and Lesbian Human Rights Commission and Center for Women’s Global Leadership, 2000, San Francisco) at 53; at the Beijing +5 conference in 2005 after the Pakistani delegate accused Western delegations of “holding the women of the world hostage to one term, ‘sexual orientation,’” when their real needs were clean water and help in overcoming illiteracy” in D. Sanders, “Getting Lesbian and Gay Issues on the International Human Rights Agenda,” *Human Rights Quarterly*, 18(1) (1996) 67, at 71.

<sup>6</sup> The term this paper will use hereafter to indicate States that support the recognition of the status of SOGI.

<sup>7</sup> H. Lau “Sexual Orientation: Testing the Universality of International Human Rights Law” 71 *U. Chi. L. Rev.* (2004) 1689 at 1689.

practices” over time.<sup>8</sup> This seems to be exactly what Sanders is referring to when she speaks of how States (mis)represent minority viewpoints or voices that speak against a particular cultural or religious orthodoxy that the State promotes, regarding women human rights activists in the Muslim world:

“individual women have a right to define religious and cultural identity on their own terms. They challenge the exclusive right (recognised by the longstanding policy of legal deference) of traditional leaders to fully determine a community's normative meaning”.<sup>9</sup>

At the launch of the UN global public education initiative *Free and Equal* in Cape Town, South Africa, in July 2013, Justice Edwin Cameron endorsed this *legitimate right* to defend SOGI-related human rights, saying the biggest foes to equality have been “invisibility and silence”.<sup>10</sup>

In terms of SOGI and evident cultural change, in 1998 UNAIDS<sup>11</sup> and the Office of the High Commissioner for Human Rights (OHCHR) highlighted issues of how State and public discrimination, stigmatisation and human rights obligations urgently needed to be addressed globally in light of the HIV/AIDS pandemic, starting with the immediate decriminalisation of same-sex sexual relations world-wide, and developing into wider non-discrimination policies.<sup>12</sup> This document demonstrated that the

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<sup>8</sup> Jack Donnelly, *Universal Human Rights in Theory & Practice* 2<sup>nd</sup> ed. (Cornell, 2003, New York) at 86.

<sup>9</sup> M. Sunder “Human Rights Law and the Demonisation of Culture (And Anthropology Along the Way)” 26(1) *Political and Legal Anthropology Review* (May 2003) 54 at 80.

<sup>10</sup> See video from launch of the United Nations *Free and Equal* campaign, UN Free and Equal “Human Rights Leaders Speak out for LGBT Equality” 26 July 2013 <https://www.unfe.org/en/actions/f-e-launch--2> (date accessed: 2 August 2013).

<sup>11</sup> UNAIDS was created in 1995 by a resolution of the Economic and Social Council. UNAIDS brings together the efforts of 10 UN agencies: UNHCR, UNICEF, WFP, UNDP, UNFPA, UNODC, ILO, UNESCO, WHO, the World Bank, to a global response to HIV/AIDS.

<sup>12</sup> UNAIDS/OHCHR *International Guidelines on HIV/AIDS and Human Rights 2006 Consolidated Version* (Joint United Nations Programme on HIV/AIDS (UNAIDS), 2006, Geneva).

application of IHRL did not provide for exceptions based on cultural values, but that to address the most marginalised groups, cultures should “evolve”, as Donnelly put it, to accommodate human rights standards.<sup>13</sup>

When, in 2001, Asma Jahangir, the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, included information on sexual minorities in her report,<sup>14</sup> some States objected forcibly to this initiative and demanded the deletion of the language that referred to sexual orientation in the resolution renewing her mandate.<sup>15</sup> However, coordinated by the High Commissioner for Human Rights, Mary Robinson, later in 2001, six thematic special rapporteurs<sup>16</sup> indicated their willingness to receive and consider information on human rights violations based on sexual orientation within their mandates.<sup>17</sup> Thus, it was established at the UN institutional level, albeit in the face of ardent disagreement, the right of sexual and gender minorities to frame and deliver their information to human rights mechanisms, and the duty of the UN to accept the information.

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[http://www.ohchr.org/english/issues/hiv/docs/consolidated\\_guidelines.pdf](http://www.ohchr.org/english/issues/hiv/docs/consolidated_guidelines.pdf) (date accessed: 13 August 2013).

<sup>13</sup> *Supra* Donnelly n.8, at 86.

<sup>14</sup> United Nations Social and Economic Council. *Report of the Special Rapporteur, Ms. Asma Jahangir, submitted pursuant to Commission on Human Rights resolution 2000/31*, E/CN.4/2001/9 11 January 2001, at paras. 48-50.

<sup>15</sup> The motion to censure the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions in the Commission session the following year was defeated, and the mandate of that officeholder authorises concern with SOGI, see D. Sanders “The Role of the Yogyakarta Principles” on *International Gay and Lesbian Human Rights Commission* (webpage), 2008, <http://www.iglhrc.org/cgi-bin/low/article/takeaction/partners/22.html> (date accessed: 3 July 2013).

<sup>16</sup> The Special Rapporteur on extrajudicial executions, the Special Rapporteur on violence against women, the Special Rapporteur on torture, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on freedom of expression, and the Special Representative of the Secretary-General on human rights defenders.

<sup>17</sup> *Supra* Sanders n.15, at 2.



### 1.1.2 *Fighting words – SOGI at the HRC*

The first serious attempt to specify that sexual orientation was indeed within the mandate of the (current) HRC was in 2003, at the 59<sup>th</sup> session of the Commission on Human Rights<sup>18</sup> (hereafter CHR, predecessor to the HRC) where Brazil tabled a surprise motion – a “Resolution on Human Rights and Sexual Orientation”.<sup>19</sup> It spurred immediate opposition from members of the Organisation of the Islamic Conference,<sup>20</sup> the Vatican (observer status), and many sub-Saharan African countries (collectively referred to as ‘opposition States’ hereafter),<sup>21</sup> demanding the deletion of all references to sexual orientation.<sup>22</sup> In 2004, the matter was put over to the next year after strategic blocking by opponents,<sup>23</sup> for consideration in 2005,<sup>24</sup> but in 2005 Brazil indicated it was dropping the motion.<sup>25</sup> As O’Flaherty and Fisher point out “the Brazilian resolution ... did raise States’ awareness of the issues, and mobilised NGOs

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<sup>18</sup> Set up under the UN Charter (United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI,) as a subsidiary body of the UN’s Economic and Social Council.

<sup>19</sup> United Nations Economic and Social Council *The Resolution on Human Rights and Sexual Orientation* E/CN.4/2003/L.92 17 April 2003; available in a Campaign Dossier produced by the International Gay and Lesbian Human Rights Commission in 2005 at 13 (annex III) (webpage pdf) <http://www.iglhrc.org/sites/default/files/213-1.pdf> (date accessed: 13 August 2013).

<sup>20</sup> Renamed as the Organisation of Islamic Cooperation in 2011. See website of the OIC – Member States (57 UN Member States) <http://www.oicun.org/3/28/> (date accessed: 2 August 2013).

<sup>21</sup> *Supra* Campaign Dossier n. 19, at Annex I: “Chronicle of the last day of the 59th session of the UN Commission on Human Rights”.

<sup>22</sup> United Nations Economic and Social Council, Proposed Amendments by Saudi Arabia, Pakistan, Egypt, Libya and Malaysia, E/CN.4/2003/L.106- 110 (2003) 9. The logic put forth then altered little from that which has been used since – a ‘new’ right, a foreign imposition, unfamiliar or unknown construction of gender and sexuality, a perversion. The amendments proposed by Saudi Arabia, Pakistan, Egypt, Libya, and Malaysia to the Brazilian resolution of 2003 deleted all references to sexual orientation and instead inserted language affirming respect for “cultural diversity,” “cultural pluralism,” and the preservation of “cultural heritage and traditions”.

<sup>23</sup> Federation Internationale pour les Droits d’Hommes (FIDH) “Item 6 - Sexual Orientation - Oral Intervention” 12 July 2005 (webpage) <http://www.fidh.org/Item-6-Sexual-Orientation-Oral> (date accessed: 13 August 2013, “because of filibustering, including the introduction of 55 “amendments” to the resolution, a no-action motion and the repeated use of points of order”; United Nations Economic and Social Council *Report on the 59<sup>th</sup> session, Commission on Human Rights, 17 March-24 April 2003*, E/CN.4/ 2003/135 20 October 2003 at paras. 575-85.

<sup>24</sup> Permanent Mission of Brazil to the United Nations, Geneva, Press Release, 29 March 2004, see [http://www.rodneycroome.id.au/other\\_more?id=198\\_0\\_2\\_0\\_M](http://www.rodneycroome.id.au/other_more?id=198_0_2_0_M) (date accessed: 4 August 2013); and *supra* FIDH n.23, at 5.

<sup>25</sup> *Supra* Sanders n.15, at 3.

from all regions to engage in UN processes”.<sup>26</sup> Rather than attempt another resolution, in 2005 New Zealand, on behalf of 32 States (cross regional) chose a more diplomatic route, and made a strong Statement at the CHR that States “cannot ignore” the evidence of human rights violations based on sexual orientation.<sup>27</sup> In December of 2006, Norway presented a statement to the Commission on Human Rights,<sup>28</sup> this time with the backing of 54 States from four of the five regions of the world. Of interest, this statement was not limited to sexual orientation but for the first time blended ‘gender identity’ into the categorical nomenclature,<sup>29</sup> reflecting the data and voices emerging from civil society, establishing the acronym ‘SOGI’ in the (then) CHR.

Concurrently with the establishment of the HRC (discussed in Section 2.1), and the access its new mechanism the UPR<sup>30</sup> afforded SOGI NGOs from all the 193 Member States of the UN to “define ... [their] cultural identity on their own terms” as Sanders expressed it,<sup>31</sup> the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (hereafter the Yogyakarta Principles) was produced and launched worldwide.<sup>32</sup> This document,

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<sup>26</sup> M.O’Flaherty & J. Fisher “Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles” *Human Rights Law Review* 8(2) (2008) 207, at 230.

<sup>27</sup> New Zealand Ministry of Foreign Affairs and Trade *Statement made by New Zealand on behalf of 32 States under agenda Item 17: Promotion and protection of human rights* 2 April 2005, available at <http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2005/0-15-April-2005a.php> (date accessed: 4 August 2013).

<sup>28</sup> United Nations Human Rights Council *Norwegian joint statement on human rights violations based on sexual orientation and gender identity*, 1 December 2006, available at: [http://uklgig.org.uk/docs/Norwegian\\_Joint\\_Statement-UNHRC\\_06.doc](http://uklgig.org.uk/docs/Norwegian_Joint_Statement-UNHRC_06.doc).

<sup>29</sup> This is a significant shift, as the visibility of gender minorities in all regions – traditionally far less politically organised and resourced than sexual minorities – was increasing and advocacy coalitions advancing at national and regional levels, and especially with INGOs.

<sup>30</sup> The UPR process offers various tracks for SOGI advocacy in the HRC environment other than formal meetings, including meeting with State representatives and networking, side events and multiple other opportunities for exchanging insight on how local implementation resonates IHRL, and contributes to a more fully global movement and skills-base.

<sup>31</sup> *Supra* Sanders n.9.

<sup>32</sup> Conference of International Legal Scholars, Yogyakarta, Indonesia, Nov. 6–9, 2006, *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation*

concerned only with the universalism of *existing* IHRL, supplied advocates and States alike with an important and authoritative guide, a soft law instrument, to the application of IHRL to SOGI,<sup>33</sup> as well as specifying descriptions of what comprises ‘sexual orientation’ and ‘gender identity’.<sup>34</sup>

Rather than bring another resolution before the HRC, the next SOGI initiative of relevance was a Statement presented by Argentina in 2008 to the United Nations General Assembly (the parent body of the HRC) on behalf of 66 States, coordinated by France and the Netherlands, which focused on non-discrimination in relation to SOGI.<sup>35</sup> In response, Syria delivered a Statement on behalf of 57 States rejecting the Argentinian initiative on the basis of “... alarm ...” at efforts to compromise State sovereignty by “... ominous usage ...” of “... notions...” of gender and sexuality “...

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*and Gender Identity* (March 2007) [http://www.yogyakartaprinciples.org/principles\\_en.pdf](http://www.yogyakartaprinciples.org/principles_en.pdf) (date accessed: 2 July 2013).

<sup>33</sup> The Principles are intended as a coherent and comprehensive identification of the obligation of States to respect, protect and fulfill the human rights of all persons regardless of their sexual orientation or gender identity, and they lay out key obligations to sexual and gender minorities under the various Articles found in key UN Covenants; the following year the Professor Michael O’Flaherty oversaw the production of the University of Nottingham Human Rights Law Centre *Jurisprudential Annotations to the Yogyakarta Principles* (November 2007) at <http://www.sxpolitics.org/wp-content/uploads/2009/05/yogyakarta-principles-jurisprudential-annotations.pdf> (date accessed: 2 July 2013).

<sup>34</sup> I use the word ‘description’ rather than ‘definition’ as, according to John Fisher of ARC-International the terms have “not been codified”. He notes that there is no definition of the word ‘race’ in the Convention on the Elimination of all forms of Racial Discrimination, and Ali Jernow adds that a “there is no need to do so” as “international human rights law and standards typically rely on a range of concepts that are not necessarily defined”, an opinion shared by Scott Long and Rosalind Petechsky in a listserve conversation of 17 October 2012 (file with author).

<sup>35</sup> Joint statement on human rights, sexual orientation and gender identity- delivered by Argentina on behalf of 66 States on 18 December 2008. Albania, Andorra, Argentina, Armenia, Australia, Austria, Belgium, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Cape Verde, Central African Republic, Chile, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Ecuador, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea-Bissau, Hungary, Iceland, Ireland, Israel, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mauritius, Mexico, Montenegro, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Paraguay, Poland, Portugal, Romania, San Marino, Sao Tome and Principe, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Timor-Leste, United Kingdom, Uruguay, and Venezuela. United Nations General Assembly *Statement on Human Rights, Sexual Orientation and Gender Identity*, G.A. Res. 2435, ¶6, 4<sup>th</sup> plen. mtg., (Dec. 18 2008).

that have no legal foundations in any international human rights instrument”.<sup>36</sup>

Interestingly, 69 States did not join either statement and there was no vote.

In 2011, resolution A/HRC/RES/17/19, (hereafter resolution 17/19)<sup>37</sup> delivered by South Africa on *Human rights, Sexual Orientation and Gender Identity* was adopted by the HRC at its 17<sup>th</sup> session in July 2011.<sup>38</sup> It was the first ever SOGI resolution accepted under the auspices of the HRC, and was adopted with a recorded vote of 23 to 19, with three abstentions, and immediately signed by 85 States.<sup>39</sup> It expressed “grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity.” It also tasked the OHCHR to produce a study report by December 2011 (delivered

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<sup>36</sup> ARC-International “Response to SOGI Human Rights Statement, read by Syria” 18 Dec 2008 <http://arc-international.net/global-advocacy/sogi-statements/syrian-statement> on behalf of Afghanistan, Algeria, Bahrain, Bangladesh, Benin, Brunei Darussalam, Cameroon, Chad, Comoros, Cote D’Ivoire, Democratic People’s Republic of Korea, Djibouti, Egypt, Eritrea, Ethiopia, Fiji, Gambia, Guinea, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan\*, Lebanon, Libyan Arab Jamahiriya, Malawi, Malaysia, Maldives, Mali, Mauritania, Morocco, Niger, Nigeria, Oman, Pakistan, Qatar, Rwanda, Saudi Arabi therea, Senegal, Sierra Leone, St. Lucia, Solomon Islands, Somalia, Sudan, Swaziland, Syria, Tajikistan, Togo, Tunisia, Turkmenistan, Uganda, United Arab Emirates, United Republic of Tanzania, Uzbekistan\*, Yemen, and Zimbabwe following the statement previously delivered by Argentina, on behalf of a group of member states on Human Rights and the so-called notions of “sexual orientation” and “gender identity”.

<sup>37</sup> United Nations Human Rights Council *Resolution Human Rights, Sexual Orientation and Gender Identity A/HRC/RES/17/19*, 14 July 2011: The voting was as follows: *In favour*: Argentina, Belgium, Brazil, Chile, Cuba, Ecuador, France, Guatemala, Hungary, Japan, Mauritius, Mexico, Norway, Poland, Republic of Korea, Slovakia, Spain, Switzerland, Thailand, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay. *Against*: Angola, Bahrain, Bangladesh, Cameroon, Djibouti, Gabon, Ghana, Jordan, Malaysia, Maldives, Mauritania, Nigeria, Pakistan, Qatar, Republic of Moldova, Russian Federation, Saudi Arabia, Senegal, Uganda. *Abstaining*: Burkina Faso, China, Zambia]: see ISHR “Groundbreaking Statement on Sexual orientation and Gender Identity” (n.d.) (online) <http://www.ishr.ch/council/376-council/1033-ground-breaking-statement-on-sexual-orientation-and-gender-identity-by-record-number-of-85-states> (date accessed: 13 August 2013).

<sup>38</sup> Interestingly the number of African countries who signed rose (from the 2008 Statement) from six to 11 including Gabon, Sao Tomé and Principe, Mauritius, Central Africa Republic, Cape Verde, Guinea Bissau, Angola, South Africa, Seychelles, Rwanda and Sierra Leone, 13 countries abstained and 28 opposed the resolution, *ibid* the 2011 Joint Statement.

<sup>39</sup> It is notable that the USA signed 17/19 in 2011, as only in March 2009 did the US sign on to the GA Statement of 2008 *supra* n. 35, after the preceding years of abstention from signing SOGI resolutions that asserted universal human rights, as in the case of sexual orientation the USA had federal laws, such as the *Defense Of Marriage Act* (DOMA: Pub L No 104-199, 110 Stat 2419 (1996), codified at 1 USC § 7 (2000) and 28 USC § 1738C (2000)) and *Don’t Ask, Don’t Tell* (Pub L No 103-160, 107 Stat 1670, codified at 10 USC § 654 (1993)), that were themselves discriminatory, as described by Lau, *supra* n.7, at 1704 and 1705.

November 2011)<sup>40</sup> documenting discriminatory laws and practices, and focusing on how human rights law can be used to end violence based on SOGI in preparation for the HRC's 19<sup>th</sup> session.<sup>41</sup>

### **1.1.3 Sovereign exceptionalism regarding SOGI at the HRC**

The understanding of IHRL implicit in the Syrian response to the 2008 SOGI resolution of trying to "... compromise State sovereignty ..." by imposing notions that have "...no legal foundation ..." in IHRL is very interesting from the point of view that it speaks to very particular ideas of what comprises sovereignty itself. States often defend their own poor human rights records by recourse to a cultural relativist argument in the context of the sanctity of their sovereignty and their traditions.<sup>42</sup> When signing CEDAW, for example, several Muslim states—including Bangladesh, Egypt, Iraq, and Saudi Arabia—entered reservations refusing to accept articles they deemed incompatible with Islamic Shari'a, the Koran-based code of law,<sup>43</sup> even though the very point of Convention on the Elimination of All Forms of Discrimination Against Women<sup>44</sup> is designed to protect the *universal* rights of women.

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<sup>40</sup> United Nations Human Rights Council *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General: Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity* A/HRC/19/41, 17 November 2011.

<sup>41</sup> See ARC-International (website) "17th session of the Human Rights Council" (n.d.) <http://arc-international.net/global-advocacy/human-rights-council/hrc17> (date accessed: 2 August 2013).

<sup>42</sup> See, for example, L.A. Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Martinus Nijhoff, 1993, Leiden) at 60 (noting that Morocco proposed an amendment to Article 2 to accommodate Muslim practice).

<sup>43</sup> For example, Austria, Denmark, Finland, France, Germany, Ireland, and the Netherlands all filed official objections against Saudi Arabia's reservation as inadmissible, see reservations at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty10.asp>; also see J.L. Southard "Protection of Women's Human Rights Under the Convention on the Elimination of All Forms of Discrimination against Women" 8(1) *Pace Intl L Rev* (1996) 21; B. Clark, "The Vienna Convention Reservations Regime and the Convention on Discrimination against Women" 85 *Am J Intl L* (1991) 281.

<sup>44</sup> United Nations General Assembly Convention on the Elimination of All Forms of Discrimination Against Women, adopted 18 Dec. 1979, entered into force 3 Sept. 1981, G.A. Res. 34/180, 34 UN GOAR, Supp. (No. 46), UN Doc. A/34/46, at 193 (1979), 1249 U.N.T.S. 14.

At the base of the relativist argument being presented is the understanding that Western notions of the universality of human rights is biased in favour of Western norms, as those notions are themselves derived from Enlightenment-era philosophy. Lau points out that the idea that has been repeatedly expressed is that as non-Western States were not the authors of the Universal Declaration of Human Rights (hereafter UDHR),<sup>45</sup> at the time being subjects of colonialism and not members of the United Nations, their relativist viewpoints were not accommodated in the production of human rights standards and language.<sup>46</sup>

Whatever the genesis of the international legal order regarding human rights, treaties are signed by competent States, and indeed can only be signed by States.<sup>47</sup> If a State feels that its authority is being restricted by its international legal obligations, it cannot just ignore or excise the parts that cause it difficulty. Hence, in the case of the reservations that are referred to above regarding CEDAW, according to the Vienna

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<sup>45</sup> United Nations General Assembly Universal Declaration of Human Rights, GA Res 217A (III), UNGAOR 3d Session, Supp No 13, UN Doc A/810, (1948) 71.

<sup>46</sup> *Supra* Lau n.7, at 1694; Abdullahi Ahmed An-Na'im "Human Rights in the Muslim World: Socio-political Conditions and Scriptural Imperatives" 3(13) *Harv Hum Rts J* (1990) 15. China also argued that it was not adequately represented in the 1940s because the Chinese seat at the UN was held by Chiang Kai-Shek's rebel regime, which China accused of pandering to its Western allies. See Ann Kent, *China, the United Nations, and Human Rights: The Limits of Compliance* (University of Pennsylvania Press, 1999, Philadelphia) at 40, noting that China did not take over the UN seat from Chiang Kai-Shek until 1971 and, when doing so, China resisted conceding to the human rights obligations entered into by Chiang's representatives.

<sup>47</sup> The concept of a State as a legal person was determined in the Montevideo Convention on the Rights and Duties of States, Art. 1, Dec. 26, 1934, 165 L.N.T.S. 19: Article 1 confirms "The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states. Article 34(1) of the Statute of the International Court of Justice (ICJ) confirms "Only states may be parties in cases before the Court", and the Advisory Opinion in *Reparation for Injuries Suffered in the Service of the United Nations* case of 1949 the ICJ confirmed that the United Nations itself possessed "objective international personality", see Opin. of 11 IV 49 (Reparation for Injuries Suffered) at 185. Finally, Article 6 of the *Vienna Convention on the Law of Treaties*, *infra* n.49, based on the personhood afforded to States, confirms "[e]very State possesses capacity to conclude treaties". Note that Article 60(3)(b)(5) specifies the protection of "human persons" regarding breaches of a treaty resulting in its termination or suspension.

Convention on the Law of Treaties,<sup>48</sup> reservations may not circumvent the main purpose of a treaty. Donnelly points out that as long as “international obligations do not subordinate states to a higher authority”, which international human rights obligations don’t,<sup>49</sup> they are completely compatible with full sovereignty. But what exactly is understood by ‘sovereignty’ when referenced by States in the international community, such as in the comment by Syria noted above, may reveal one reason why fractures regarding recognition of SOGI have opened so widely.

Sovereignty does not imply, or perhaps more accurately can no longer be seen to imply, that “one’s authority is absolute and unlimited”,<sup>50</sup> as was expressed in early modern-period conceptions of sovereignty in the work of Aquinas, Bodin, Grotius and Hobbes.<sup>51</sup> The trajectory of conceptions of sovereignty over the centuries is illustrative of the *telos* of international law itself, a purpose or end that is in place not just to protect States’ territorial integrity, their political autonomy, but also primarily to protect the citizens and residents of those States. Donnelly says that “[t]ransformations of sovereignty reflect a process of articulating new norms, and new understandings of old norms, into the framework of international law and politics”.<sup>52</sup>

Glanville notes that conceptions of sovereignty have been evolving through the

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<sup>48</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331 at Article 18.

<sup>49</sup> *Supra* UN Charter n.18.

<sup>50</sup> J. Donnelly “State Sovereignty and Human Rights” *Working Paper No. 21* 23 June 2004 at 15: <http://www.du.edu/gsis/hrhw/working/2004/21-donnelly-2004.pdf> (date accessed, 14 August 2013).

<sup>51</sup> See T. Aquinas. *De regno [De regimine principum], ad regem Cypri* (On Kingship, to the King of Cyprus) [1267], translated by Gerald B. Phelan, (The Pontifical Institute of Mediaeval Studies, 1949, Toronto); J Bodin *Les six livres de la République* (1576) (“For if justice is the end of law, law the work of the prince, and the prince the image of God, then by this reasoning, the law of the prince must be modeled on the law of God” from J.H. Franklin *On Sovereignty: Four Chapters from The Six Books of the Commonwealth* (Cambridge University Press, 1992, Cambridge) at 45`); H. Grotius *The Rights of War and Peace*, edited by Richard Tuck. 3 vols. (Indianapolis Liberty Fund, 2005, Toronto) at ii.xx.40.1 and ii.xx.40.4; Thomas Hobbes *Leviathan* (Oxford, Oxford University Press, 1998 [1955]).

<sup>52</sup> *Supra* Donnelly n.50, at 15.

centuries, and as such there has never been a fixed notion of what it actually inheres – or more accurately, fixed notions have been evolving in relation to societal and cultural change.<sup>53</sup> For example, in 2008 former High Commissioner for Human Rights, Louise Arbour, in relation to the doctrine of the ‘responsibility to protect’ wrote that a State’s claims on being an “impotent and powerless bystander” is “altogether unpersuasive”, and that sovereignty must be conceived as *duty*.<sup>54</sup> Her statement seems to rest on the concept of sovereignty as not being limited to States (as legal persons), but pertaining primarily to the *individual humans* within those States.<sup>55</sup>

The issue of States seemingly unresolvable politicisation and selectivity regarding respect for Treaty obligations by relying on relativist cultural values (exceptionalism) was one of the central triggers for abolishing the CHR<sup>56</sup> and setting up the Human Rights Council on 15 March, 2006, by Resolution 60/251.<sup>57</sup> Two UN reports are considered to have laid the groundwork for the metamorphosis of the CHR into the HRC: *A More Secure World: Our Shared Responsibility*<sup>58</sup> which reinterpreted the concept of sovereignty to be one of governmental responsibility towards its citizens, rather than based solely on territorial control considerations. McMahon points out that in this view rights should be protected not because they are intrinsically good, but “because they are necessary to achieve the dignity, justice, worth and safety of their

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<sup>53</sup> See generally L. Glanville “The Myth of “Traditional” Sovereignty” 57 *International Studies Quarterly* [2013] 79.

<sup>54</sup> L. Arbour “The responsibility to protect as a duty of care in international law and practice” 34 *Review of International Studies* [2008] 445, at 445.

<sup>55</sup> Anne Peters calls this the “humanising of sovereignty”, see A. Peters “Humanity as the A and Ω of Sovereignty” 20(3) *EJIL* [2009] 513 at 533.

<sup>56</sup> See, for example, J. Becker *Campaigning for Justice: Human Rights Advocacy in Practice* (Stanford University Press, 2012, California) at 59.

<sup>57</sup> United Nations Human Rights Council Resolution adopted by the General Assembly 60/251, UNGAOR, 60th Sess, UN Doc A/RES/60/251, 2006.

<sup>58</sup> United Nations High-level Panel on Threats, Challenges and Change *A More Secure World: Our Shared Responsibility* (United Nations, 2004, New York).



citizens”.<sup>59</sup> In *Larger Freedom: Development, Security and Human Rights for All*, Kofi Annan spoke of undermining effects on human rights of self-interest by States.<sup>60</sup>

In light of the selectivity of States’ engagement with Treaty obligations, their self-interest in terms of maintaining the *status quo* of power and political representation in domestic forums, and the fact that sexual orientation is not an enumerated ground of human rights protection, SOGI-based rights are still to achieve the status of international customary law. Unlike CEDAW, which Lau says at least confers the *opinio juris* element of customary human rights law,<sup>61</sup> there are no dedicated mechanisms – treaties, rapporteurs, or other Special Procedures that monitor human rights violations, or State compliance, based on SOGI. Therefore, of crucial importance to the arguments posed by ‘opponent States’ in the name of sovereign relativist values – codified at the HRC since 2009 in the formulation “traditional values” (discussed in Section 1.4) - is that according to international law, when Treaty and customary law are unclear, the substantial body of Treaty Body practice, international court decisions, writings of jurists, and national legal practice that references IHRL serve as subsidiary sources of law<sup>62</sup> regarding SOGI.

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<sup>59</sup> E. R. McMahon *The Universal Periodic Review: A Work in Progress An Evaluation of the First Cycle of the New UPR Mechanism of the United Nations Human Rights Council* (Friedrich-Ebert-Stiftung, February 2013, Berlin) at 9.

<sup>60</sup> Kofi Annan *In Larger Freedom: Development, Security and Human Rights for All* (United Nations, 2005, New York): in which he said: “The Commission’s capacity to perform its tasks has been increasingly undermined by its declining credibility and professionalism. In particular, States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticise others. As a result, a credibility deficit has developed, which casts a shadow on the reputation of the United Nations system as a whole”.

<sup>61</sup> Lau, writing in 2004, notes that CEDAW illustrates that the *opinio juris* component of customary international law has been established with regard to the universal protection of women’s rights. *Opinio juris* is one of two components of customary international law, the second being usage, *supra* Lau n.7, at 1698.

<sup>62</sup> Statute of the International Court of Justice, Art 38(1)(d), 59 Stat 1055, 1060, Treaty Serial No 933 (1945), lists subsidiary sources of international law.

## Section 1.2

### Sourcing the status of SOGI in IHRL

This section briefly focuses on some of the significant legal practice that has emerged over the past 20 years in relation to non-discrimination, decriminalisation and ‘sensitisation’<sup>63</sup> regarding SOGI, which are these three areas that this paper identifies as most prominently advocated for, most addressed in a variety of sources of law, and also by far most frequent themes to emerge in the UPR process itself (as will be discussed in Section 2).<sup>64</sup> The first part (1.2.1) cites a variety of very recent authoritative sources generally, while part (1.2.2) contextualises a series of cases regarding non-discrimination and SOGI. Part (1.2.3) does the same for some decriminalisation cases that set standards that can be referenced in comparable country situations, and (1.2.4) cites a substantial body of Treaty Body practice, mostly from the Committee on Civil and Political Rights (hereafter CCPR) regarding both discrimination and decriminalisation. This collective profusion in sources of law asserts the status of SOGI as a base on which human rights protections must be afforded.

#### 1.2.1 A profusion of law

The outputs from various sources of law are increasing each year.<sup>65</sup> To illustrate this, the International Commission of Jurists compilation on SOGI in IHRL of 2013

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<sup>63</sup> In this paper, this term is used to refer to general public awareness and education, media, training at State, institutional, judicial, legal, police and other professional sites on SOGI, including NHRIs and private sectors. Its realisation implies general human rights education, NGO engagement, and the protection of human rights defenders, amongst others.

<sup>64</sup> This paper has heavily relied on three compendium texts for relevant texts and interpretations throughout: International Commission of Jurists *Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook* (ICJ, 2011, Geneva); and *infra* International Commission of Jurists n.66 and n.67.

<sup>65</sup> Also for example, besides sources listed, add such interventions as that of Professor Alain Pellet, former member and Chairperson of the International Law Commission of the United Nations, who is

mention the authors had to limit the content of Treaty Body practice cited due to sheer volume,<sup>66</sup> while the 2010 edition had attempted to include everything that preceded that year.<sup>67</sup> Further, since 2011 numerous UN entities have recognised that the status of SOGI requires particular attention both in international legal and policy settings, and in States themselves.<sup>68</sup>

This paper situates these cases as a way to illustrate the weight of international human rights law that informs and informed the concurrent debates in the HRC about the status of SOGI. The majority of this body of law concerns sexual orientation, rather than issues of gender identity, reflecting the nature of the advocacy emerging in States around the world over the past 20 years.<sup>69</sup> However, as will be discussed, since the

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the Independent Objector (IO) for ICANN. ICANN is the body that distributes domain names on the internet globally. Following some comments in 2012 on the ICANN website the IO decided to make the unusual move and offer an Opinion on the viability of a ‘.gay’ or ‘.lgbt’ extensions without a complaint actually having been lodged. Unequivocally, relying on international law, yet cognisant of cultural sensitivities, the IO found that future objection would not be warranted, see ICANN Independent Objector” Opinion (webpage) <http://www.independent-objector-newgtlds.org/english-version/the-independent-objector-s-comments-on-controversial-applications/gay-general-comment/> (date accessed 2 September 2013).

<sup>66</sup> International Commission of Jurists *Sexual Orientation and Gender Identity in International Human Rights Law: the ICJ Compilation*, 5<sup>th</sup> ed., (ICJ, 2013, Geneva) at 6.

<sup>67</sup> International Commission of Jurists *Sexual Orientation and Gender Identity in Human Rights Law*, 4<sup>th</sup> ed., (ICJ, 2010, Geneva).

<sup>68</sup> For example, *supra* resolution 19/41 n.40, at para. 1; also *supra* resolution 17/19, n.37; United Nations High Commissioner for Refugees, *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* HCR/GIP/12/01 23 October 2012; United Nations General Assembly, *Extrajudicial, summary or arbitrary executions: resolution / adopted by the General Assembly A/RES/67/168* 15 March 2013; United Nations Office of the High Commissioner for Human Rights, *Born Free and Equal: Sexual Orientation and Gender identity in International Human Rights Law* HR/PUB/12/06 September 2012; United Nations Development Program *HIV and the Law: Risks, Rights, Health* (Global Commission on HIV and the Law, 2012, New York); Speeches and statements of Secretary-General Ban Ki-Moon, High Commissioner Navi Pillay, and Assistant Secretary-General for Human Rights Ivan Simonovic (25 addresses since September 2010): <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTSpeechesandstatements.aspx> (date accessed 16 August 2013).

<sup>69</sup> For example, the first regional and international transgender networks (NGOs and other advocates) emerged in the mid-2000s – such as Global Action for Trans\* Equality (GATE), Transgender Europe (TGEU), Asia-Pacific Transgender Network (APTAN), and only the World Professional Association for Transgender Health (WPATH) in the 1980s (then US-based). In contrast, the International Lesbian and Gay Association (ILGA) pre-dated these, founded in 1978.

mid-2000s gender identity has increasingly been twinned with sexual orientation in international sexual rights advocacy regarding non-discrimination particularly, as reflected in various UN entities' and Treaty Body practice.<sup>70</sup>

### **1.2.2 Discrimination**

The first set of law that this paper discusses is that concerning of non-discrimination and SOGI. Non-discrimination is a foundational principle of human rights law.

International law defines discrimination as “any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on a prohibited ground of discrimination and that has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of rights guaranteed under international law”.<sup>71</sup> The Vienna Declaration and Programme of Action that reaffirmed the principles of universality, indivisibility, inter-relatedness and interdependence of human rights,<sup>72</sup> speaks of the protection and promotion of these rights as being “the first responsibility of Governments”.<sup>73</sup> The principle of non-

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<sup>70</sup> For example, see United Nations Committee on Economic, Social and Cultural Rights *General Comment 20 E/C.12/GC/20* (2009) at para. 32 (discussing the status of “other status in the Convention: “Other status” as recognised in article 2, paragraph 2, includes gender identity [as asserted in United Nations CESCR *General Comment No. 14* (2000) at para. 18, and United Nations CESCR *General Comment No. 15* (2003) at para. 13]); “States parties should ensure that a person’s sexual orientation is not a barrier to realising Covenant rights, for example, in accessing survivor’s pension rights. In addition, gender identity is recognised as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace”.

<sup>71</sup> United Nations Human Rights Committee, *General Comment No. 18*, para. 7; and United Nations CESCR *General Comment No. 20*, para. 7; See the International Convention on the Elimination of all forms of Racial Discrimination, Art. 1; the Convention on the Elimination of All Forms of Discrimination against Women, Art. 1; and the Convention on the Rights of Persons with Disabilities, Art. 2.

<sup>72</sup> Adopted unanimously by all States at the United Nations World Conference on Human Rights in 1993, UN General Assembly, *Vienna Declaration and Programme of Action A/CONF.157/23* 12 July 1993, at para. 5.

<sup>73</sup> *Ibid* at para. 1 “Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments”.

discrimination underpins the world's human rights instruments that States use regionally, as well as internationally.<sup>74</sup>

A theme that runs through the following cases is the conflation or distinction between status and conduct. The European Court and the UN Human Rights Committee have both concluded that the criminalisation of same-sex sexual conduct violated the right to privacy long before they dealt directly with the question of the right to be protected against discrimination based on sexual orientation; in other words, they addressed sexual activity before sexual identity. Thus, in *Dudgeon*,<sup>75</sup> the Court found in 1981 that Northern Ireland's sodomy laws violated rights under Article 8 of the European Convention, but did not decide until 1999 that a difference in treatment based on sexual orientation violated the applicant's rights under Article 14 of the ECHR in *Salegueiro da Silva Mouta v. Portugal*.<sup>76</sup> The UN Rights Committee decided *Toonen*<sup>77</sup> in 1994 and observed in passing that "sexual orientation" was included in Article 26 of the ICCPR, but only in 2003, in *Young v. Australia*<sup>78</sup> did the Committee

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<sup>74</sup> The African Commission on Human and Peoples' Rights has observed: "Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under Article 2 of the Charter provides the foundation for the enjoyment of all human rights" African Commission on Human and Peoples' Rights, Decision of 15 May 2006, *Zimbabwe NGO Human Rights Forum v. Zimbabwe*, Communication No. 245/2002, para. 169; The Inter-American Court has held that it "considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws." Inter-American Court of Human Rights, Advisory Opinion OC-18/03 of 17 September 2003, *Juridical Condition and Rights of Undocumented Migrants*, para. 101.

<sup>75</sup> European Court of Human Rights *Dudgeon v. United Kingdom* (Application No. 7525/76), 22 October 1981.

<sup>76</sup> European Court of Human Rights *Salegueiro da Silva Mouta v. Portugal*, Application No. 33290/96, 21 December 1999, at para. 36.

<sup>77</sup> United Nations Human Rights Committee *Toonen v. Australia*, Communication No. 488/1992, Views of 4 April 1994.

<sup>78</sup> United Nations Human Rights Committee *Young v. Australia*, Communication No. 941/2000, 18 September 2003, at para. 10.4.

explain that individuals had a more general right to be guaranteed equal protection under the laws with respect to sexual orientation.

This universal principle of non-discrimination was evident in the ruling given in the High Court of Uganda in *Mukasa and Oyo*,<sup>79</sup> where although acts of “carnal knowledge against the order of nature” are penalised,<sup>80</sup> the sexual orientation of the plaintiffs was not at issue, but what was being adjudicated on was the police ill-treatment (search and seizure of property and physical abuse) of them based on that sexual orientation. Likewise, two years later in *Kasha Jacqueline, David Kato, and Onziema Patience v. Rolling Stone*,<sup>81</sup> the question was about whether, in the heightened atmosphere around the proposed Anti-Homosexuality Bill (AHB) in Uganda,<sup>82</sup> the constitutional rights of the plaintiffs had been breached, and not about “homosexuality *per se*”.<sup>83</sup> Despite widespread institutionalised and public discrimination in the country, the guarantees of universal human rights were asserted in this case regardless of SOGI.

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<sup>79</sup> *Mukasa and Oyo v. Attorney General*, High Court of Uganda at Kampala (22 December 2008).

<sup>80</sup> The actual act of same sex sexual relations indicated by the word ‘carnal’ as set out in Section 145 of the Penal Code of Uganda is criminalised with a maximum term of life imprisonment.

<sup>81</sup> *Kasha Jacqueline, David Kato Kisule and Onziema Patience v. Rolling Stone Ltd and Giles Muhame*, High Court of Uganda at Kampala (30 December 2010).

<sup>82</sup> The Anti Homosexuality Bill, Bill No.18, Uganda, 25 September 2009.

<sup>83</sup> The respondents were the publishers of a newspaper called “Rolling Stone”. On 2 October 2010, an article with the title “100 Pictures of Uganda’s top homos leak” was published in the newspaper. The article accused the gay community of trying to recruit “very young kids” and “brainwash them towards bisexual orientation”. It called on the government to take a bold step against this threat by hanging dozens of homosexuals. The article published the names and pictures of several members of the Ugandan LGBT community and provided information about them and, in some cases, their home addresses. David Kato, one of those named taking the action and advocacy officer for Sexual Minorities Uganda (SMUG), was found murdered in his home on 27 January 2011: results of the official investigation into his death remain ‘inconclusive’.

The case of *Sunil Babu Pant v. Government of Nepal*,<sup>84</sup> decided by the Supreme Court of Nepal in December 2007, is historic for its recognition of the rights of “people of the third gender”, known as Metis in Nepal. Metis were shown to be subject to persistent discrimination by police and State institutions because of their gender identity and expression, and often denied citizenship cards, thereby limiting their opportunities to realise a wide range of rights. It was the “responsibility of the State to create the appropriate environment and make legal provisions accordingly for the enjoyment of such rights”, the Court found.<sup>85</sup>

In *Romer v. Evans*<sup>86</sup> the US Supreme Court held regarding excluding sexual orientation from the state’s anti-discrimination laws that: “Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws”. In his dissenting opinion, Justice Scalia focused on the ‘act’ of homosexuality as relied on in *Bowers v. Hardwick*,<sup>87</sup> but in this case the majority focused on the status of the individual, not their potential acts.

This principle of ‘status’ appeared in *Vriend v. Alberta*,<sup>88</sup> the Supreme Court held that the legislature’s omission of sexual orientation from Alberta’s law on equality rights. Although “sexual orientation” might be read as neutral, in that it is shared by both heterosexuals and homosexuals, the Court addressed the requirements of substantive

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<sup>84</sup> *Sunil Babu Pant and Others v. Nepal Government and Others*, Supreme Court of Nepal (21 December 2007).

<sup>85</sup> *Ibid*, at p.284.

<sup>86</sup> *Romer, Governor of Colorado, et al. v. Evans et al.* (94-1039), 517 U.S. 620 (1996) (final paragraph of judgment).

<sup>87</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986), 1986 (upholding State law criminalising sodomy against constitutional challenge).

<sup>88</sup> *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

equality, observing that heterosexuals were not discriminated against on the basis of their sexual orientation.

### **1.2.3 Decriminalisation**

Regarding decriminalisation, currently laws criminalise same-sex sexual conduct in 78 countries around the world (see section 1.3.2). The majority of these focus on sex between men, although recently both Botswana and Malawi have enacted laws criminalising lesbian sex,<sup>89</sup> Iran specifies “lesbianism”, Cameroon’s ‘same sex’ laws refer to males and females, and Kyrgyzstan has twice (1999 by CEDAW and 2000 by CESCR) been critiqued for laws classifying ‘lesbianism’.<sup>90</sup>

Such cases, usually known as morals offences, are justified by reference to tradition, popular opinion, and public morality. The idea that the function of the criminal law should be to prevent harm, not to legislate moral values, as expressed in the Wolfenden Report,<sup>91</sup> is central to the present paper. The principle appeared in *Toonen*, where the Committee rejected Tasmania’s public morality justification. Also, as the ICJ 2011 Casebook points out, “national courts are engaged in an ongoing conversation, specifically about same-sex sexual conduct and more generally about the criminal law’s role in regulating private, consensual and non-harmful conduct.”<sup>92</sup>

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<sup>89</sup> Botswana Penal Code [Chapter 08:01], amended by the Penal Code Amendment Act 5, 1998 )Section 164. Unnatural offences); Penal Code Cap. 7:01, Laws of Malawi (Section 153 Unnatural offences).

<sup>90</sup> United Nations CESCR *Concluding Observations: Kyrgyzstan*, ICESCR, E/2001/22 (2000) at paras. 345 and 358; United Nations CEDAW *Concluding Observations: Kyrgyzstan*, CEDAW, A/54/38/Rev.1 part 1 (1999) 15 at paras. 127 and 128.

<sup>91</sup> In the words of the Wolfenden Report (the report that informed the British rescinding their homosexuality laws in 1967): “[U]nless a deliberate attempt be made by society through the agency of the law to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business”. Wolfenden Committee, Report of the Committee on Homosexual Offences and Prostitution (Home Office & Scottish Home Department, London 1957) at para. 61.

<sup>92</sup> This observation is made in *supra* ICJ Casebook n.64, at 8.



In *Leung*,<sup>93</sup> the Hong Kong Court of Appeal stated: “Any restriction on a constitutional right can only be justified if (a) it is rationally connected to a legitimate purpose and (b) the means used to restrict that right must be no more than is necessary to accomplish the legitimate purpose in question”. Numerous prior cases had failed to establish the primacy of human rights, for example, in one from Zimbabwe (*Banana*)<sup>94</sup> and another Botswana (*Kanane*)<sup>95</sup> the courts found that the criminalisation laws were succeeding in *upholding* public morality. In *McCoskar & Nadan*,<sup>96</sup> like the ECtHR cases such as *Dudgeon*, the Court appeared to accept that public morality was a legitimate State interest but found that it failed the proportionality test, given the importance of the rights involved. However, in *Lawrence*,<sup>97</sup> and *National Coalition for Gay and Lesbian Equality*<sup>98</sup> the public morality case was not accepted at all. In *Naz Foundation*,<sup>99</sup> which overturned the British colonial ‘section 377’ as an infringement on the Constitution of India, after discussing *Lawrence*, *Dudgeon*, *Norris*<sup>100</sup> and the *National Coalition* cases, the Delhi Court held: “[m]oral indignation, howsoever strong, is not a valid basis for overriding individual’s fundamental rights of dignity and privacy”.

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<sup>93</sup> *Leung v. Secretary for Justice*, High Court of the Hong Kong Special Administrative Region, Court of Appeal (20 September 2006).

<sup>94</sup> In *Banana v. State*, Supreme Court of Zimbabwe (29 May 2000), the Chief Justice said, “I do not believe that this court, lacking the democratic credentials of a properly elected parliament, should strain to place a sexually liberal interpretation on the Constitution of a country whose social norms and values in such matters tend to be conservative”.

<sup>95</sup> *Kanane v. State*, Court of Appeal, Botswana (30 July 2003).

<sup>96</sup> *McCoskar and Nadan v. State*, High Court of Fiji at Suva (26 August 2005).

<sup>97</sup> *Lawrence v. Texas*, United States Supreme Court, 2003. Justice O’Connor: “Moral disapproval of a group cannot be a legitimate State interest under the Equal Protection Clause because legal classifications must not be drawn for the purpose of disadvantaging the group burdened by the law.”

<sup>98</sup> *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs*, Constitutional Court of South Africa, 1999.

<sup>99</sup> *Naz Foundation v. Government of NCT of Delhi and Others*, High Court of Delhi at New Delhi, India, 2009. [Postscript: in November 2013, the Indian Supreme Court reversed this decision.]

<sup>100</sup> European Court of Human Rights *Norris v. Ireland* (Application No. 10581/83), 26 October 1988.

### 1.2.4 Treaty bodies and SOGI

The CCPR has been the most prolific Treaty Body regarding issuing Concluding Observations regarding non-discrimination and decriminalisation. Regarding discrimination, various areas of how it plays out are identified in these statements. For example, in 2009 the Committee expressed concern at “systematic discrimination” on the basis of sexual orientation in all areas of public life in Russia,<sup>101</sup> partnership benefit discrimination in Japan,<sup>102</sup> (also the subject of the only sexual orientation discrimination case brought before the Committee in *X v. Colombia*<sup>103</sup> in 2007), inclusive anti-discrimination legislation in the Czech Republic, France, San Marino and Austria,<sup>104</sup> gender recognition legislation in Ireland,<sup>105</sup> and awareness-raising in Chile,<sup>106</sup> as well as training activities with police in Azerbaijan.<sup>107</sup> The Committee has

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<sup>101</sup> “The Committee notes with concern the systematic discrimination against individuals on the basis of their sexual orientation in the State party, including hate speech and manifestations of intolerance and prejudice by public officials, religious leaders and in the media. The Committee is also concerned about discrimination in employment, health care, education and other fields, as well as the infringement of the right to freedom of assembly and association and notes the absence of legislation that specifically prohibits discrimination on the basis of sexual orientation. (art. 26)” at para. 27. United Nations Human Rights Committee *Concluding observations of the Human Rights Committee: Russian Federation* CCPR/C/RUS/CO/6, 29 October 2009.

<sup>102</sup> United Nations Human Rights Committee *Concluding observations of the Human Rights Committee: Japan*, CCPR/C/JPN/CO/5, 18 December 2008.

<sup>103</sup> United Nations Human Rights Committee *X v. Colombia*, Communication No. 1361/2005, 14 May 2007.

<sup>104</sup> United Nations Human Rights Committee *Concluding observations of the Human Committee: Czech Republic*, CCPR/C/CZE/CO/2/Add.1, 9 September 2008; United Nations Human Rights Committee *Concluding observations of the Human Rights Committee: France*, CCPR/C/FRA/CO/4, 31 July 2008; United Nations Human Rights Committee *Concluding observations of the Human Rights Committee: Republic of San Marino*, CCPR/C/SMR/CO/2, 31 July 2008; United Nations Human Rights Committee *Concluding observations of the Human Rights Committee: Austria*, CCPR/C/AUT/CO/4, 30 October 2007.

<sup>105</sup> United Nations Human Rights Committee *Concluding observations of the Human Rights Committee: Ireland*, CCPR/C/IRL/CO/3, 30 July 2008.

<sup>106</sup> United Nations Human Rights Committee *Concluding observations of the Human Rights Committee: Chile*, CCPR/C/CHL/CO/5, 18 May 2007.

<sup>107</sup> United Nations Human Rights Committee *Concluding observations of the Human Rights Committee: Azerbaijan* CCPR/C/AZE/CO/3, 13 August 2009.

called for decriminalisation in a number of States,<sup>108</sup> frequently citing the discriminatory environment such legislation produces.

Concluding Observations from the other Treaty Bodies regarding SOGI are less numerous – a survey of the ICJ SOGI database<sup>109</sup> reveals only five occurrences from the Committee on Economic, Social and Cultural Rights (CESCR), three of which pertain to non-discrimination,<sup>110</sup> one to decriminalisation,<sup>111</sup> and the other welcoming the creation of a NRHI for SOGI.<sup>112</sup> The Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) has issued Concluding Observations on two cases regarding SOGI, one commending Sweden for non-discrimination in granting residents’ permits to those fleeing persecution due to their SOGI,<sup>113</sup> and one expressing concern at ‘lesbianism’ being criminalised in Kyrgyz law.<sup>114</sup> The four

Concluding Observations from the Committee Against Torture (CAT) all concern

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<sup>108</sup> United Nations Human Rights Committee *Concluding observations of the Human Rights Committee: Grenada*, CCPR/C/GRD/CO/1, 14 August 2009; United Nations Human Rights Committee *Concluding observations of the Human Rights Committee: Tanzania*, CCPR/C/TZA/CO/4, 6 August 2009; United Nations Human Rights Committee *Concluding observations of the Human Rights Committee: Botswana*, CCPR/C/BWA/CO/1, 24 April 2008; United Nations Human Rights Committee *Concluding observations of the Human Rights Committee: St. Vincent and The Grenadines*, CCPR/C/VCT/CO/2, 24 April 2008; United Nations Human Rights Committee *Concluding observations of the Human Rights Committee: Sudan* CCPR/C/SDN/CO/3, 29 August 2007 (and death); United Nations Human Rights Committee *Concluding observations of the Human Rights Committee: Zambia*, CCPR/C/ZMB/CO/3, 9 August 2007; United Nations Human Rights Committee *Concluding observations of the Human Rights Committee: Barbados*, CCPR/C/BRB/CO/3, 11 May 2007; *Chile*, CCPR/C/CHL/CO/5, 18 May 2007.

<sup>109</sup> International Commission of Jurists “SOGI database” <http://www.icj.org/sogi-un-database/> (date accessed: 2 August 2013).

<sup>110</sup> United Nations Committee on Economic, Social and Cultural Rights, *Hong Kong Special Administrative Region (China)*, E/2002/22 (2001) 39 at paras. 177 and 193; United Nations Committee on Economic, Social and Cultural Rights, *Trinidad and Tobago*, E/2003/22 (2002) 45 at paras. 262 and 285; United Nations Committee on Economic, Social and Cultural Rights, *Hong Kong Special Administrative Region (China)*, E/2006/22 (2005) 34 at paras. 202, 207 and 219.

<sup>111</sup> United Nations Committee on Economic, Social and Cultural Rights, *Kyrgyzstan*, CEDAW E/2001/22 (2000) 62 at paras. 345 and 358.

<sup>112</sup> United Nations Committee on Economic, Social and Cultural Rights, *Sweden*, CEDAW E/2002/22 (2001) 106 at para. 715.

<sup>113</sup> United Nations Committee on the Elimination of All Forms of Discrimination Against Women, *Sweden*, CEDAW A/56/38 part II (2001) 76 at para. 334.

<sup>114</sup> United Nations Committee on the Elimination of All Forms of Discrimination Against Women, *Kyrgyzstan*, CEDAW A/54/38/Rev.1 part I (1999) 15 at paras. 127 and 128.

violence (torture or degrading treatment) on grounds of sexual orientation, in prison,<sup>115</sup> police custody,<sup>116</sup> and allegations of torture.<sup>117</sup> (There were also two sexual orientation asylum cases that came before CAT, both of which failed.)<sup>118</sup> All three Committee on the Rights of the Child (CRC) Concluding Observations concern discrimination, two regarding “insufficient efforts” to ensure Article 2 is enshrined adequately in law (in Isle of Man and in UK Overseas territories),<sup>119</sup> and another in 2002 concerning access to information.<sup>120</sup>

### **Section 1.3**

#### **The human rights language of SOGI**

In terms of trying to find a global consensus regarding the inclusion of SOGI into the HRC mandate, language is an extremely contested subject. This very short section touches on some of the issues in finding some universality, rather than cultural specificity, in the terminology used (1.3.1) and offers an interesting insight into the terms that currently exist in criminal codes that penalise SOGI (1.3.2).

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<sup>115</sup> United Nations Committee Against Torture, *Brazil*, CAT A/56/44 (2001) 49 at para. 119.

<sup>116</sup> United Nations Committee Against Torture, *Egypt*, CAT A/58/44 (2002) 22 at paras. 41 and 42. This Observation also calls “to remove all ambiguity from the legislation” regarding sexual orientation.

<sup>117</sup> United Nations Committee Against Torture, *Venezuela*, CAT A/58/44 (2002) 32 at para. 80; United Nations Committee Against Torture, *Argentina*, CAT A/60/44 (2004) 12 at paras. 34 and 35.

<sup>118</sup> United Nations Committee Against Torture, *K. S. Y. v. The Netherlands* (190/2001), CAT A/58/44 (15 May 2003) 107 (CAT/C/30/D/190/2001) at paras. 2.1, 2.4, 2.5, 7.1 and 7.3-7.5, concerned an Iranian individual who claimed he would be tortured if returned to Iran; United Nations Committee Against Torture, *E. J. V. M. v. Sweden* (213/2002), CAT A/59/44 (14 November 2003) 267 (CAT/C/31/D/213/2002) at paras. 1.1, 2.5, 2.10 and 8.7, concerned a Costa Rican citizen also claiming art.3 violation if returned to Costa Rica.

<sup>119</sup> United Nations Committee on the Rights of the Child, *United Kingdom of Great Britain and Northern Ireland (Isle of Man)*, CRC, CRC/C/100 (2000) 31 at paras. 186 and 187; United Nations Committee on the Rights of the Child, *United Kingdom of Great Britain and Northern Ireland (Overseas Territories)*, CRC, CRC/C/100 (2000) 40 at paras. 233 and 234.

<sup>120</sup> United Nations Committee on the Rights of the Child, *United Kingdom of Great Britain and Northern Ireland*, CRC, CRC/C/121 (2002) 23 at paras. 135 and 136.

### 1.3.1 *Harmonising languages of sexual and gender diversity internationally*

A core dilemma for those advocating for the recognition of SOGI as a human rights status is how to formulate claims to universal rights in language that recognises the significance of cross-cultural constructions of both sexuality and gender.<sup>121</sup> Labels and perceptions attached to same-sex sexual identity and behavior vary enormously from culture to culture.<sup>122</sup> Likewise, perceptions of what comprises gender,<sup>123</sup> both in its formation and its expression, vary widely around the globe both historically and contemporaneously.<sup>124</sup>

Katyal notes that efforts to globalise the language of ‘gay rights’ as human rights is counter-productive<sup>125</sup> - ‘gay’ being a traditionally Western notion of sexual identity, therefore fueling the rhetoric of ‘opposing States’ about Western agendas. Petchesky

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<sup>121</sup> I. Saiz *Bracketing Sexuality: Human Rights and Sexual Orientation - A Decade of Development and Denial at the UN SPW Working Papers*, N.2, November 2005 (Sexuality Policy Watch, 2005, Rio de Janeiro).

<sup>122</sup> See generally, G. Herdt, *Same Sex, Different Cultures* (Westview Press, 1997, Oxford).

<sup>123</sup> This was a point of great contestation at both Cairo and Beijing; Cynthia Rothschild (in a paper delivered at an IGLHRC conference in 2000) describes how powerful lobbying by the Vatican--in concert with Islamic countries and conservative North American organisations--has consistently impeded attempts to address SOGI issues at international human rights and women's rights conferences in the past decade. At the Rome Conference, 1998, this same group of opponents claimed that any inclusion of "gender" in the draft statute was a backdoor point of entry for sexual orientation. So extreme was their opposition that they attempted to eliminate every reference to gender in the statute, including the treatment of rape and sexual violence as war crimes, since they were referred to as "gender" crimes. Joydeep Sengupta "How the UN Can Advance Gay Rights" (webpage) 1 November 2003, <http://www.thefreelibrary.com/How+the+UN+can+advance+gay+rights.-a0110733590> \*date accessed: 5 August 2013).

<sup>124</sup> For example, Bacchá (Central Asia), Baklas (Philippines), Bedaghs (Pakistan), Dýseiaisha (Japan), Hijras (South Asia), Ibbis (Senegal), Soaw Praphet Song (Thailand, Lao), Katumua (Angola), Bitesha (Congo), Kothis (South Asia), (Ma)shoga (East African coast), Motsoalle (Lesotho), Muxe or Mampo (Mexico), Ovashengi (Southwest Africa), Tongzhi (China), Travestis (Latin America), Two-spirited (North America), Waria (Indonesia), Xaniths (Oman), ‘Yan daudu (Northern Nigeria), Kuchus (Uganda, Rwanda, Kenya), Fakaleiti (Tonga), Fa’afafine (Samoa), Pinapinaaine (Tuvalu and Kiribati), Tmahu or Rae rae (Tahiti and Hawaii) and Vakasalewalewa (Fiji), see Global Rights Initiative *Demanding Credibility and Sustaining Activism: A Guide to Sexuality-based Advocacy* (Global Rights, 2008, Washinton) at 97-99.

<sup>125</sup> S. Katyal, "Exporting Identity" *Yale Journal of Law and Feminism*, 14(1) (2002) 97; O. Phillips, "Constituting the Global Gay" in D. Herman & C. Stychin (eds.) *Sexuality in the Legal Arena* (Athlone, 2000, London); B. Adam, J. Duyvendak & A. Krouwel (eds.) *The Global Emergence of Gay and Lesbian Politics* (Temple University Press, 1998, Philadelphia).

expands this idea by remarking besides the fact of incoherence of such identity descriptors as LGBTIQ (lesbian, gay, bisexual, transgender, intersex and queer) “translating a formula based on a Latinised alphabet into the world's diverse languages would seem quite problematic”.<sup>126</sup> However, as Saiz pointed out in 2004, soon after the Brazilian resolution of 2003, “[t]he increasingly central role being played by rights activists from the South in UN processes around sexuality is the most eloquent response to those governments that seek to claim that sexual rights are an exclusively Northern concern”.<sup>127</sup>

But from the perspective of international human rights law, “gay rights”<sup>128</sup> or “LGBT rights” presupposes a separate category of rights for different individuals based on personal characteristics<sup>129</sup> - feeding into the accusation that the call being made is for ‘new rights’, rather than the application of existing human rights law. The language of “savagery, perversion, and degeneracy” is a tool that opponents of ‘gay rights’ have used to differentiate them from those who are protected by human rights, and to defend their own penal codes.<sup>130</sup> In many cases, this rhetoric not only justifies

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<sup>126</sup> R. P. Petchesky “The Language of “Sexual Minorities” and the Politics of Identity: A Position Paper” *Reproductive Health Matters* 17(33) (2009) 105, at 108.

<sup>127</sup> *Supra* Saiz n.121, at 16; It should be noted that since the UPR process was initiated that opportunity for “eloquent response” is available to be made and heard by all States in the Global South through their UPR submissions and follow-up processes.

<sup>128</sup> For example, Hilary Clinton’s speech that firmly put an end to US exceptionalism regarding SOGI in UN fora, see, IIP Digital Secretary Clinton: “Gay Rights Are Human Rights” 19 December 2011 <http://iipdigital.usembassy.gov/st/english/video/2011/12/20111219142526aerdna0.5667492.html#ixzz2fBE7Rrsf> (date accessed: 12 August 2013).

<sup>129</sup> This was observed by Michael O’Flaherty in an interview in 2011: Law Think *Not Rights for Gays; Rights for All!* 2 October 2011 (radio interview) <http://www.lawthink.co.uk/2011/10/not-rights-for-gays-rights-for-all/> (date accessed: 12 August 2013).

<sup>130</sup> BBC News, “Homosexual and Hated in Zimbabwe”, 12 August 1998, (website) [http://news.bbc.co.uk/2/hi/programmes/crossing\\_continents/143169.stm](http://news.bbc.co.uk/2/hi/programmes/crossing_continents/143169.stm) (date accessed: 12 August 2013), (quoting President Robert Mugabe of Zimbabwe stating that homosexuality is a “scourge planted by the white man on a pure continent”); Russell Goldman, *Ahmadinejad: No Gays, No Oppression of Women in Iran*, ABC News, Sept. 24, 2007, <http://abcnews.go.com/S/story?id=3642673&page=1> (last visited Feb. 17, 2010) (quoting President Mahmoud Ahmedinejad of

differential treatment, but torture and execution also.<sup>131</sup> The production of the *Yogyakarta Principles* in late-2006 spoke against this logic by formulating a description of SOGI that refers not to identity (or indeed to behavior), but to *status*. Every human being has a *sexual orientation*, and every human being has a *gender identity*,<sup>132</sup> no matter from what culture or tradition. Thus, SOGI is a term that denotes status, and transcends the limitations inherent in such formulations as ‘queer’,<sup>133</sup> ‘LGBT’ or ‘gay’ which, as mentioned, are commonly used against the movement in the politics *of* human rights, and problematic in the politics *for* human rights in terms of international human rights law.

### 1.3.2 Terminology in laws

Buggery – the term of art in the 1861 British Act<sup>134</sup> - is what was outlawed under British law in 1861 until its repeal in 1967. Listed under ‘unnatural offences’ in the British statute, it is remarkable to observe how this concept flowed into legislative codes around the world. Of the 78 countries<sup>135</sup> that currently criminalise same-sex

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Iran that “[i]n Iran, we don’t have homosexuals . . .”). Both Iran and Zimbabwe use the key term ‘sodomy’ in their penal codes – Iran under Shari’a.

<sup>131</sup> R.R. Thoreson “Queering Human Rights: The Yogyakarta Principles and the Norm That Dare Not Speak Its Name” *Journal of Human Rights*, 8 (2009) 323 at 330; Mauritania, Iran, Sudan, Saudi Arabia, Yemen, Northern Nigeria and Southern Somalia all enact the death penalty.

<sup>132</sup> The Preamble to the Yogyakarta Principles sets out a description of SOGI: “Understanding ‘sexual orientation’ to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender; understanding ‘gender identity’ to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms... .”

<sup>133</sup> Petchesky n.126, at 108 : “... many South-based activists reject the term “queer” – another attempt to invent a global, all-inclusive terminology to capture everything that is not hetero- or gender-normative – because of its Western and post-modern academic derivation but more importantly because it has no equivalent translation in practically any language besides English”

<sup>134</sup> UK Sexual Offences Act 1956 1956 c. 69 (Regnal. 4\_and\_5\_Eliz\_2) Part I Unnatural offences Section 12 (replaced Offences Against the Person Act 1861 1861 c. 100 (Regnal. 24\_and\_25\_Vict)).

<sup>135</sup> 76 countries are most usually listed, but the present list includes Northern Cyprus and the new State of South Sudan.

sexual acts – for this is what they all do: they do not criminalise how one identifies *per se* – 42 of them retain the words “unnatural” or “against the order of nature” in their penal codes, 13 refer to “sodomy”, 9 to “buggery”, 7 use other activators, while remarkably, only 7 use the term “homosexual” as the primary descriptor of what exactly their criminal codes outlaw.<sup>136</sup> None use the term “sexual orientation” in their legal codes.<sup>137</sup> Only 3 of those, Iran, Qatar and Libya make exclusive reference to Shari’a law as the primary source of the criminalisation.<sup>138</sup> By this analysis, 97.5% of criminalising States adopt language within their legislative codes regarding sexual orientation that is itself imported: 27 in the Asia-Pacific group, 36 in the African group and 10 in the Latin American and Caribbean Group. It is notable that of the Organisation of Islamic Cooperation (hereafter OIC) countries of which 57 UN Member States are affiliated members,<sup>139</sup> 34 of them criminalise same sex sexual acts behavior, and in the other 23,<sup>140</sup> same sex sexual relations are either subject of deep taboo, SOGI activism is minimal, and it is reported that other articles in the penal codes are frequently used to target those perceived as being of diverse SOGI.<sup>141</sup>

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<sup>136</sup> This information is tabulated in the Annex of this paper, Table 1.

<sup>137</sup> See Table 1 in the Annex of this paper that organises this information for the 78 countries. These figures were produced by finding the key condition for penalisation in the title or first references of the subject in the legal codes of each of the countries. These codes are listed in the latest ILGA report 2013, see International Lesbian, Gay, Bisexual, Trans and Intersex Association, *State-sponsored Homophobia: A world survey of laws; criminalisation, protection and recognition of same-sex love* (ILGA, May 2013, Brussels).

<sup>138</sup> *Ibid* at 75 and 51: entries on Qatar and Libya where there are no direct reference to same sex acts, but the law of ‘Zina’ refers to sex outside of marriage). The entry on Iran is of interest because, under a heading of ‘sodomy’, it is the only legal code that refers to ‘homosexuality’ and ‘lesbianism’ under the Shari’a law in the Islamic Penal Code (1991) at 70.

<sup>139</sup> *Supra* 2006 Statement n.28; also see Table 1 in the Annex of this paper which identifies the criminalising country to its bloc group, and OIC membership as appropriate.

<sup>140</sup> Azerbaijan, Benin, Burkina Faso, Chad, Djibouti, Egypt, Guinea-Bissau, Indonesia, Iraq, Ivory Coast, Jordan, Kazakhstan, Kyrgyzstan, Mali, Niger, Palestine, Suriname, Tajikistan and Turkey.

<sup>141</sup> For example, in Egypt, the Law 58/1937 promulgating The Penal Code: Article 98(f), 1937, as amended 2006 on blasphemy: “Detention for a period of not less than six months and not exceeding five years, or paying a fine of ... shall be the penalty inflicted on whoever exploits and uses the religion in advocating and propagating by talk or in writing, or by any other method, extremist thoughts with the aim of instigating sedition and division or disdaining and contempting any of the heavenly religions or the sects belonging thereto, or prejudicing national unity or social peace,” and Article 278: “Whoever commits in public a scandalous act against shame shall be punished with detention for a



## Section 1.4

### Traditional values and human rights at the HRC

In examining the thesis put forward in this paper that the failure to encompass SOGI in the mandate of the HRC's work reflects a weakness in the overall human rights framework, this section on traditional values offers particular insight to the logic currently being proffered by those who oppose SOGI inclusion. The first part (1.4.1) looks at the phrasing and logic behind two attempts to pass resolutions for what is known "traditional values of humankind", as it first presented in 2009 in reaction to an ever-increasing SOGI presence in UN and HRC affairs. The next subsection (1.4.2) describes the reach and impact of resolution 16/3, and increasing hostility on this issue, reflected in a 2012 OIC walkout from a HRC panel, and the final part (1.4.3) looks at the draft reports of the HRC Advisory Committee which might be seen to compound the impasse rather than remedy it.

#### 1.4.1 *The first and second 'traditional values' resolutions, 2009*

Perhaps spurred on by the ability to expose abuse the UPR process would afford SOGI advocates (see Section 2.1), as well as by increased support for the SOGI Statement of 2008 (the first put before the UNGA),<sup>142</sup> the Russian Federation (supported by non-Member States of the HRC, Singapore, Sri Lanka and Viet Nam) presented a draft resolution at the 11<sup>th</sup> session of the HRC on "traditional values of humankind".<sup>143</sup> This resolution called for a report to be produced by the UN High Commissioner for Human Rights on the interplay of human rights and "customs,

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period not exceeding one year or a fine ..."; Also see *infra* Section 54 n.295, where Section 54, and not Section 377, is frequently used in Bangladesh to make arrests of sexual and gender minorities.

<sup>142</sup> *Supra* 2008 Statement n.35.

<sup>143</sup> United Nations Human Rights Council *Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind* A/HRC/11/L.1, 12 June 2009.

religions and beliefs” following interreligious and intercultural dialogues on the subject. A series of controversial informal debates followed on the proposed resolution and Russia was forced to postpone its adoption to the next session of the HRC.

This Russian initiative was soon to find favor with both theocratic Islamic States (and the Vatican) and others with shared concerns, such as China and Cameroon, albeit for different reasons. Clearly conservative States saw in this resolution the potential to address a swathe of issues of difficulty to them that had appeared in UN fora and Treaty Body practice regarding sexual and reproductive health and rights, gender and sexuality over the previous two decades. It validated such long-held sentiments as that articulated by Egypt (on behalf of the African Group) at the 6<sup>th</sup> session of HRC in December 2007, that warned against “... the persistent attempts to streamline those values [abortion and sexual orientation] at the UN while they are objectionable by [sic] the majority of the countries ...”.<sup>144</sup> As a result, at the 12<sup>th</sup> session of the HRC, the resolution 12/21 ‘Promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind’<sup>145</sup> gained the support of 26 Member States,<sup>146</sup> and was adopted. It was rejected by 15 States,<sup>147</sup> with six HRC Member States abstaining.<sup>148</sup>

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<sup>144</sup> ARC-International “Statement of Egypt on the Review, rationalisation and improvement the mandate of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Human Rights Council, 6th session (resumed), Geneva, 10-14 December 2007” at 5 (webpage) <http://arc-international.net/wp-content/uploads/2011/09/Report-Dec07.pdf> (date accessed: 5 August 2013).: this statement echoes responses frequently encountered in UN fora, such as that in 1999 regarding the ICPD+5 where, as Saiz points out (*supra* n.121, at 13) “... the Holy See forged alliances with other theocratic governments [namely members of the OIC] in fiercely resisting any language in the ICPD+5 Key Actions Document that could be interpreted as addressing either abortion or homosexuality” [my addition added in brackets].

<sup>145</sup> *Supra* A/HRC/11/L.1 n.143.

<sup>146</sup> Angola, Bahrain, Bangladesh, Bolivia (Plurinational State of), Burkina Faso, Cameroon, China, Cuba, Djibouti, Egypt, Gabon, India, Indonesia, Jordan, Kyrgyzstan, Madagascar, Nicaragua, Nigeria, Pakistan, Philippines, Qatar, Russian Federation, Saudi Arabia, Senegal, South Africa, Zambia.

Many States, and representatives of civil society groups and human rights defenders warned that the resolution was attempting to elevate traditional values above the established legal principles of human rights. According to this, the observance of human rights would be played down.<sup>149</sup> An OHCHR report of October 2010<sup>150</sup> concluded that “there was a danger in making something as undefined and constantly evolving as “traditional values” the standard for human rights ...” and “[p]ositive values existed in all cultures, but there was a need to support communities to examine, contest, negotiate and reconcile their values and practices with human rights.”<sup>151</sup> In pointing out that traditional practices can be “at odds” with human rights, cultural communities’ “[a]ttitudes ... [towards] ... some distinctive characteristic or trait ... could be hugely problematic, denying the human worth of such individuals who were treated without dignity and, sometimes, may even be deprived of life”.<sup>152</sup> In other words, the term ‘traditional values’ could be a byword for human rights violation and abuse, with no guarantees that they will determine the content of human rights.<sup>153</sup>

#### **1.4.2 A third traditional values resolution**

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<sup>147</sup> Belgium, Chile, France, Hungary, Italy, Japan, Mauritius, Mexico, Netherlands, Norway, Republic of Korea, Slovakia, Slovenia, United Kingdom of Great Britain and Northern Ireland, United States of America.

<sup>148</sup> Argentina, Bosnia and Herzegovina, Brazil, Ghana, Ukraine, Uruguay.

<sup>149</sup> See Asociación par alas Naciones Uindas en Espana “The Human Rights Under Debate? Human Rights vs Traditional Values” C’Mun 2013 (website) <http://www.anue.org/cmum/cmum2013-dossier-HRC.pdf> (date accessed: 12 August 2013).

<sup>150</sup> United Nations Human Rights Council *Workshop on Traditional Values of Humankind: Report of the United Nations High Commissioner for Human Rights A/HRC/16/37*, 13 December 2010.

<sup>151</sup> *Ibid* at para. 70.

<sup>152</sup> *Ibid* at para. 68.

<sup>153</sup> A likelihood anticipated in H. J. Steiner & P. Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press, 1996 Oxford) at 166–225 (on cultural relativism).

At the 16<sup>th</sup> session of the HRC, in April 2011, the Russian Federation presented an amended version of the resolution (A/HRC/RES/16/3, hereafter resolution 16.3)<sup>154</sup> that posited values of dignity, freedom and responsibility as being traditional values already enshrined in IHRL law and instruments, but it added in paragraph 5 that it “Notes the important role of family, community, society and educational institutions in upholding and transmitting these values, ...”. Innocuous as this may sound at first, numerous civil society organisations, including NGOs – international, regional and national - quickly recognised how “ominous”<sup>155</sup> this logic posed for minorities – sexual or otherwise – that deviation from tradition could set you beyond the reach of human rights as conceived in resolution 16/3.<sup>156</sup> However, the resolution was adopted by a recorded vote of 24 to 14, with 7 abstentions.<sup>157</sup>

Three months later in June 2011, resolution 17/19 was passed and the following March at the 19<sup>th</sup> session, the OHCHR’s report was scheduled to be discussed.<sup>158</sup> The panel there featured an address (by video) from UN Secretary-General Ban Ki-

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<sup>154</sup> United Nations Human Rights Council *Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind* A/HRC/RES/16/3, 8 April 2011.

<sup>155</sup> “It [traditional values] sounds innocuous, but its implications are ominous. Indeed, it is an immediate threat to the rights of many vulnerable groups – including women and lesbian, gay, bisexual and transgender (LGBT) people. And it flies in the face of the founding principles of universality and indivisibility enshrined in the Universal Declaration of Human Rights”, see Association for Women’s Rights in Development (AWID) “‘Traditional Values’ Code For Human Rights Abuse?” Global Public Square, 18 October 2012 (webpage) <http://www.awid.org/Library/Traditional-Values-code-for-human-rights-abuse> (date accessed: 13 August 2013).

<sup>156</sup> United Nations Human Rights Council Advisory Committee Item 3 (a) (viii) of the Provisional Agenda, Joint Submission, A/HRC/AC/7/NGO/1, 3 August 2011: Joint written statement submitted by almost 100 NGOs and INGOs; also see Graeme Reid “The Trouble With Tradition” *World Report 2013* (Human Rights Watch, 2013) (online) <http://www.hrw.org/world-report/2013/essays/trouble-tradition?page=3> (date accessed: 13 August 2013).

<sup>157</sup> [Adopted by a recorded vote of 24 to 14, with 7 abstentions. The voting was as follows: *In favour*: Angola, Bahrain, Bangladesh, Burkina Faso, Cameroon, China, Cuba, Djibouti, Ecuador, Ghana, Jordan, Kyrgyzstan, Malaysia, Maldives, Mauritania, Nigeria, Pakistan, Qatar, Russian Federation, Saudi Arabia, Senegal, Thailand, Uganda, Zambia *Against*: Belgium, France, Hungary, Japan, Mauritius, Mexico, Norway, Poland, Republic of Korea, Slovakia, Spain, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America *Abstaining*: Argentina, Brazil, Chile, Guatemala, Republic of Moldova, Ukraine, Uruguay].

<sup>158</sup> *Supra* Res. 19/41 2011 n.40.

moon,<sup>159</sup> an opening statement by High Commissioner for Human Rights Navi Pillay introducing her report on the topic, and other speakers, followed by an interactive dialogue.<sup>160</sup> Unprecedented in HRC history, the OIC staged a walkout at the beginning of the session to demonstrate the depth of their objection at SOGI being discussed at the UN in the context of human rights.<sup>161</sup> Ali Jernow observes that “[w]hat the debate was actually about, however, was how to determine the meaning and content of international human rights.”<sup>162</sup> This viewpoint is validated by a letter that Pakistan (coordinator of the OIC) sent to the President of the HRC a month previously and repeated in its statement at the 19<sup>th</sup> session, which presented the rationale that as the UDHR and core human rights treaties do not specify SOGI, these “attempts to create” “new standards” regarding SOGI “seriously jeopardise the entire international human rights framework”.<sup>163</sup> Jernow points out that the drafters of the UDHR, in Article 2 deliberately left the list of prohibited grounds open-ended with the phrase ‘other status’.<sup>164</sup> She continues that Treaty Bodies have “recognised other [un-enumerated]

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<sup>159</sup> United Nations Secretary-General (video message), Panel Discussion Sexual Orientation and Gender Identity, (22nd Meeting) 19<sup>th</sup> session of the HRC, 7 March 2012 <http://www.unmultimedia.org/tv/webcast/2012/03/secretary-general-video-msg-panel-discussion-sexual-orientation-and-gender-identity-22nd-meeting.html> (date accessed: 17 August 2013).

<sup>160</sup> Reported on by: United Nations Office of the High Commissioner for Human Rights “Human Rights Council Holds Panel Discussion on Discrimination and Violence Based on Sexual Orientation and Gender Identity”, *News* (online), 7 March 2012 <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11920&LangID=E> (date accessed: 17 August 2013).

<sup>161</sup> B. Levesque “Arab, African delegates walk out on U.N. LGBT rights conference” *LGBTQ Nation* (website), 7 March 2012 <http://www.lgbtqnation.com/2012/03/arab-african-delegates-walk-out-on-u-n-lgbt-rights-conference/> (date accessed: 17 August 2013).

<sup>162</sup> A. Jernow “SOGI in International Human Rights Law” *Intlawgrrls*, 9 March 2012 (website), <http://www.intlawgrrls.com/2012/03/sogi-in-international-human-rights-law.html> (date accessed: 17 August 2013).

<sup>163</sup> See copy of letter: Permanent Mission of Pakistan to United Nations, Addressed to Ms. L.D. Lasserre, President of the Human Rights Commission *No.Pol/SO/2012*, 14 February 2012 (online) <http://www.keepandshare.com/doc/3579062/oic-to-president-pdf-february-20-2012-10-22-am-67k?dn=y> (Date accessed: 13 August 2012).

<sup>164</sup> United Nations General Assembly *Universal Declaration of Human Rights* (adopted 10 December 1948) UNGA Res 217 A(III), art. 2: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to

grounds protected from arbitrary differences in treatment, including age, health status and disability” in their General Comments and Concluding Observations,<sup>165</sup> a message repeatedly articulated in face of the “denialism”<sup>166</sup> encountered at the HRC.

### **1.4.3 Human Right Council Advisory Committee Draft Reports 2012**

In the month prior to that “historic” panel discussion at the 19<sup>th</sup> session,<sup>167</sup> the Advisory Committee of the HRC, having been tasked by Resolution 16/3 with producing a report on Traditional Values of Humankind,<sup>168</sup> delivered their first draft at the 8<sup>th</sup> session of the Advisory Committee in February 2012.<sup>169</sup> This report, A/HRC/AC/8/4, was described as “deeply worrying” by one of the main INGOs concerned with SOGI issues at the UN, ARC International.<sup>170</sup> ARC points to paragraph 75 of the report which states “all international human rights agreements ...

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which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”

<sup>165</sup> For example, *supra* General Comment 20 n.70, states: “The nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of “other status” is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognised grounds in article 2, paragraph 2 [ICESCR]. These additional grounds are commonly recognised when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalisation”.

<sup>166</sup> This is a term used by P. L. Ettelbrick & A.L. Zerán *The Impact of the Yogyakarta Principles on International Human Rights Law Development: A Study of November 2007 – June 2010* Final Report (online) at 10

[http://www.asiapacificforum.net/support/issues/sexual\\_orientation/downloads/yogyakarta-principles/Yogyakarta\\_Principles\\_Impact\\_Human\\_Rights\\_Law.pdf](http://www.asiapacificforum.net/support/issues/sexual_orientation/downloads/yogyakarta-principles/Yogyakarta_Principles_Impact_Human_Rights_Law.pdf) (date accessed: 30 July 2013).

<sup>167</sup> This term “historic” was widely used to describe the event, for example see F. Jordans, "U.N. Gay Rights Protection Resolution Passes, Hailed As 'Historic Moment'" *Associated Press*, 17 June 2011 [http://www.huffingtonpost.com/2011/06/17/un-gay-rights-protection-resolution-passes-\\_n\\_879032.html](http://www.huffingtonpost.com/2011/06/17/un-gay-rights-protection-resolution-passes-_n_879032.html) (date accessed: 2 August 2013).

<sup>168</sup> *Supra* Resolution 16/3 n.150, of which paragraph 6 reads: “6. *Requests* the Human Rights Council Advisory Committee to prepare a study on how a better understanding and appreciation of traditional values of dignity, freedom and responsibility can contribute to the promotion and protection of human rights, and to present that study to the Council before its twenty-first session”.

<sup>169</sup> United Nations Human Rights Council Advisory Committee *Preliminary Study on Promoting Human Rights and Fundamental Freedoms Through a Better Understanding of Traditional Values of Humankind* A/HRC/AC/8/4, 12 December 2011.

<sup>170</sup> See ARC International “UN HRC Advisory Committee” (website) <http://arc-international.net/global-advocacy/human-rights-council/hrc-advisory-committee> (date accessed: 8 August 2013).

must be based on, and not contradict, the traditional values of humankind. If this is not the case, they cannot be considered valid” to indicate the proportion of the threat to minorities the proposal endorsed. The organisation also singled out the text as transmitting that the international community should defer to the sovereignty of States, that human rights recognition arises from “responsible behaviour” by the individual, and in promoting “the family” as a transmitter of moral values, it fails to acknowledge either the diversity of family forms or the fact that families can also be potential sites of abuse. Substantial concerns were raised<sup>171</sup>

A second draft of this report was delivered at the 9<sup>th</sup> session of the Advisory Committee<sup>172</sup> in August 2012, which did address some contentious issues that had been left unaddressed in the previous version, such as the harmful effects of traditional values and associated practices. However, notions such as “individual responsibility” caused the International Service of Human Rights, in a joint statement, to point out that:

“traditional values meant different things to different people and there were legitimate concerns about the ways that States had invoked traditional values as a defense against the application of human rights law. It was highly controversial to import the notion of individual responsibility into human rights; individual responsibility mainly came into play in respect of

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<sup>171</sup> For example, see Top 10 Concerns with the Draft Study formally submitted to the Advisory Committee in advance of the session, and was supported by 100 NGOs: ARC-International “Concerns: Draft Report on Traditional Values” (2012 webpage) [http://arc-international.net/global-advocacy/traditional\\_values\\_sign\\_on](http://arc-international.net/global-advocacy/traditional_values_sign_on) (date accessed: 4 August 2013).

<sup>172</sup> United Nations Human Rights Council Advisory Committee *Preliminary Study on Promoting Human Rights and Fundamental Freedoms Through a Better Understanding of Traditional Values of Humankind* A/HRC/AC/9/2, 1 June 2012.

the conduct of individuals acting in their capacity as agents of States or entities.”<sup>173</sup>

Although delivery of the third draft study was postponed from the 21<sup>st</sup> session to the 22<sup>nd</sup> session of the HRC in March 2013, its arrival has been further postponed until September 2013 at the 24<sup>th</sup> session of the HRC. However, in preemption of the earlier date, the Russian Federation proposed and succeeded in garnering support amongst HRC voting members (25 to 15, with 7 abstentions) for a fourth resolution on traditional values in anticipation of the report.<sup>174</sup> The lack of a clear and objective, universally applicable description of the term traditional values troubled objectors to this resolution, as the term could be used to impose the morals of the State, and thereby increase the polarisation of excluded minorities, who are legislatively subject to these rules even when in conflict with binding IHRL.<sup>175</sup>

## SECTION 2

### POLITICKING FOR HUMAN RIGHTS

This second section of this paper focuses on the contribution of the UPR mechanism and in particular the role of civil society engagement, those that *politic* [used here as a

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<sup>173</sup> Summary report published by United Nations Office of the High Commissioner for Human Rights “Human Rights Council Advisory Committee Discusses Traditional Values and Human Rights” *News* (website), 6 August 2012

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12414&LangID=E> (date accessed: 14 August 2013); International Commission of Jurists (ICJ) & the International Service for Human Rights (ISHR) “Statement to the HRC Advisory Committee on Traditional Values” August 2012 (online) <http://arc-international.net/wp-content/uploads/2012/02/Statement-to-Advisory-Committee-Aug-2012.pdf> (date accessed: 12 August 2013).

<sup>174</sup> United Nations Human Rights Council *Promoting Human Rights and Fundamental Freedoms Through a Better Understanding of Traditional Values of Humankind: Best Practice A/HRC/RES/21/3*, 9 October 2012.

<sup>175</sup> *Supra* C’mun n.149, at 5.



verb] *for* human rights in establishing a SOGI norm at the HRC. It opens by setting out the modalities of the UPR, its purpose and its relevance to both the HRC and to SOGI advocates (2.1), particularly on the issue of civil society ‘voice’ reaching the State-centric HRC practice. It then presents some original data on the *themes* that are rejected by SuRs, viewed through the regional blocs in operation at the HRC (2.2). The final, and substantial, part of this section comprises three case studies that centre on Bangladesh, Cameroon and Russia’s SOGI situations, their performance at the UPR (first cycle) and preparations for second cycle (2.3). While, these pick up the central themes and legal issues referred to in Section 1 regarding representation (universalist/ relativist claims) and sovereignty, a crucial question is what effect does engagement with the UPR have on the SOGI activism in those countries, and how can such engagement be seen to be contributing to the production of a SOGI norm internationally?

## **Section 2.1**

### **Overview of the UPR mechanism**

This section posits that the dialogic modality of the UPR allows a more nuanced space to emerge that feeds into understandings of SOGI, and potentially into norm-setting, than the typically politicised and conflictual stand-offs at the HRC (2.1.1). It describes the structure of the UPR process and section (2.1.2) explains the ‘action level’ process for assessing (through use of active verb) what kind of recommended action is expected of a State, an issue that has particular relevance to the recognition of SOGI.

#### **2.1.1 *The UPR modality***

Section 1 considered some of the reasons why the recognition of the human rights status of SOGI is so contentious in the political space of the HRC, and followed some of the implications of that debate for IHRL and the problems therein in establishing a norm regarding SOGI at the HRC. Perhaps one of the central problems at the HRC in regards to establishing a norm around a subject that resonates so many deeply-held cultural and personal values is the *modus operandi* through which these considerations are happening. Regional groups (cross cut by organisation membership, such as the OIC) make politicised and recalcitrant statements regarding human rights in resolutions that are then voted on, rather than having the space for expansive or explorative dialogue for what are genuine concerns, both opposing and accepting, to be aired in anything other than polarised terms.<sup>176</sup>

The UPR process by its very structure seems to facilitate an expansive understanding of the multiple perspectives existing in any one State on human rights issues, and how they intersect or relate to each other. Although the UPR is a State-centric process, civil society access reveals uniquely situated perspectives on how cultural values interact with the diversity of population living under the States' authority. The preparation for, and follow on from, the act of articulating such perspectives in the UPR reporting cycle builds capacity for CSOs to engage human rights practices and alliances with which to operate in the domestic setting. As the process essentially critiques the State overtly, it can also open human rights defenders and particular minorities to considerable risk, often State-sponsored and citizen-led.

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<sup>176</sup> This is well illustrated in the process the four traditional values resolutions have taken to date, described in section 1.4.

According to its founding resolution, the main goal of the Human Rights Council is to promote universal respect for “the protection of all human rights and fundamental freedoms for all”.<sup>177</sup> To help fulfill this mandate the Universal Periodic Review (UPR) was created as a cooperative mechanism that, according to the OHCHR NGO handbook, is “intended to complement, not duplicate, the work of the human rights treaty bodies.”<sup>178</sup> The UPR’s purpose is to promote and deepen respect for human rights through this provision of feedback to UN Member States on their human rights performance. In addition to the State reports that the State under Review (SuR) has to submit, the OHCHR must prepare a 10-page compilation from all the other relevant UN documents that provides an IHRL context to the submissions (this includes reports of the Treaty bodies, Special Procedures and other relevant documents). Further and of great relevance to the process, civil society actors have the opportunity, in the period following the SuR’s initial State Report, to deliver reports on their State’s performance, and speak through UN-accredited NGOs at various point in the UPR process.

### ***2.1.2 The first cycle of the UPR 2008 – 2012***

The first cycle of the UPR process began in 2008, in which each year 48 UN Member States’ human rights performances were examined by fellow UN Member States.<sup>179</sup> A three-member HRC committee (troika) oversees the preparation and presentation of

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<sup>177</sup> *Supra* Resolution 60/251 n.57.

<sup>178</sup> United Nations Office of the High Commissioner for Human Rights *Working with the United Nations Human Rights Programme: A Handbook for Civil Society* 2<sup>nd</sup> ed, (United Nations, 2008, New York and Geneva), HR/PUB/06/10/Rev.1, at 157 (online) <[http://www.ohchr.org/EN/AboutUs/CivilSociety/Documents/Handbook\\_en.pdf](http://www.ohchr.org/EN/AboutUs/CivilSociety/Documents/Handbook_en.pdf)> (date accessed: 20 July 2013).

<sup>179</sup> Following a review of the system – see United Nations Human Rights Council *Review of the work and functioning of the Human Rights Council* A/HRC/RES/16/21, 12 April 2011 (Annex I C § 6) – the modality for the 2<sup>nd</sup> round of the UPR that began in 2012 now hears 42 States per year, with slightly longer sessions.

information from the State under Review (SuR), NGOs and the UN regarding the SuR's adherence to a range of human rights criteria. Each SuR then presents a self-assessment of its human rights record. Member States comment on this and issue recommendations. The government of the SuR has the choice to accept, reject, provide a general answer, or ignore these recommendations. The State is obliged to seek to fulfill its accepted recommendations.<sup>180</sup>

Further, and of particular note to this paper to indicate the specificity of the action that States agree to take, 'action level' categories have been designed that are indicated by the type of primary action verb used by the Recommending State (hereafter RS) in delivering a recommendation. These can be divided into five types, ranked on a scale from 1 (minimal action), 2 (continue doing), 3 ((to consider), 4 (general action) to 5 (specific action).<sup>181</sup> The verb used defines whether the SuR is requested only to 'consider' the action or to complete it. For instance, the Czech Republic recommended Angola to "*Decriminalise consensual same-sex activity between adults*", which is a category 5 recommendation, whereas a recommendation made by Belgium asking Benin to "*Consider decriminalising homosexual activities between consenting adults*" is only a category 3 recommendation.<sup>182</sup> In his recent analysis of

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<sup>180</sup> *Supra* McMahon n.59, at 9.

<sup>181</sup> Category 1 includes recommendations requiring 'minimal action' (indicated by verbs such as 'call on', 'seek', 'share'); category 2 includes recommendations requiring states to 'continue' a certain action indicated with verbs such as 'continue', 'maintain', 'persevere', 'persist', 'pursue'); category 3 recommendations require states to 'consider' a certain action ('analyse', 'consider', 'envisage', 'envision', 'examine', 'explore', 'reflect upon', 'revise', 'review', 'study'); category 4 recommendations request states to undertake a general action ('accelerate', 'address', 'encourage', 'engage with', 'ensure', 'guarantee', 'intensify', 'promote', 'speed up', 'strengthen', 'take action', 'take measures or steps towards'); and finally category 5 recommendations ask for specific action from states ('conduct', 'develop', 'eliminate', 'establish', 'investigate', 'undertake', as well verbs that indicate direct legal action: 'abolish', 'accede', 'adopt', 'amend', 'implement', 'enforce', 'ratify'), see UPR-info "Action Categories" 2012 (webpage) [http://www.upr-info.org/IMG/pdf/Database\\_Action\\_Category.pdf](http://www.upr-info.org/IMG/pdf/Database_Action_Category.pdf) (date accessed 21 July 2013).

<sup>182</sup> This example is quoted from M.D., Schlanbusch "Sexual Orientation and Gender Identity Rights in the Universal Periodic Review", Dissertation submitted in partial fulfillment for the degree: Master in

the HRC, Rathberger notes that amongst the 21,353 recommendations issued through the first cycle of the UPR (sessions 1-12), the more specific or action-oriented the recommendations the lower the acceptance rate.<sup>183</sup>

Interestingly to the subject of the present paper, however, he notes that explicit or outright rejections of recommendations tended not to be articulated, reluctance being coded in such terms as “taking note of recommendations” or other general responses.<sup>184</sup> As will be seen in the data presented below, this conciliatory or diplomatic approach appears to apply to SOGI much less often, the subject of which has frequently elicited strong and unambiguous rejection from African (hereafter AF) and Asian & Pacific (hereafter AS+PAC) bloc States particularly, in all action categories. Their responses to recommendations reflect issues of sovereignty and tradition, most often in terms of protecting public morality. The overall acceptance rate for all recommendations in the first cycle of the UPR was 73%, however acceptance of the recommendations related to recognition of SOGI-related rights was only 36%.<sup>185</sup>

As the construction of the HRC itself is based on geographical group membership, and groups often coordinate responses, influenced by the politics of the organisations they are in (such as the Organisation of Islamic Cooperation),<sup>186</sup> this pattern found in

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Human Rights Practice. School of Global Studies, University of Gothenburg School of Business and Social Sciences, University of Roehampton Department of Archaeology and Social Anthropology, University of Tromsø, Spring 2013 at 32. [http://www.upr-info.org/IMG/pdf/schlanbusch\\_-\\_sogi\\_rights\\_in\\_the\\_upr\\_-\\_2013.pdf](http://www.upr-info.org/IMG/pdf/schlanbusch_-_sogi_rights_in_the_upr_-_2013.pdf) (date accessed: 22 July 2013).

<sup>183</sup> T. Rathgeber *Performance and Challenges of the UN Human Rights Council: An NGOs' View* (Friedrich-Ebert-Stiftung, February 2013, Berlin) at 9.

<sup>184</sup> *Ibid.*, at 9.

<sup>185</sup> *Supra* Schlanbusch n.182, at 35.

<sup>186</sup> *Supra* OIC n.20.

SuRs' UPR responses reflects voting patterns and responses long witnessed in the HRC regarding SOGI – Western States promote a SOGI-inclusive stance regarding explicit incorporation in human rights norms, Islamic and African States are SOGI-rejectionist.

## **Section 2.2**

### **Sexual orientation data in the UPR first cycle**

This section provides overview data on SOGI from the first cycle of the UPR that shows weightings that reveal just how far the African/Asian-Pacific blocs dominate the rejections of SOGI recommendations (2.2.1). The second part (2.2.2) produces information that breaks these negative responses down by the three main themes identified in section 1.2: non-discrimination, decriminalisation and sensitisation that appear most frequently in the data. These indicate what both local CSOs and INGOs are lobbying for, and speaking through the loudspeaker of 'friendly' State endorsement, combining towards setting a universal SOGI norm.

#### ***2.2.1 Overview of first cycle***

From a total of 21,353 recommendations to all States in the first cycle, only 493 (2.3%) referred to sexual orientation and gender identity (across the five action types). Of these 179 (36%) were 'accepted' – 18 by the African group, 29 by the Asian & Pacific group, 60 by the Eastern European Group; (EEG) group, 36 (by the Latin American and Caribbean Group (GRULAC) and 36 by the Western European and Others Group (WEOG) group. These 493 recommendations were issued by only 39

States in total.<sup>187</sup> Schlanbusch points out that 76% of these came from 22 (of 28) WEOG States, 16% from two EEG States (Slovenia and the Czech Republic), 8% from six GRULAC States, and none from the African bloc.<sup>188</sup> The only one that came from the AS+PAC bloc (Bangladesh) recommended that Tonga's criminal laws regarding sodomy be continued.<sup>189</sup>

Of those recommendations that elicited negative response regarding SOGI (where no meaningful action might be expected) 314 (63.5%) were either 'rejected', given a 'general response' or received 'no response' at all.<sup>190</sup> Of these, Africa outright *rejected* 107 recommendations (34% of all those rejected) with negligible responses to a further 23 (8%).<sup>191</sup> While at the other extreme, WEOG rejected 15, with negligible response to a further 5. As mentioned in section (1.3.2) above, African countries account for around half of the world's criminalising States, and as described here, account for almost half (42%) of the world's total UPR rejections of recommendations regarding SOGI.

Of those 314 responses that can be read as negative, 223 are outright rejections and 91 responses comprise general responses or no comment at all. Each one of these negative responses can be seen as a statement of how States' understanding of how

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<sup>187</sup> The conclusions of the issues analysis by UPR-info on the first eight sessions of the UPR mention that SOGI-related human rights are less endorsed by States in comparison to other human rights issues would seem to be confirmed by the above figure UPR Info. "Issue Analysis: Lesbians, Gays, Bisexuals, Transexuals - Sessions 1-8" (2011 webpage) [http://www.upr-info.org/IMG/pdf/issue\\_analysis\\_lgbts.pdf](http://www.upr-info.org/IMG/pdf/issue_analysis_lgbts.pdf) (date accessed: 22 July 2013).

<sup>188</sup> *Supra* Schlanbusch n.182.

<sup>189</sup> *Infra* Tongan situation n.198.

<sup>190</sup> The information here is derived from search term 'recommendations only' on UPR-info database ('all SuRs', 'all RSs' and 'All issues') in the first cycle, then by issue ('sexual orientation and gender identity'), and then by 'response', UPR-info "Database" <http://www.upr-info.org/database/> (date accessed: 12 July 2013).

<sup>191</sup> Of the outright rejections, 70 (65%) were in action level 5, (22%) at action level 4, 13 (12%) at level 3, and none at either action levels 2 or 1.

traditional and cultural values on what they consider to be ‘sensitive’ issues “trumps” (to reverse Dworkin’s thesis)<sup>192</sup> human rights obligations as interpreted in the body of practice and other sources of law referred to in section 1.2 of this paper.

### ***2.2.2 Thematic breakdown of rejections***

In terms of the subject content of the recommendations to SuRs, this paper identifies three areas of SOGI advocacy that present as most frequently cited across the range of NGO UPR submissions - decriminalisation, discrimination and public sensitisation and training (subsumed under the category of ‘awareness’ in this paper). The principle of non-discrimination is an issue of over-arching importance and application that inheres in many of the issues that are categorised under the ‘other’ category in the limits of the present paper.<sup>193</sup> Once the law is officially neutral with regard to same-sex relationships, the discriminatory nature of differential treatment based on sexual orientation becomes apparent,<sup>194</sup> which is why decriminalisation is such a vital first step in non-discrimination work regarding SOGI. Public sensitisation and training are critical building blocks in the eradication of stigmatisation of diverse SOGI, involving work with judiciary, police, prison, health workers and others involved in the delivery of services to the public. Pivotal to that work are SOGI human rights defenders who gather and disseminate evidence that informs that education in national settings.

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<sup>192</sup> R. Dworkin *Taking Rights Seriously* (Harvard University Press, 2007, Cambridge, MA) at xv.

<sup>193</sup> These issues include such important rights protecting freedom of expression, assembly and expression, same-sex relationship and family recognition, health (including HIV/AIDS), sex work, and various others, which also appear in Treaty Body practice, tend to be less numerous cited across the range of UPR NGO submissions and Responding State recommendations.

<sup>194</sup> *Supra* ICJ Casebook n. 64, at 4.



As fourteen recommendations held content that spans two of the categories listed here, there is a total of 507 recommendations,<sup>195</sup> of which 171 (33.5%) are ‘accepted’ (across all five action categories): 107 (62%) regard discrimination, 13 (7%) regard decriminalisation, 21 (12%) around public awareness, and 33 (19%) coming into the ‘other’ category (see Table 2 in Annex)<sup>196</sup> Regarding the question of what evidence is there of the actual effect of the UPR on national legislations, the 7% decriminalisation figure is interesting as it indicates five countries accepted Action level 5 recommendations (take specific action) to decriminalise sexual orientation in the first cycle of the UPR.<sup>197</sup>

Of the 336 (66.5%) that received a negative response by the SuR: 120 (35%) concern discrimination, 158 (47%) pertain to decriminalisation, 25 (7%) to public awareness, and 49 (14%) in the ‘other’ category. It is clear that discrimination and decriminalisation are by far the most frequently rejected thematic concern by these SuRs.

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<sup>195</sup> The data here on the key words refers to the number of discreet entries in which the search term appears in the database. Where it might appear multiple times in one entry - that is not recorded. Where the key word appears in a number of different Responding States entries to one country, that is recorded, where for example, five countries (Australia, Canada, France, Norway and Spain) asked the Seychelles to take immediate action (level 5 Action) to decriminalise their ‘homosexuality’ laws, this counts as five occurrences, as each occurrence offers the SuR opportunity to choose some form of rejection of the recommendation. See United Nations Human Rights Council *Report of the Working Group on the Universal Periodic Review: Seychelles A/HRC/18/7*, 11 July 2011 at 17.

<sup>196</sup> This information is tabulated in the Annex to this paper, at Table 2.

<sup>197</sup> *Ibid* the Seychelles; Nauru, United Nations Human Rights Council *Report of the Working Group on the Universal Periodic Review Nauru A/HRC/17/3*, 8 March 2011; Palau, United Nations Human Rights Council *Report of the Working Group on the Universal Periodic Review: Palau A/HRC/18/5*, 11 July 2011; Solomon Islands, United Nations Human Rights Council *Report of the Working Group on the Universal Periodic Review: Solomon Islands A/HRC/18/8*, 8 March 2011; Sao Tomé & Príncipe, United Nations Human Rights Council *Report of the Working Group on the Universal Periodic Review: Sao Tome & Principe A/HRC/17/13*, 16 March 2011. It appears that Sao Tomé & Príncipe decriminalised homosexuality in late 2012 – according to the ILGA 2013 report, *supra* n.137, at 56: “Penal Code of September 16, 1886, as amended in 1954, ... Articles 70 and 71 ... [Portuguese]. It appears that a new Penal Code was adopted in 2012, without the .. [“acts against nature”] ... provisions. However, it is not clear whether or not the new Penal Code has already entered into force.”

One particularly novel use of this human rights mechanism (the UPR) occurred when Bangladesh recommended Tonga to retain its same sex (male to male) criminalisation law (crime of ‘sodomy’).<sup>198</sup> Tonga rejected this recommendation, but it also rejected recommendations from Canada, Czech Republic and the Netherlands urging Tonga to amend the legislation.<sup>199</sup> In the second cycle of the UPR in 2013, there is no mention of sexual orientation in the initial report from the Tongan State party, but they did reject recommendations (from Spain, France, Norway, the US and, again, Canada) to decriminalise.<sup>200</sup> But what this single recommendation illustrates is a potential for the UPR to be used directly to promote the denial of human rights.

This data does confirm that although a small issue in terms of overall recommendations (2.3%), SOGI issues evoke quite intense responses at the UPR, with two thirds of them being rejected, unsurprisingly by African and Islamic States. The UPR process has been especially useful at bringing data in from the ground level of these ‘opposing States’ that demonstrates exactly what the ‘protection’ of morals or sovereignty costs their minority citizens in terms of human rights. Patterns of discrimination and HRVs can begin to be described through this ‘pool’ of information

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<sup>198</sup> The law in Tonga conflates sodomy and bestiality, and can bestow 10 years on the offender (only male sodomy is mentioned), possibly as well as whipping (S.136, S142 substituted by Act 9 of 1987), and, for the purpose of evidence, “shall be deemed complete on proof of penetration only” (S.140), Laws of Tonga, Criminal Offences [Cap 18] 1988 Edition); see ILGA 2013 report, *supra* n.137, at 108. Incidentally, Tonga, like a number of other Polynesian islands, has a long history of a ‘third sex’ population (the *fakaleiti*) who are highly integrated in traditional society, just as are the *fa’afafine* of Samoa, the *pinapinaaine* of Tuvalu and Kiribati, the *mahu* or *rae rae* of Tahiti and Hawaii and the *vakasalewalewa* of Fiji (see, S. Farran & A. Su’a “Discriminating on the Grounds of Status: Criminal Law and the Fa’afafine, and Fakaleiti in the South Pacific” *Journal of South Pacific Law* 9(1) (2005) (online) <http://www.paclii.org/journals/fJSPL/vol09no1/5.shtml#> (date accessed: 14 July 2013). In Tonga, there appears to be little sexual orientation advocacy, see LGBT Peace Corps Alumni (webpage) at <http://lgbpcv.org/2013/01/15/lesbians-non-existent-in-tonga-a-current-peace-corps-volunteer/> (date accessed: 14 July 2013).

<sup>199</sup> See United Nations Human Rights Council *Report of the Working Group on the Universal Periodic Review: Tonga A/HRC/8/48*, 5 June 2008, at para. 58.

<sup>200</sup> United Nations Human Rights Council *Report of the Working Group on the Universal Periodic Review: Tonga, A/HRC/23/4*, 21 March 2013.

now made available. The practices required to operate at this level feed into building stronger skills bases amongst sexual and gender minority communities, and alliances are being formed. However, the limit of the process is that there is no accountability mechanism to impel offending States to align their behavior with that of their Convention obligations, so that States like Russia (see case study 3) can forge ahead into their effective dismantling of the meaning of these agreements, and ignore the sources of law that inform the principles therein.

### **Section 2.3**

#### **Three case studies on the effects of UPR engagement**

Regarding the question of what use the UPR can be seen to have to SOGI activists, the paper now looks into three countries situations, Cameroon, Bangladesh and Russia, where the human rights of sexual and gender minorities are seriously compromised, both in terms of public responses to SOGI and in their respective legislative codes. By examining the wording of State responses to UPR recommendations and the questions they throw up regarding IHRL in relation the limits of sovereign autonomy, and looking at the situation on-the-ground since the first UPR cycle, it is possible to get a sense of what impact the protection of ‘traditional values’ plays out on sexual and gender minorities in these States, and what difference engagement with the UPR has made.<sup>201</sup>

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<sup>201</sup> To capture a range of issues that are frequently referenced in advocacy contexts, I have chosen case studies from: Cameroon as a predominantly Christian African post-colonial State where there is a surge in homophobia reported over the past number of years and that criminalises same sex sexual relationships; Bangladesh as it is a Muslim country, yet under British colonial legislative code that has been amended by its neighbours, but also has a ‘third sex’ population who are not recognised or protected in law; and Russia, which decriminalised ‘homosexuality’ in 1993, but has recently adopted a

### 2.3.1 Cameroon - case study 1

#### *Recommendation Response*<sup>202</sup>

“Cameroon has taken note of the request by many delegations to remove homosexuality from the penal code. This is an extremely sensitive issue in the cultural environment and whereas Cameroon understands the wishes of the international community, it must balance them with this sensitivity.”<sup>203</sup>

There is no mention of same-sex relations or homosexuality in the Cameroon’s State report to the UPR in late 2008, although “Protection of minorities” and “Equal rights and obligations for all” “without distinction” are listed as binding Constitutional imperatives in paragraph 8.<sup>204</sup> This paper will briefly examine two of the notions

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federal law that bans the “promotion” of “non-traditional sexual relationships” to minors, and where significant blocks to SOGI advocacy have been mounted through legislative initiatives, and where neo-fascist and Orthodox Christian influences deeply inform public opinion.

<sup>202</sup> Seven recommendations were made to Cameroon in 2009 regarding decriminalisation and discrimination and public awareness: four level 5 recommendations by Canada, Luxembourg, Czech Republic and Brazil, two level 4 recommendations by France and Mexico, and one level 3 recommendation from Argentina. Canada asked Cameroon to “... (b) amend its Criminal Code to abolish the criminalisation of homosexual acts to conform to the provisions of the ICCPR, particularly articles 2 and 26, and the provisions of the African Charter of Human Rights and Peoples’ Rights.” Luxemburg joined the others recommending Cameroon to “... (c) reform its legislative arsenal on this point and establish effective protection of homosexuals against discrimination and attacks.” Czech Republic recommended “...(d) the decriminalisation of same-sex activity between consenting adults and adoption of measures to promote tolerance in this regards, which would also facilitate more effective educational programs for the prevention of HIV/AIDS.” Brazil recommended “... (c) to amend domestic law regarding homosexuality, with a view to decriminalise it;” France recommended “...respect international provisions in the area of protection of minorities and vulnerable groups... (c) and non-discrimination against homosexuals.” Mexico asked that “... (b) that all national legislation that criminalised homosexuality be brought into line with the Universal Declaration on Human Rights and other relevant instruments.” “Argentina recommended Cameroon considering the possibility of reforming the laws criminalising homosexuality and adapting them to international standards”, United Nations Human Rights Council, *Report on the Working Group on the Universal periodic Review, Cameroon A/HRC/11/21*, October 12, 2009, paras. 20, 22, 25, 28, 29, 32, and 46.

<sup>203</sup> United Nations Human Rights Council *Final report of the Working Group: Cameroon A/HRC/11/21*, 29 May 2009 at para. 37. It should be noted that Cameroon only rejected 15 of the 61 recommendations it received (seven of which) related to SOGI, see UPR-info “Responses to Recommendations – Cameroon” at 1 [http://www.upr-info.org/IMG/pdf/Recommendations\\_to\\_Cameroon\\_2009.pdf](http://www.upr-info.org/IMG/pdf/Recommendations_to_Cameroon_2009.pdf) (date accessed: 25 July 2013).

<sup>204</sup> United Nations Human Rights Council *National Report: Cameroon A/HRC/WG.6/4/CMR/1*, 11 December 2008.

embedded in the logic that was forwarded in Cameroon's response to recommendations in its first UPR in 2009: balancing rights, and the protection of human rights defenders (HRDs)

### ***Balancing rights in Cameroon***

As a participant to every rejection of the inclusion of SOGI in the HRC mandate since 2003<sup>205</sup> and a signatory to all four 'traditional values' resolutions (see section 1.4), the emphasis on the terms "cultural" and "sensitivity" in Cameroon's 2009 response is unsurprising. Cameroon's Fourth Periodic Review under the CCPR happened to coincide with Cameroon's first cycle UPR process, and in its *Follow-Up State Party Report* of May 2010, the logic behind this UPR rejection was given some articulation. Cameroon said that it did not see any conflict with its criminalisation of "l'homosexualité"<sup>206</sup> and (ICCPR) Convention obligations, as no rights were being denied to individuals based on their sexual orientation.<sup>207</sup> Cameroon had previously iterated this perspective in 2007 to the Working Group on Arbitrary Detention<sup>208</sup> where it claimed what was involved was prosecution for practices contrary to law and to the moral standards of Cameroonian society – a claim that was roundly refuted as

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<sup>205</sup> Cameroon is a member of the OIC, although interestingly only with a Muslim population of 18.3% in a population of nearly 20 millions, 70.3% of whom are recorded as Christian, see Pew Research Global "Religious Landscape, Table: Religious Composition by Country 2012", 2012 (webpage) at 45 <http://www.pewforum.org/files/2012/12/globalReligion-tables.pdf> (date accessed: 23 July 2013).

<sup>206</sup> The actual text of the law that Cameroon is upholding in Penal Code of 1965 and 1967, as amended in 1972, article 347a, 'Whoever has sexual relations with a person of the same sex shall be punished with imprisonment from six months to five years and fine of from 20,000 to 200,000 francs.' "Est puni d'un emprisonnement de six mois à cinq ans et d'une amende de 20.000 à 200.000 francs toute personne qui a des rapports sexuels avec une personne de son sexe", (translation of text from ILGA 2013 report n.132, at 45).

<sup>207</sup> United Nations Human Rights Committee *Réponses du gouvernement du Cameroun à la liste des points à traiter (CCPR/C/CMR/Q/4) à l'occasion de l'examen du quatrième rapport périodique du Cameroun (CCPR/C/CMR/4) CCPR/C/CMR/Q/4/Add.1*, 3 May 2010, at para. 79: "L'incrimination de l'homosexualité n'est pas, du point de vue de l'ordre juridique camerounais, contraire aux dispositions du Pacte en ce sens qu'il n'est pas refusé aux personnes homosexuelles le bénéfice d'un droit ou d'une prestation en raison de leur orientation sexuelle presume".

<sup>208</sup> United Nations Working Group on Arbitrary Detention *Opinion No. 22/2006 (Cameroon)*, A/HRC/4/40/Add.1, 2 February 2007, at para. 16.

explained in relation to the case of Mongoche below. In that 2007 response the government also stated that homosexuality is not a “value” in Cameroon, and seen to be unethical.<sup>209</sup>

But the rationale in Cameroon’s response to UPR recommendations is problematic, on both the factual and IHRL levels. Firstly, at the factual there had been a number of cases brought to public attention of human rights violations resulting from targeting people of diverse sexual orientation in Cameroon. The case of Mr. Alim Mongoche who had HIV, arrested with 10 other men in 2005 under the 347a Act, who died soon after his release one year later because he could not access his HIV drugs while incarcerated, was widely reported nationally and internationally.<sup>210</sup>

Soon after, a spate of arrests began, and have continued since.<sup>211</sup> In a 2007 report, Alternatives-Cameroun documented that 78 people had been imprisoned in Douala central prison for engaging in same-sex sexual relations from 1997 to 2007.<sup>212</sup> In 2006, a newspaper published a list of Cameroon’s “Top 50 homosexuals” (politicians, public figures and activists) presented negatively.<sup>213</sup> The media continues to publish

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<sup>209</sup> *Supra* CCPR/C/CMR/Q/4/Add.1 n.207, at para. 83, “En l’état actuel de la culture africaine, l’homosexualité n’apparaît pas comme une valeur admise par la société camerounaise et est globalement conçue comme contraire à la morale.”

<sup>210</sup> *Supra* WG on Arbitrary Detention n.208, at para. 18, “The source adds that the Government’s contention that issues of morality are solely within the jurisdiction of States themselves is unacceptable: to agree to it would be to open the door to the removal from international control of a potentially considerable number of domestic laws that could give rise to interference in people’s private lives. The sources reassert that the deprivation of liberty of the above-mentioned 11 persons was, for all those reasons, arbitrary”; United Nations Office of the High Commissioner for Human Rights *Born free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law* (OHCHR, 2012, New York) at 36.

<sup>211</sup> BBC News “Row Over Cameroon ‘Gay’ Witchhunt”, 6 February 2006 <http://news.bbc.co.uk/2/hi/africa/4685298.stm> (date accessed: 12 August 2013).

<sup>212</sup> Alternatives-Cameroun, “*Projet Atteintes aux bonnes mœurs* (Project 347 bis)” (unpublished, but referred to in Human Rights Watch *Guilty by Association: Human Rights Violations in the Enforcement of Cameroon’s Anti-Homosexuality Law* (HRW, 2013, New York)).

<sup>213</sup> This article was subsequently printed or referenced in at least 34 news articles in 19 publications.

sensational stories about alleged gay and lesbian individuals.<sup>214</sup> Since January 2010, at least 28 persons have had homosexuality prosecutions initiated against them; at least eight have been convicted, although two were subsequently acquitted on appeal.<sup>215</sup>

According to Human Rights Watch the reality of article 347 is that “innocent people are framed, spied upon by neighbors,” many are being subjected to extortion and bribery,<sup>216</sup> and there are numerous reports of people being beaten by police, humiliated with flawed anal examinations, raped in custody, disowned by parents as a result of arrest, and emotionally scarred by traumatic encounters with law enforcement”.<sup>217</sup> As the UN Human Rights Committee observed in their consideration of Cameroon’s Fourth Periodic Review in 2010, “[f]urthermore, arrests of homosexuals were routinely reported in the press, adding to their stigmatisation and exposing them to violence in detention”.<sup>218</sup> The climate of fear is such that, as widely acknowledged,<sup>219</sup> arrests are made on the basis of third party testimonies,<sup>220</sup> a situation recognised in *HJ (Iran)* where the court accepted that a Cameroonian man was fleeing persecution on the basis of his sexual orientation.<sup>221</sup>

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<sup>214</sup> *Supra* HRW n.212: Human Rights Watch interviews, Yaoundé and Douala, October 2012.

<sup>215</sup> *Ibid* HRW at 9.

<sup>216</sup> International Gay & Lesbian Human Rights Commission, “Nowhere to Turn,” 2011 at 89 (online): <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/484-1.pdf> (date accessed: 23 July 2013).

<sup>217</sup> *Supra* HRW n.212, at 51. This report also discusses these issues in the context of ten extensive case studies, all referring cases since 2010.

<sup>218</sup> United Nations Human Rights Committee *Fourth periodic report of Cameroon CCPR/C/SR.2725*, 15 April 2011, at para. 34.

<sup>219</sup> See generally, Human Rights Watch *Guilt By Association: Human Rights Violations in the Enforcement of Cameroon’s Anti- Homosexuality Law*, March 2013 (online) <http://www.hrw.org/reports/2013/03/21/guilty-association> (date accessed: 25 July 2013).

<sup>220</sup> *Supra* CCPR/C/SR.2725 n.218, at para. 34.

<sup>221</sup> *HJ (Iran) v. Secretary of State for the Home Department; HT (Cameroon) v. Secretary of State for the Home Department*, Supreme Court of the United Kingdom (7 July 2010).

Despite all of the above, the Working Group's *Draft Report* on Cameroon for its second cycle UPR in 2013, records: "The delegation stressed that homosexuals were not pursued and that the few cases that had been brought to the attention of the international community had been cases recorded in public places. We must therefore put this phenomenon in quantitative terms is [sic] negligible".<sup>222</sup>

In terms of IHRL, Cameroon's reliance on the concept of criminalising one group within the population so to protect the moral values of the majority, and as mentioned in section 1.2 of this paper, the UN Human Rights Committee found in *Toonen v. Australia* (referring to the logic applied on *Dudgeon v. United Kingdom*, (ECtHR, 1981)<sup>223</sup> that criminalisation of homosexuality breaches both article 17 (privacy) and article 26 (non-discrimination) in the ICCPR,<sup>224</sup> and since then the Committee has encouraged States to comply with this principle.<sup>225</sup> In questioning the Cameroonian delegation in their Fourth Periodic Review of the ICCPR, Mr O'Flaherty pointed out the right for an individual to choose their sexual orientation "did not appear guaranteed"<sup>226</sup> in this climate of moral protection created by criminalisation in Cameroon.

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<sup>222</sup> United Nations Human Rights Council *Draft Report of the Working Group on the Universal Periodic Review: Cameroon* A/HRC/WG.6/16/L.13, 3 May 2013, at para. 57.

<sup>223</sup> *Supra Dudgeon* n.75.

<sup>224</sup> *Supra Toonen v. Australia* at n.77.

<sup>225</sup> See for example, UN Human Rights Committee *Concluding Observations* for the following all of which reference arts. 17 and 26: United Nations Human Rights Committee *Concluding Observations of the Human Rights Committee: Sudan*, CCPR/C/SDN/CO/3, 29 August 2007; United Nations Human Rights Committee *Concluding observations of the Human Rights Committee: Barbados*, CCPR/C/BRB/CO/3, 11 May 2007; United Nations Human Rights Committee *Concluding observations of the Human Rights Committee: Botswana*, CCPR/C/BWA/CO/1, 24 April 2008; United Nations Human Rights Committee *Concluding observations of the Human Rights Committee: Zambia*, CCPR/C/ZMB/CO/3, 9 August 2007.

<sup>226</sup> *Supra* CCPR/C/SR.2725 n. 218, at para. 25.



This observation recalls the issue brought up in *Leung*<sup>227</sup> and also in *Nadan & McCoskar*, where the Court found that public morality was indeed a State interest but has to be subjected to a proportionality test given the importance of the rights involved. More lately it recalls *Fedotova v. Russian Federation* where the CCPR quotes its own General Comment 34, that spoke of the limitations any one tradition or religion inhere, thereby the protection of morals must be understood in the light of universality.<sup>228</sup> Mr O Flaherty's comment regarding the right to choose one's sexual orientation implies rights involved in self-identification that extend to both sexual orientation and gender identity, such as those argued in *City of Chicago v. Wilson*.<sup>229</sup>

The 2008 UN OHCHR compilation report lists only one direct reference to homosexuality on Cameroon,<sup>230</sup> already referenced above.<sup>231</sup> However, in its 2013 compilation for Cameroon's second cycle at the UPR, the OHCHR gathered a body of Treaty Body practice relevant to the recommendations it received to decriminalise same sex sexual relations.<sup>232</sup> The compilation cited two CAT Concluding

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<sup>227</sup> *Supra Leung* n.93, at para. 46: The Hong Kong Court of Appeal stated in "Any restriction on a constitutional right can only be justified if (a) it is rationally connected to a legitimate purpose and (b) the means used to restrict that right must be no more than is necessary to accomplish the legitimate purpose in question".

<sup>228</sup> United Nations Human Rights Committee *Fedotova v. Russian Federation*, Communication No. 1932/2010, 30 November 2012, at para. 10.5: "In this respect, the Committee recalls, as stated in its General Comment No. 34, that "the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations ... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition'. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination", United Nations Human Rights Committee, *General Comment 34*, CCPR/C/GC/34, 12 September 2011, at para. 32.

<sup>229</sup> *City of Chicago v. Wilson*, Supreme Court of Illinois, United States (26 May 1978) (where the Court relied on *Roe v. Wade*, United States Supreme Court, 1973, to establish that not all constitutional protections have to be textually explicit, as the values (such as personal autonomy) underpinning them are already encoded in the Constitution).

<sup>230</sup> United Nations Human Rights Council *Office of the High Commissioner for Human Rights Compilation: Cameroon A/HRC/WG.6/4/CMR/2*, December 2008.

<sup>231</sup> *Supra* WG on Arbitrary Detention n.2028, at para. 23, which said, "... the criminalisation of homosexuality in Cameroonian law is incompatible with articles 17 and 26..." of the ICCPR.

<sup>232</sup> United Nations Human Rights Council *Office of the High Commissioner for Human Rights Compilation: Cameroon A/HRC/WG.6/16/CMR/2*, 11 February 2013. In light of the repeal of the

Observations of relevance regarding violence against women and girls,<sup>233</sup> and fundamental legal safeguards.<sup>234</sup> It also cited the CCESR recommendation on institutional framework building,<sup>235</sup> and CEDAW on gender-based violence.<sup>236</sup>

### ***Protection on the ground***

The final two references in the OHCHR's compilation concern the second subject of this case study – the protection of human rights defenders (HRDs) and people who are perceived to be of diverse SOGI. It points to the Statement made by the Spokesperson for the High Commissioner for Human Rights, regarding homophobia in Cameroon focusing on the targeting of HRDs and individuals for their perceived SOGI, and the requirement for the State to step up its efforts to combat violence and discrimination based on SOGI).<sup>237</sup> Finally, it refers to the HRC's identification of issues that require the Council's attention.<sup>238</sup>

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Chilean law in 1999, following its 2007 Concluding Observations on Chile (*supra* n.106, at para. 16), the UN Human Rights Committee in 2010 said it “remains deeply concerned” about the situation in Cameroon, recalled other mechanisms on the issue, called for “immediate steps” to decriminalise. “in order to bring its law into conformity with the Covenant”, see United Nations Human Rights Committee *Concluding observations of the Human Rights Committee: Cameroon CCPR/C/CMR/CO/4*, 4 August 2010, at para. 12.

<sup>233</sup> *Ibid* at para. 30.

<sup>234</sup> *Ibid* at para. 11.

<sup>235</sup> United Nations Committee on Economic, Social and Cultural Rights, Implementation of the International Covenant on Economic, Social and Cultural Rights, E/C.12/CMR/CO/2-3, 10 July 2010, at para. 20 (concerning the institutional framework of Cameroon, including “the modernisation of the judiciary, the creation of a national human rights institution with enhanced powers, the subordination of the penitentiary system to the Ministry of Justice, the creation of a Human Rights and International Cooperation Directorate within the Ministry of Justice and the establishment of a police oversight division”).

<sup>236</sup> United Nations CEDAW Concluding observations of the Committee on the Elimination of Discrimination against Women CEDAW/C/CMR/CO/3, 10 February 2009, at paras. 26–27.

<sup>237</sup> See United Nations Office of the High Commissioner for Human Rights “Statement made by the Spokesperson for the United Nations High Commissioner for Human Rights”, 16 November 2012 <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTSpeechesandstatements.aspx> (date accessed: 28 July 2013).

<sup>238</sup> United Nations Human Rights Council *Human Rights Situations that Require the Council's Attention A/HRC/21/49*, 7 September 2012 at 37 (reports two individuals violently attacked at the venue of an officially banned HIV/AIDS workshop, for Men who have Sex with Men (MSM) in Yaounde, and police breakup of another group with 14 subsequent arrests in Maroua).

On the consideration of how engagement with the UPR process has changed situations on the ground, the inclination is to search in positive terms. There is no doubt that awareness of SOGI has much increased in Cameroon particularly since 2009, and there is evidence of SOGI coalitions emerging with a human rights focus that spreads through SOGI communities and through their work, analysis and engagements. But so too is the public articulation of outrage and violence against people who identify as LGBT is on the increase in Cameroon. This rise in homophobia, including hate speech and public manifestations of intolerance and prejudice,<sup>239</sup> is contributed to by the authorities, both State and religious, and in the media in the country.

Patrick Awondo, a scholar of African sexualities, described the two issues behind the rising tensions that are being exploited in the political arena currently. They feed directly into the notions that inform the dialogue on traditional values. He says, firstly, of ‘westernisation’, in relation to SOGI, “simply put, homosexuality has always existed, but some of the current forms of gay self-identification and gay activism originated elsewhere, then inspired similar developments in other countries, including countries in Africa.”<sup>240</sup> This then would speak to the problems of *identity* language over *status* terms when building public awareness strategies. The second observation Awondo makes is about what he calls post-colonial tensions: “For example, increased funding from the European Union to Cameroonian groups serving homosexuals provoked outrage from some in the news media and in politics in 2011”.

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<sup>239</sup> For one example of many, see Pink News “Cameroon: Over a hundred take part in anti-gay rally targeting suspected gay friendly bars”, 21 August 2013 (website) <http://www.pinknews.co.uk/2013/08/21/cameroon-over-a-hundred-take-place-in-anti-gay-rally-targeting-suspected-gay-friendly-bars/> (date accessed: 24 August 2013).

<sup>240</sup> E. O. Lembembe “What Traditional African Homosexuality Learned from West”, 8 May 2012 *Erasing 76 Crimes* (website) <http://76crimes.com/2012/05/08/traditional-african-homosexuality-has-learned-from-west/> (date accessed: 26 July 2013).

Being hailed as “moral leaders”, the ongoing advocacy of the these former colonial powers in favour of universal decriminalisation “... causes conservative reactions in many countries”<sup>241</sup>

Recent utterances of the Catholic Bishop Bakot, former archbishop of Yaoundé, (40% of the population are Catholic) highlight how this tension is being expressed: “We do not want homosexuality in Africa. The West has its culture and Africans have ours... let each of us remain set in their own culture,” “homosexuality opposes humanity and destroys it,” and “same-sex marriage is a serious crime against humanity”.<sup>242</sup>

Professor Tamale explains,<sup>243</sup> it is the roots of these assertions – Judeo-Christian and Arabic religions – that are, ironically, themselves foreign imports and “un-African”.<sup>244</sup>

She describes a long history of same sex relationships in pre-colonial Africa: for example, among the Langi of northern Uganda, the mudoko dako “males” were treated as women and they could marry men. Homosexuality was also acknowledged

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<sup>241</sup> *Ibid* Lembembe.

<sup>242</sup> Reuters “Cameroon Archbishop Calls Same-Sex Marriage Crime Against Humanity”.25 December 2012 (website) <http://uk.reuters.com/article/2012/12/25/us-cameroon-homosexuality-idUKBRE8BO05O20121225> (date accessed: 26 July 2013).

<sup>243</sup> Quoting Professor Sylvia Tamale, Makerere University, Kampala in Cameroon Foundation For AIDS (CAMFAIDS), St. Paul’s Foundation for International Reconciliation, Le Réseau des Défenseurs des Droits Humains en Afrique Centrale (REDHAC) and L’Association pour la Défense des Droits des Homosexuels (ADEFHO) Joint submission to the 54<sup>th</sup> Ordinary Session (22 October – 5 November, 2013) of the African Commission on Human and Peoples’ Rights “Report on the Violation of Rights on the Basis of Sexual Orientation and Gender Identity in the Republic of Cameroon” in response to the Third Periodic Review of Cameroon under the African Charter on Human and Peoples’ Rights, August 2013, at para. 114 [http://www.theadvocatesforhumanrights.org/uploads/cameroon\\_shadow\\_report\\_african\\_commission\\_lgbti\\_3\\_sept\\_2013.pdf](http://www.theadvocatesforhumanrights.org/uploads/cameroon_shadow_report_african_commission_lgbti_3_sept_2013.pdf) (date accessed: 1 September 2013) (note, this is the first ever report sent to the African Commission on Human and Peoples’ Rights regarding SOGI from Cameroon).

<sup>244</sup> The concept of diverse SOGI being un-African is widely referred to by those opposing it, feeding into the colonial anxiety Awondo speaks of, *supra* n.240; also see, for example, M. E. Hungochani *The History of Dissident Sexuality in Southern Africa* (McGill-Queens University Press, 2005, Quebec); W. Roscoe and S.O. Murray *Boy-Wives and Female Husbands: Studies in African Homosexualities* (Palgrave, 1998, New York); and Divani, Aarti: ‘Is Homosexuality “Un-African”?’ in *Think Africa Press*, 12 October 2011 (website): <http://thinkafricapress.com/gender/homosexuality-un-african-colonialism> (date accessed: 1 September 2013).

among the Iteso, Bahima, Banyoro, and the Baganda. It was an open secret in Royal Buganda that Kabaka (king) Mwanga was, in contemporary parlance, ‘gay’.

Under IHRL, it is the State’s duty to protect all of its citizens through law and policy.

Article 45 of the Constitution of Cameroon provides that international treaties supersede domestic law. The Vienna Declaration of 1993 states “[w]hile the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms”,<sup>245</sup> and thus, to ensure that the protection of international human rights norms is universally applied. The Declaration on Human Rights Defenders, adopted in 1999, outlines States’ duties to “create all conditions” (art 2) to ensure the safety of those promoting human rights.<sup>246</sup>

One of the most effective ways to combat rising public homophobia and violence against LGBT people is through awareness-raising work on the ground, and amongst police, judiciary, prison, border and education personal especially as endorsed by many Treaty Bodies<sup>247</sup> and recommendations in the UPR.<sup>248</sup> In 2009 the Special

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<sup>245</sup> *Supra* n.72, at para.5.

<sup>246</sup> United Nations General Assembly *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms*, A/RES/53/144, 8 March 1999; and the OHCHR produced an explanatory webpage on this resolution, see United Nations Office of the High Commissioner for Human Rights *OHCHR Declaration on Human Rights Defenders* (n.d) (online resource resource) <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Declaration.aspx> (date accessed: 3 September 2013).

<sup>247</sup> For example, see United Nations Committee Against Torture: *Costa Rica*, CAT/C/CRI/CO/2, 7 July 2008 (regarding discrimination training with police and prison officials); United Nations Human Rights Committee *Concluding observations of the Human Rights Committee: Sweden*, CCPR/C/SWE/CO/6, 7 May 2009 (general public awareness of SOGI in relation to discrimination); United Nations Human Rights Council *Report of the Special Representative of the Secretary-General on the Situation of Human Rights Defenders* A/HRC/10/12, 12 February 2009; United Nations Committee on the

Rapporteur on the Situation of Human Rights Defenders expressed “deep concern” for those working on SOGI issues experiencing persistent and increasing violence and threats, and not being treated properly by police.<sup>249</sup> This was elaborated in her reports on Colombia and Honduras in 2010 where she speaks of her concern at stigmatisation of sexual and gender minorities by authorities,<sup>250</sup> and in 2011 her report referred to the arduous situation of HRDs working on SOGI in Uganda.<sup>251</sup> Recalling article 7 of Declaration on Human Rights Defenders, the Special Rapporteur has stressed that States must protect those who challenge accepted sociocultural norms, traditions, perceptions and stereotypes, including about SOGI,<sup>252</sup> a view shared by the UN Human Rights Committee.<sup>253</sup> Cameroonian SOGI NGOs reported to the second cycle of the UPR that HRDs are commonly arrested without evidence and held for lengthy periods. While in custody, detainees undergo degrading treatment such as anal examinations with no medical validity.<sup>254</sup>

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Elimination of All Forms of Discrimination Against Women *Guatemala* CEDAW/GUA/CO/7, 10 February 2009.

<sup>248</sup> See Section 2.2 of present paper.

<sup>249</sup> United Nations Human Rights Council *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, A/HRC/13/22, 30 December 2009, at para. 49.

<sup>250</sup> United Nations Human Rights Council *Report of the Special Rapporteur on Human Rights Defenders on her mission to Colombia* A/HRC/13/22/Add.), 4 March 2010 at para. 50; United Nations Human Rights Council *Report of the Special Rapporteur on Human Rights Defenders Addendum: Mission to Honduras*, A/HRC/22/47/Add.1, 13 December 2012, at para. 91.

<sup>251</sup> United Nations Human Rights Council Special Rapporteur on Human Rights Defenders *Report of the Special Rapporteur on Human Rights Defenders*, A/HRC/19/55, 21 December 2011 at para. 90.

<sup>252</sup> United Nations Human Rights Council Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association. *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association. Addendum: Observations on communications transmitted to Governments and replies received*, A/HRC/20/27/Add.3, 19 June 2012 at para. 200 (in relation to Malaysia).

<sup>253</sup> United Nations Human Rights Council *Compilation prepared by the Office of the High Commissioner for Human Rights: Cameroon* A/HRC/WG.6/16/CMR/2, 11 February 2013, at para. 36; and *supra* CAT/C/CMR/CO/4 n. 222, at para. 14.

<sup>254</sup> Cameroon Affirmative Action, Alternatives-Cameroun, the Association for the Defense of Gay and Lesbian Rights (ADEFHO), Cameroonian Foundation for AIDS (CAMFAIDS), Evolve, Human Rights Watch, Humanity First Cameroon, and the International Gay and Lesbian Human Rights Commission (IGLHRC) Joint Submission to the universal Periodic Review: Cameroon, October 2012, at 4 (online) [http://www.upr-info.org/IMG/pdf/js6\\_upr\\_cmr\\_s16\\_2013\\_joints submission6\\_e.pdf](http://www.upr-info.org/IMG/pdf/js6_upr_cmr_s16_2013_joints submission6_e.pdf) (date accessed: 26 July 2013).

However, in the face of this rising hostility, SOGI activism has expanded rapidly. Prior to 2008 there were just three SOGI-concerned CSOs working in Cameroon, all in the context of HIV and AIDS work.<sup>255</sup> None of these made a submission to the 2009 first cycle UPR round. Prior to 2006 there appears to have been very little organised political work being done around SOGI, although some HIV/AIDS work with a human rights focus.<sup>256</sup> Post-2009, five more SOGI-based CSOs have emerged<sup>257</sup> that move towards designing advocacy work in terms of international human rights standards and mechanisms, and as a way towards SOGI-based community strengthening.<sup>258</sup> Five of these CSOs made a Joint Submission to the UPR in 2013, supported by three INGOs.<sup>259</sup>

SOGI CSOs themselves are targeted by authorities, as was the case of Alternatives-Cameroun that was forced to close temporarily in 2012 due to mob violence, following deliberate misinformation.<sup>260</sup> In 2012, the OHCHR spoke about the grave situation of intimidation of individuals and organisations.<sup>261</sup> The following July, 2013,

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<sup>255</sup> One in Yaoundé Affirmative Action (set up in 2008), and two in Douala - Alternatives Cameroon (2006); ADHEFO (2006).

<sup>256</sup> Along the lines of work outlined in *supra* UNAIDS Guidelines n.11.

<sup>257</sup> CAMFAIDS (2010); First Humanity Cameroon (2010); ADEPEV (2009), SID'ADO (2010), Evolve (2012).

<sup>258</sup> International Lesbian and Gay Association (n.d.) Information page on *Cameroon (Movement)* (online) <http://ilga.org/ilga/en/countries/CAMEROON/Movement> (date accessed: 2 August 2013).

<sup>259</sup> *Supra* Joint Submission n.254, supported by Human Rights Watch, Humanity First Cameroon, and the International Gay and Lesbian Human Rights Commission (IGLHRC).

<sup>260</sup> As recorded in United Nations Human Rights Council *Draft report of the Working Group on the Universal Periodic Review: Cameroon (VI. Freedom of Assembly, Association and Expression)* A/HRC/WG.6/16/L.13, 3 May 2013 at 5; “In February 2012, having met someone for a date on the internet, and subsequently been turned over to the police, a young man, in exchange for his release, police forced him to give interviews to three television channels in which he falsely claimed the organisation Alternatives- Cameroun had “recruited” him into homosexuality. After this incident, Alternatives-Cameroun had to temporarily suspend its work due to public outcry against the organisation”.

<sup>261</sup> United Nations Office of the High Commissioner for Human Rights “Statement made by the Spokesperson for the United Nations High Commissioner for Human Rights”, 16 November 2012 (online) <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTSpeechesandstatements.aspx> “Speaking of a prominent human rights lawyer, Alice Nkom, who has defended many people of diverse

the body of a prolific young SOGI activist and journalist Eric Lembembe, director of CAMFAIDS, was found murdered in his home one week after speaking publicly about the growing discrimination of LGBT people.<sup>262</sup> The UN Office of the High Commissioner for Human Rights said his body showed mistreatment possibly amounting to torture, and the UN has called for an independent investigation.<sup>263</sup> Mob violence and intimidation are continuing in opposition to SOGI,<sup>264</sup> reportedly causing tension over strategy amongst partner and ally SOGI organisations that deal with HIV/AIDS.<sup>265</sup>

CAMFAIDS (mentioned above in relation to murdered Eric Lembembe)

representatives will be present at the 24<sup>th</sup> session of the UPR at which Cameroon will respond to recommendations received in the second cycle of the UPR, reported that on 4 September 2013 on a national radio station, the Chairwoman of the National Human Rights Commission issued a warning to any Cameroonian human rights activists “who denigrate their country abroad” and appeal for help from international

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SOGI in Cameroonian courts, a Spokesperson for the OHCHR said in November 2012, that it is “especially worrying” that she and her family have received death threats because of her work. “Civil society organisations that have spoken out on behalf of LGBT people have also been threatened and intimidated”.

<sup>262</sup> Reportedly his face was initially unrecognisable as it had so many burns made from a hot iron, and his feet were smashed, see Indiegogo “Justice 4 Eric Lembembe” (n.d.) (webpage) <http://www.indiegogo.com/projects/justice-4-eric-lembembe> (date accessed: 10 September 2013); also see *infra* Ambassador’s 2013 statement n. 267.

<sup>263</sup> UPI.com “U.N. Asks Investigation in Death of Cameroonian Gay Activist Lembembe” 20 July 2013 (online) [http://www.upi.com/Top\\_News/US/2013/07/19/UN-asks-investigation-in-death-of-Cameroonian-gay-activist-Lembembe/UPI-11721374267758/#ixzz2e9aKRQW2](http://www.upi.com/Top_News/US/2013/07/19/UN-asks-investigation-in-death-of-Cameroonian-gay-activist-Lembembe/UPI-11721374267758/#ixzz2e9aKRQW2) (date accessed: 10 September 2013).

<sup>264</sup> Erasing 76 Crimes “More Mob Violence in Cameroon; Anti-Gay Attacks Continue” 20 August 2013 (website) <http://76crimes.com/2013/08/20/more-mob-violence-in-cameroon-anti-gay-attacks-continue/> (date accessed: 3 September 2013).

<sup>265</sup> Erasing 76 Crimes “Abandoned: Plans to Keep AIDS Fighters Safe in Cameroon” 2 September 2013 (website) <http://76crimes.com/2013/09/02/abandoned-plans-to-keep-aids-fighters-safe-in-cameroon/> (date accessed: 3 September 2013).



bodies.<sup>266</sup> “If they do that, she said, they shouldn’t expect to be safe when they return to Cameroon ... they themselves are responsible for what happens.”<sup>267</sup> The UN Secretary General addressed the issue of reprisals against HRDs two days later,<sup>268</sup> reflecting a long-standing issue.<sup>269</sup>

As sexual and gender minorities in the country have succeeded in engaging the loudspeaker of international mechanisms by producing such reports as those delivered to two UPR cycles, strategic advocacy and cohesion, and alliance building capacity are on the increase amongst SOGI activists in Cameroon. However, the intensity of the State and public backlash resulting from this work is severe and dangerous, increasingly forcing people of diverse SOGI to remain hidden and invisible. This is in part the legacy of UPR engagement in Cameroon. In terms of setting a SOGI norm either at the national level or feeding back into the HRC through Cameroon’s

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<sup>266</sup> Erasing 76 Crimes “New Threats to LGBTs in Cameroon as U.N. Review Nears” September 9, 2013 (website) <http://76crimes.com/2013/09/09/new-threats-to-lgbts-in-cameroon-as-u-n-review-nears/> (date accessed: 10 September 2013).

<sup>267</sup> Although not, at time of writing the present paper (23 September 2013), as yet undocumented officially by the OHCHR, it is reported that Cameroon has rejected all SOGI-related recommendations in the 2<sup>nd</sup> cycle UPR. Further the following is reported to have been announced at the review meeting by the Ambassador to the UN regarding the death of Eric Lembembe (*supra* Lembembe n.262): “So I reject this alleged case of this young man who allegedly was found dead as a result of his homosexuality. Distinguished Ambassadors, ladies and gentlemen, these are just things that have been made up. Look at the details of this person’s life and you will understand why he died”. This information has been sourced through private correspondence, with author.

<sup>268</sup> On 6 September 2013, United Nations Secretary-General Ban Ki-moon, having enumerated cases in Bahrain and the Philippines of harassment of individuals presenting at the UPR, said that “reprisals and intimidation against individuals cooperating with the United Nations in the field of human rights are unacceptable” and calls on the HRC to “act to address cases of reprisal in a coherent and systematic manner and use the various tools it has at its disposal,” see UPR-info “UN Secretary-General Denounces Cases of Reprisals Against NGOs Engaging in the UPR” 6 September 2013 (website) <http://www.upr-info.org/+UN-Secretary-General-denounces+.html> (date accessed: 10 September 2013).

<sup>269</sup> For example, see International Service for Human Rights “Philip Alston: UN must develop an effective response on reprisals” 16 September 2013 (webpage) <http://www.ishr.ch/council/428-council-not-in-feed/1578-philip-alston-un-must-develop-an-effective-response-on-reprisals> (date accessed: 17 September 2013), quoting Philip Alston former UN Special Rapporteur on extrajudicial, summary or arbitrary executions from 2004 – 2010, “[t]here is clearly reason to be gravely concerned that individuals who have been courageous enough to provide UN fact-finders with the essential information that they need in order to carry out their missions successfully are subsequently subjected to reprisals carried out or orchestrated by officials of the governments concerned”.

participation with that body, it would appear that the UPR to date has not altered the situation positively, but perhaps inflamed it. Louise Arbour's comment States being "impotent and powerless bystanders"<sup>270</sup> would seem apt to describe UN Member States' virtual total ineffectiveness as this is playing out before the HRC and the UNGA.

### **2.3.2 Bangladesh - case study 2**

#### *Recommendation Response*<sup>271</sup>

"Bangladesh accepts the recommendation concerning the human rights training of judicial officers. The judicial officers are being trained on the issue of rights of women, children and minorities.

However, the specific recommendation on sexual orientation cannot be accepted. Bangladesh is a society with strong traditional and cultural values. Same-sex activity is not an acceptable norm to any community in the country. Indeed, sexual orientation is not an issue in Bangladesh. There has been no concern expressed by any quarter in the country on this. Therefore, the recommendation is out of context."<sup>272</sup>

#### ***Invisibility and duty***

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<sup>270</sup> *Supra* Arbour n. 54.

<sup>271</sup> The final report of the Working Group records Chile as asking Bangladesh to "c) consider abolishing article 377 of the Penal Code, which criminalises sexuality against the "order of nature". United Nations Human Rights Council *Report of the Working Group on the Universal Periodic Review: Bangladesh* A/HRC/11/18, 3 March 2009, at para. 41; and Czech Republic: g) provide human rights training to law enforcement and judicial officers, with a specific focus on the protection of the rights of women, children and persons of minority sexual orientation or gender identity, (h) adopt further measures to ensure protection of these persons against violence and abuse and (i) decriminalise same sex activity between consenting adults and adopt further measures to promote tolerance in this regard, *ibid* at para. 64.

<sup>272</sup> United Nations Human Rights Council *Report of the Working Group on the Universal Periodic Review: Bangladesh, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review* A/HRC/11/18/Add.1, 9 June 2009. at para. 27.

Addressing whether or not SOGI is an issue in Bangladesh or individuals or groups have appealed for the law's<sup>273</sup> reform is immaterial to the domestic law's standing in IHRL to which it is obligated: namely articles 17 and 26 of the ICCPR (as discussed in the previous case study on Cameroon) that Bangladesh acceded to on 6<sup>th</sup> September 2000.<sup>274</sup> *Norris* established that the “very existence” of such laws have “far-reaching effects,”<sup>275</sup> the CCPR in *Toonen* asserted a State's moral issues do not render it immune from scrutiny,<sup>276</sup> and UNHCR guidance explains norms that do not confirm with IHRL can be seen to be persecutory “*per se*”.<sup>277</sup>

The statement within the State's 2009 UPR response that “sexual orientation is not an issue” in Bangladesh is misleading. Firstly, sexual minorities are forced to live in

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<sup>273</sup> Section 377 of the Bangladeshi Penal Code: “Unnatural Offences” “Whoever voluntary has carnal intercourse against the order of nature with man, woman, or animal, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to 10 years, and shall also be liable to fine. Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.” Text of the law is available at; [http://bdlaws.minlaw.gov.bd/sections\\_detail.php?id=11&sections\\_id=3233](http://bdlaws.minlaw.gov.bd/sections_detail.php?id=11&sections_id=3233); This law mirrors the British law of 1861, was enacted under British colonial rule of India, survived the partition of India and Pakistan, and continued through the founding of the State of Bangladesh in 1971 until the present, see Londoni.co “Declaration of Independence - the birth of "Bangladesh"” (n.d.) (webpage) <http://www.londoni.co/index.php/history-of-bangladesh?id=139> (date accessed: 4 august 2013); Navi Pillay has pointed out the irony that “these laws are relics of the colonial era ... increasingly becoming recognised as anachronistic, and as inconsistent both with international law and with traditional values of dignity, inclusion, and respect for all”, see United Nations General Assembly *Address by Ms. Navanetham Pillay, United Nations High Commissioner for Human Rights on the Theme of Gender Identity, Sexual Orientation and Human Rights*, 63rd session of the General Assembly, New York, 18 December 2008.

<sup>274</sup> Although to date it has not submitted any reports to CCPR periodic reviews – its initial report due in 2001 is still “overdue”, see Treaty Body Report *Bangladesh* (n.d.) (webpage) <http://treatybodyreport.org/stateparty/bangladesh.html> (date accessed: 30 July 2013).

<sup>275</sup> *Supra Norris* n.96, at para. 38: this case elaborated that the problem of existing criminal laws in 1988, where the ECtHR said that the “very existence of such laws, irrespective of whether they are enforced and the severity of the penalties they impose, may have far-reaching effects on LGBT persons' enjoyment of their fundamental human rights”.

<sup>276</sup> The CCPR elaborated that it could not accept “moral issues are exclusively a matter of domestic concern, as this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy”, *supra Toonen*, n.77, at para. 8.6.

<sup>277</sup> United Nations High Commissioner for Refugees *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*, HCR/GIP/02/01, 7 May 2002 paras. 57, 59, “[a] law can be considered as persecutory *per se*” where an applicant can show a well-founded fear of persecution” based on laws that reflect “social or cultural norms which are not in conformity with international human rights standards”.

acute secrecy for a number of reasons including being harassed, disinherited, beaten, forced into marriage, thrown out of home or brought to a doctor to be ‘cured’. Reports of being sexually abused, raped or harassed by law enforcement agents, as well as receiving beatings, extortion of money, obstruction of movement, threats and blackmail are common.<sup>278</sup> As pointed out in the joint report to the UPR in 2013 (hereafter JS3), “[n]on-normative gender and sexual behavior is considered immoral, sinful, disgusting and absolutely unacceptable”,<sup>279</sup> forcing those of diverse SOGI underground and unprotected in terms of human rights.

“Marriage is seen as the only recognition of sexuality, wealth distribution, as production unit, legality of future generation and a binding string of moral fabrics based on religious beliefs,” and a such many men and women hide their sexual identities, thereby giving the impression that sexual minorities are non-existent.<sup>280</sup>

Finding for an applicant in 2010, the Australian Refugee Appeals Tribunal, found “he is at risk of harm throughout Bangladesh”,<sup>281</sup> based on the fact as he is of a particular social group for the purposes of the [1951] Convention.<sup>282</sup> The Tribunal recognises

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<sup>278</sup> Rainer Ebert “Bangladesh’s Invisible Minority” *bdnews24*, 24 January 2012, (website) <http://opinion.bdnews24.com/2012/01/24/bangladesh’s-invisible-minority/#sthash.yhmLegsV.dpuf> (date accessed: 13 August 2013).

<sup>279</sup> Boys of Bangladesh, Creating Resources through Empowerment and Action, Sexual Rights Initiative *Joint Submission on Sexual Orientation and Gender Identity in Bangladesh 2013* (n.d.) at 3 (online) [http://www.upr-info.org/IMG/pdf/js3\\_upr\\_bgd\\_s16\\_2013\\_joints submission3\\_e.pdf](http://www.upr-info.org/IMG/pdf/js3_upr_bgd_s16_2013_joints submission3_e.pdf) (date accessed: 12 August 2013) (hereafter JS3 – as referred to in later UPR documentation on Bangladesh). The only other NGO submission to the 2013 round of UPR on Bangladesh that mentioned SOGI directly was the Commonwealth Human Rights Initiative “Bangladesh Stakeholders Report to UPR Human Rights Forum, Bangladesh” 9 October 2012 (online) [http://www.upr-info.org/IMG/pdf/js10\\_upr\\_bgd\\_s16\\_2013\\_joints submission10\\_e.pdf](http://www.upr-info.org/IMG/pdf/js10_upr_bgd_s16_2013_joints submission10_e.pdf) (date accessed: 12 July 2013) (recorded as JS10 on the OHCHR database.); also echoed in the observation made in *RRT Case No. 1003995*, [2010] RRTA 580, Australia: Refugee Review Tribunal, 7 July 2010, at para. 48 “[h]omosexuals are seen as deviant, sick, and to some extent within Muslim cultures, evil”.

<sup>280</sup> *Ibid* JS3 at 4.

<sup>281</sup> *Supra* RRT Case n.271, at para. 61.

<sup>282</sup> United Nations General Assembly, *Convention Relating to the Status of Refugees*, 28 July

that “[a] man must get married. If he doesn't then there is something wrong with him, he shames his family and community, he is sick” and “to openly admit to being a homosexual shames the whole community”.<sup>283</sup> One interviewee said in 2009, “[a]s long as you don't come out open to your family, you are safe”<sup>284</sup> Violence against same-sex relationships between women is common, according to CREA “[t]here is immense stigma and fear within women. As a result their relationships are always in secrecy because of the fear of stigma, discrimination and rejection in society”.<sup>285</sup>

Third sex individuals (Hijras and Kothis) typically experience great discrimination because of their actual *visibility*, as much in terms of their gender identity as their sexual orientation.<sup>286</sup> As Towte and Morgan point out comprehension of gender and sexuality differ quite radically to the binary conception of the West, despite the colonial law of Article 377.<sup>287</sup> Ancient Indian literature, Mughal and Bengal painting,

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1951, United Nations, Treaty Series, vol. 189, p. 137.

<sup>283</sup> *Supra RRT Case* n.271, at para. 48.

<sup>284</sup> LGBTI Bangladesh, “*An Analysis of Homosexuality in Bangladesh*”, 21 March 2009 (webpage) <http://lgbtbangladesh.wordpress.com/2009/03/28/an-analysis-of-homosexuality-in-bangladesh/> (date accessed: 6 August 2013).

<sup>285</sup> CREA “*Count Me In! Research on Violence Against Marginalised Women in South Asia*” *Executive Summary* (2011) (online) <http://web.creaworld.org/ResearchSummary-F-2.pdf> (date accessed: 6 August 2013); It has been noted that women human rights defenders, are particularly at risk of suffering violence and other violations for “challenging accepted socio-cultural norms, traditions, perceptions and stereotypes about femininity, sexual orientation, and the role and status of women in society”.<sup>285</sup> The General Assembly has invited all actors to address “situations of violence and discrimination that affect many women as well as other individuals on the grounds or in the name of religion or belief or in accordance with cultural and traditional practices, see United Nations Human Rights Council *Report of the Special Rapporteur on Freedom of Religion or Belief: Summary of cases transmitted to Governments and replies received*, A/HRC/13/40/Add.1, 16 February 2010, para. 16(b).

<sup>286</sup> *Supra SRI* n. 284, at f.n.11 “[f]or instance section 364, 366, 374 of the Penal Code or the Women and Child Repression Act 1995 are based on a heteronormative understanding of sexuality”.

<sup>287</sup> Towle, R.B. and Morgan, L.M. “Romancing the Transgender Native: Rethinking the Use of the “Third Gender” Concept” in Stryker, S. and Whittle, S. *Transgender Studies Reader* (Routledge, 2006, New York, London).

and other historical evidence attests to the presence of a third sex, as well as (and often combined with) same sex sexual relations.<sup>288</sup>

As recently as 2009 in *Khaki v. Rawalpindi*,<sup>289</sup> the Supreme Court of Pakistan, operating in a cultural context much akin to Bangladesh regarding Hijras (born male but who adopt female gender identities and expression), ordered that Hijras should be permitted to register as a “third sex” (that is, neither male nor female). Kothis are distinguished from Hijras although they too often dress and express in public as women traditionally do in Bangladeshi culture, and refer to each other in the feminine pronoun.<sup>290</sup> Although no political party overtly lobbies in their favour, in the general election of 2008, Hijras were allowed to vote for the first time, but either as a male or a female (but not as a third sex as in India and Nepal, Pakistan and Iran).<sup>291</sup>

The issue of invisibility that the State raises in its 2009 UPR response - although technically correct when looking through the lens of numbers of judicial proceeding based on the law – is somewhat calculated to evade a pertinent and challenging social issue on the ground.<sup>292</sup> It is reported that Article 377 is hardly ever prosecuted,<sup>293</sup>

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<sup>288</sup> Boys of Bangladesh (BoB), Bangladesh Liberal Forum (BLF), Bandhu Social Welfare Society (BSWS) *Amra Chhilam. Amra Achhi Amra Thakbo What You Should Know About Homosexuality*, 2 February 2013 (online brochure) <http://rainerebert.wordpress.com/2013/02/02/what-you-should-know-about-homosexuality/> (date accessed: 23 August 2013).

<sup>289</sup> *Khaki v. Rawalpindi*, Supreme Court of Pakistan (12 December 2009).

<sup>290</sup> Interestingly, usual partners of Hijras and Kothis are masculine men (known as panthis) who are generally married outside of this partnership, and who would not refer to themselves as ‘gay’ or ‘bisexual’ men, see Catalyst Consortium “In Their Own Words: The Formulation of Sexual and Reproductive Health Behaviour Among Young Men in Bangladesh” (n.d.) (website) [http://www.rhcatalyst.org/site/PageServer?pagename=Programs\\_STI\\_Prevention\\_Bangladesh](http://www.rhcatalyst.org/site/PageServer?pagename=Programs_STI_Prevention_Bangladesh) (date accessed: 23 August 2013).

<sup>291</sup> *Supra* JS3 n.279. (Postscript note: in November 2013, Hijras were recognised as a third sex in Bangladeshi Law.)

<sup>292</sup> There is no mention of sexual orientation, homosexuality, acts against nature, etc. in the national report submitted to the HRC in 2008. References to ensuring rights of minorities relate to religious and ethnic minorities only.

although it is frequently used for bullying, harassment and extortion purposes,<sup>294</sup> an opinion shared by the Ministry of Law in 2002.<sup>295</sup> However, much abuse of Section 54 of the Criminal Procedure Code 1898 is reported: arrest can be made without warrant on suspicion of a cognisable offence,<sup>296</sup> and this is actually the law under which many prosecutions of diverse SOGI sex workers are made.

The OHCHR compilation of 2008<sup>297</sup> (prepared for Bangladesh's first cycle UPR) only cited one reference to sexual orientation and gender identity regarding Bangladesh:

“27. A 2004 UNDP report noted that men who have sex with men and “Hijras” reported being severely discriminated against because of their sexual orientation”.<sup>298</sup>

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<sup>293</sup> In an interesting observation quoted at the Australian Refugee Tribunal, *supra* n.275, a Bangladeshi lawyer contributed; “[y]ou will notice that the word ‘homosexual’ or ‘homosexuality’ have not been used in the statute. The instances of prosecution under this section is extremely rare. In my twenty years of law practise, I have not known or heard of a case where a person has been prosecuted for or convicted of homosexuality under the aforesaid section. Such a prosecution in fact would be extremely difficult, if not impossible, for lack of witness or evidence. (UK Home Office, Country of Origin Information Service, *Country of Origin Information Report Bangladesh*, April 2006, paragraph 6.139)”.

<sup>294</sup> Sexual Rights Initiative (composing Mulabi – Latin American Space for Sexualities and Rights; Action Canada for Population and Development, Creating Resources for Empowerment, Action-India and others), *Joint Submission to the first cycle UPR on Bangladesh Report on Bangladesh 4th Round of the Universal Periodic Review* February 2009 [http://www.upr-info.org/IMG/pdf/SRI\\_BGD\\_UPR\\_S4\\_2009\\_SexualRightsInitiative\\_JOINT\\_upr.pdf](http://www.upr-info.org/IMG/pdf/SRI_BGD_UPR_S4_2009_SexualRightsInitiative_JOINT_upr.pdf) (date accessed: 27 July 2013) at para. 30.

<sup>295</sup> This report stated that 377 "exists only to be used by the police to victimise gay and bisexual men whom they catch in public areas with a motive to extort money and blackmail". The report concluded that "Section 377 of the Penal Code violates [the] constitutionally protected right to privacy under the expanded definition of right to life and personal liberty (article 32)". Institutional Development of Human Rights in Bangladesh (IDHRB) *Mapping Exercise on HIV/AIDS- Law, Ethics, and Human Rights* (Ministry of Law, Justice and Parliamentary Affairs, 2002, Dhaka) at 33.

<sup>296</sup> Human Rights Watch *Ravaging the Vulnerable: Bangladesh* (HRW, August 2003, New York) at Chapter VI [http://www.hrw.org/node/12282/section/6#\\_ftn222](http://www.hrw.org/node/12282/section/6#_ftn222) (date accessed: 27 July 2013); Bondyopadhyay, Aditya and Khan, Shivananda: *Against the odds: The impact of legal socio-cultural, legislative and socio-economic impediments to effective HIV/AIDS intervention with males who have sex with males in Bangladesh* (Naz Foundation International and Bondu Social Welfare Society, 2006, Dhaka).

<sup>297</sup> United Nations Human Rights Committee *Office of the High Commissioner on Human Rights Compilation: Bangladesh A/HRC/WG.6/4/BGD/2*, 12 December 2008.

<sup>298</sup> United Nation Development Program *Law, Ethics and HIV/AIDS in South Asia: A Study of the Legal and Social Environment of the Epidemic in Bangladesh, India, Nepal and Sri Lanka* (UNDP, 2004) at 25.

It is notable that although the UPR guidance to States advises the SuR to carry out national consultations with NGOs and CSOs,<sup>299</sup> in the period between the first and second cycle no such consultation was made available to SOGI advocates in Bangladesh,<sup>300</sup> including with Boys of Bangladesh (hereafter BoB), the largest SOGI-focused CSO in Bangladesh who did make a joint submission to the second cycle UPR in 2013, but not the first.<sup>301</sup> The government had said in its 2009 UPR response that SOGI is not an issue in the country, despite the Sexual Rights Initiative's (hereafter SRI) 'credible and reliable'<sup>302</sup> documentation delivered in 2009 that demonstrated clearly that there are indeed extreme cases of discrimination based on SOGI in Bangladesh.<sup>303</sup> There are no SOGI-based NGOs in Bangladesh and such an organisation may not be allowed to register because of the existing laws,<sup>304</sup> a view endorsed in 2011 by one of Bangladesh's only barristers concerned with SOGI issues, Sara Hossain.<sup>305</sup>

However, despite the lack of NGO capacity, efforts to bring the issue of SOGI in Bangladesh to international attention have brought Hijra, Kothi and SOGI advocates

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<sup>299</sup> United Nations Human Rights Council *General Guidelines for the preparation of Information under the Universal Periodic Review* Decision 6/102, 27 September 2007.

<sup>300</sup> See list of NGOs consulted in Annex B of the State's Report of 2013 at [http://www.upr-info.org/IMG/pdf/a\\_hrc\\_wg.6\\_16\\_bgd\\_1\\_bangladesh\\_annexes\\_e.pdf](http://www.upr-info.org/IMG/pdf/a_hrc_wg.6_16_bgd_1_bangladesh_annexes_e.pdf).

<sup>301</sup> *Supra* JS3 n.279.

<sup>302</sup> The information provided to NGOs by the OHCHR specifies this criteria for all information delivered in NGO reports: United Nations Office of the High Commissioner for Human Rights "Information Note for NGOs regarding the Universal Periodic Review (as of 8 January 2008)" (n.d.) (website <http://www.ohchr.org/EN/HRBodies/UPR/Pages/NoteNGO.aspx> (date accessed: 25 July 2013)).

<sup>303</sup> *Supra* SRI, n.286 (the only SOGI-related report submitted to the UPR on Bangladesh in 2009).

<sup>304</sup> Section 377 extends to membership of a SOGI-based organisation according to the compilation by the University of Toronto "Bangladesh: Country Report for Use in Refugee Claims Based on Persecution Relating to Sexual Orientation and Gender Identity" March 2011 (online) [http://ihrp.law.utoronto.ca/utfl\\_file/count/documents/SOGI/Bangladesh\\_SOGI\\_2011.pdf](http://ihrp.law.utoronto.ca/utfl_file/count/documents/SOGI/Bangladesh_SOGI_2011.pdf) (date accessed: 22 August 2013).

<sup>305</sup> *Supra* JS3, n.293, at 8 (Sara Hossain presented the Human Rights Forum's submission to the UPR in May 2013).



together through the frame of a human rights analysis.<sup>306</sup> The Asia-Pacific Transgender Network was set up in late-2009 to advocate for transgender women's issues, which include sexual orientation.<sup>307</sup> In March of that same year the 'LGBTI Bangladesh' website started (by BoB volunteers), and in its opening post asserted the site was created to promote dialogue and understanding of implementation of IHRL in the domestic setting.<sup>308</sup> In a later post of April 2013,<sup>309</sup> it spoke of "[t]he sexual and gender minority community of Bangladesh has also discovered this new mechanism [UPR] as a way to raise awareness for the violations of their human rights on an international platform" just a few days prior to the delivery of the second cycle *Draft Report of the Working Group on Bangladesh to the HRC*.<sup>310</sup>

In 2009, after the first cycle UPR, two SOGI-based CSOs (BoB and the Bhandu Social Welfare Society) lobbied the Human Rights Forum (hereafter HRF) to include their agendas within the scope of that coalition's work.<sup>311</sup> In its 2013 submission to the UPR, HRF did include the issue of criminalisation under Section 377, and

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<sup>306</sup> S.F. Rashid "Creating a Public Space and Dialogue on Sexuality and Rights: a Case Study from Bangladesh" 2011. (website) <http://www.health-policy-systems.com/content/9/S1/S12> (date accessed: 14 August 2013), since 2009, "civil society initiatives needed to create some cohesion in the nascent SOGI movement: practical skills of the gay/lesbian community to demand political, social and legal reformation and the sheer number of visible Hijra/Kothi communities have been initiated".

<sup>307</sup> International Lesbian and Gay Human Rights Commission "World's First Asia Pacific Transgender Network Launched to Champion Health and Rights of Transgender Women in the Region" *News 12* December 2009 (online) <http://www.iglhc.org/content/worlds-first-asia-pacific-transgender-network-launched-champion-health-and-rights> (date accessed: 14 August 2013). There is only one resource on Bangladesh on the Asia Pacific Transgender Network website, Adnan Hossain "They Swing Between Both Sexes: Hijras as "Asexual Others"" *Research and Discussion Paper* (n.d.) (webpage) [http://www.transgenderasia.org/paper\\_swinging.htm](http://www.transgenderasia.org/paper_swinging.htm) (date accessed: 14 August 2013).

<sup>308</sup> LGBTI Bangladesh 'About' (n.d.) (website) <http://lgbtblangladesh.wordpress.com/about/> (date accessed: 14 August 2013).

<sup>309</sup> Shakhawat Hossain "Human rights: Bangladesh's LGBT Community and the UPR 2013" *LGBTI Bangladesh* 28 April 2013 <http://lgbtblangladesh.wordpress.com/> (date accessed: 13 August 2013).

<sup>310</sup> United Nations Human Rights Council *Draft report of the Working Group on the Universal Periodic Review: Bangladesh A/HRC/WG.6/16/L.10*, 1 May 2013.

<sup>311</sup> Bambuser.com "Human Rights Forum - Bangladesh Launches Draft Report of Universal Periodic Review" (n.d.) (website) <http://bambuser.com/node/3074119> (date accessed: 15 August 2013).

requested the government to repeal it, include SOGI in policy-making, include SOGI-related material in school curriculum, and sensitise State agencies to the issue.<sup>312</sup>

The 2013 submission of JS3 records that the Chairman of the new National Human Rights Commission (formed in 2009 after UPR recommendations to do so)<sup>313</sup> dismissed the idea of taking action on SOGI, saying “the society is not ready yet and the time is not right”,<sup>314</sup> even though Bangladesh has ratified all the major UN Treaties that have already made statements on this issue.<sup>315</sup> However, in October 2012, the NHRC Bangladesh report did directly advocate for the rights of people of diverse SOGI: “[t]he NHRC Bangladesh believes that it is now time to ensure that all groups, including those who are transgender, intersex or sexual minority, are protected from discrimination”.<sup>316</sup>

At the 16<sup>th</sup> session of the HRC regarding Bangladesh’s second cycle UPR, the Minister for Foreign Affairs, Dr. Dipu Moni, said the State would remain committed to upholding family values and tradition as well as human rights of all individuals. At

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<sup>312</sup> *Supra* JS10 n.293, at para. 58.

<sup>313</sup> National Human Rights Commission Bangladesh “About” (n.d.) (website) <http://www.nhrc.org.bd/about.html> (date accessed: 2 August 2013).

<sup>314</sup> *Supra* JS3 n.279, at 6.

<sup>315</sup> *Supra* JS3 n.279: International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities: At paragraph 17 of its submission to the 2013 UPR, *supra* JS3 n.279, says: “17. However, very few strides have been adopted to inject the spirit of these treaties into the sphere of the domestic laws. Moreover the state also failed to submit its periodic reports on measures taken to materialise human rights. The initial report to the UN Committee on Torture was due in 1999 and to the Committees on ICESR and ICCPR in 2000 and 2001. So far Bangladesh has only managed to report systematically to CEDAW and CRC but implementation of their recommendations has been poor”.

<sup>316</sup> Asia-Pacific Forum “Putting the Spotlight on Sexual Orientation and Gender Identity”, 2013 (at eight paragraphs) (webpage) <http://www.asiapacificforum.net/news/putting-the-spotlight-on-sexual-orientation-and-gender-identity> (date accessed: 12 August 2013).

that meeting, regarding Chile and US recommendations to repeal Article 377,<sup>317</sup> the Minister “underscored that laws in the country should be in harmony with social and religious mores”, but then surprisingly added: “[o]n LGBT rights... on LGBT, we concur with NHRC [National Human Rights Commission] that the laws of the land... [here the sentence is left unfinished]. However, we recognise the need for protecting all vulnerable groups of our population, given their constitutional equal rights and freedoms. Moreover, we do not condone any discrimination or violence against any human being on any pretext.”<sup>318</sup> Interestingly, on 18 September 2013, at the Asia-Pacific Population Conference, it appears that Bangladesh did express reservations about the SOGI element, but did not attempt to block the Declaration that included language that referenced SOGI.<sup>319</sup>

### ***Policing morality in Bangladesh***

The idea that SOGI concerns may be picked up in anti-discrimination legislation while decriminalisation of same-sex sexual relations remains on the statute, is unlikely and legislatively discordant. As Kaoma points out, the work of activists who campaign for SOGI equality is frequently presented as a direct threat to religious values and institutions.<sup>320</sup> In a population that is predominantly Muslim (89.8%) in the

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<sup>317</sup> As quoted in the United Nations Human Rights Council *Report of the Working Group on the Universal Periodic Review Bangladesh A/HRC/24/12*, 8 July 2013, Chile - “Consider repealing article 377 of the Criminal Code” (at para. 131.2), and US - “The United States of America commended promotion of women’s participation in Government and the National Human Rights Commission acknowledgment that all individuals – including lesbian, gay, bisexual and transgender (LGBT) individuals – should be protected from discrimination”, at para. 51.

<sup>318</sup> YouTube, Clip of Minister’s Statement on SOGI in Bangladesh, 29 April 2013 (webpage) [http://www.youtube.com/watch?v=\\_BQkJm34KzQ](http://www.youtube.com/watch?v=_BQkJm34KzQ) (date accessed: 12 August 2013).

<sup>319</sup> Private correspondence (on listserv) with Bangladeshi human rights activist, 19 September 2013 (file with author); also see Economic and Social Commission for Asia and the Pacific: Sixth Asian and Pacific Population Conference 16-20 September 2013 *Draft Asian and Pacific declaration on population and development Bangkok*, E/ESCAP/APPC(6)/WP.1/Rev.3, 18 September 2013, at para. OP15 and PP6 (both relating to discrimination of SOGI).

<sup>320</sup> Kapya Kaoma *Globalizing the Culture Wars: US Conservatives, African Churches, and Homophobia* (Political Research Associates, 2009, Massachusetts).

world's most densely populated country (148,690,000),<sup>321</sup> according to BoB, religion remains the single most persistent obstacle for SOGI rights.<sup>322</sup> In its 2009 report to the UPR, the SRI said that there is a culture of denial about the existence of sexual and gender minorities in the country, accentuated by the recent rise in religious fundamentalism and dismissed in the idea that same sex sexual relationships and identities are Western constructs.<sup>323</sup> The UN Human Rights Committee had long ago adopted *General Comment 22* that emphasised the right to non-discrimination regarding predominant religions or beliefs.<sup>324</sup>

In light of the landmark Delhi High Court judgment in June 2009 that found criminalisation of same sex behavior was unconstitutional in neighbouring India,<sup>325</sup> in August of that year, six months after Bangladesh's first UPR, Supreme Court Justice Rabbani strongly came out against 'homosexuality', stating that the Penal code cannot be changed and even if it can be changed homosexuality can never be accepted because the Quranic Law has forbidden it.<sup>326</sup> This comment should be read against the UN Committee Against Torture's comments on Costa Rica, where it expressed cautioned that "rules on public morals can grant the police and judges discretionary power which, combined with prejudices and discriminatory attitudes, can lead to

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<sup>321</sup> *Supra* Pew Research n.205.

<sup>322</sup> LGBTI Bangladesh "LGBT Community Calls for the Repeal of Section 377" 2 February 2011 (webpage) <http://lgbtblangladesh.wordpress.com/> (date accessed: 16 August 2013).

<sup>323</sup> *Supra* SRI n. 284, at 2.

<sup>324</sup> United Nations Human Rights Committee, *General Comment 22, Article 18 Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1* at 35 (1994), at para. 10, "[i]f a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognised under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it"

<sup>325</sup> Under exactly the same penal code dating back to colonial rule when India, Pakistan and Bangladesh were one State.

<sup>326</sup> *Supra RRT Case* n.279, at para. 47.

abuse against this group (arts. 2, 11 and 16)”,<sup>327</sup> and also the comment of the Special Rapporteur on Freedom of Religion or Belief who stresses that under IHRL ensuring freedom of religion should not become an instrument for undermining freedoms.<sup>328</sup>

Tackling stigma<sup>329</sup> that is deeply entrenched in socio-cultural norms and attitudes requires raising awareness of stigmatising practices that are pursued under the umbrella of culture, religion and tradition.<sup>330</sup> As cultures and traditions are neither immutable nor homogenous, by their nature they are open to challenge, including by questioning the legitimacy of those who perpetuate stigmatising practices in the name of culture and uncovering the underlying power dynamics.<sup>331</sup> This idea of exactly which interpretive school of Islam (in the case of Bangladesh) the State is promoting is very relevant to the current discussion,<sup>332</sup> recalling Sunder’s point about the right of individuals to speak their divergence from *inside* their cultural contexts.<sup>333</sup>

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<sup>327</sup> United Nations Committee Against Torture *Conclusions and Recommendations of the Committee Torture: Costa Rica CAT/C/CRI/CO/2*, 7 July 2008, at para. 11.

<sup>328</sup> United Nations Human Rights Council *Report of the Special Rapporteur on Freedom of Religion or Belief A/HRC/6/5*, 20 July 2007, at para. 28.

<sup>329</sup> *Ibid* A/HRC/6/5 describes stigma as follows, at para. 12: “Stigma relates closely to power and inequality, and those with power can deploy it at will. Stigma can broadly be understood as a process of dehumanising, degrading, discrediting and devaluing people in certain population groups, often based on a feeling of disgust. Put differently, there is a perception that the person with the stigma is not quite human. Stigma attaches itself to an attribute, quality or identity that is regarded as “inferior” or “abnormal”. Stigma is based on a socially constructed “us” and “them” serving to confirm the “normalcy” of the majority through the devaluation of the “other”.”

<sup>330</sup> United Nations Human Rights Council *Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Stigma and the realisation of the human rights to water and sanitation*, A/HRC/21/42, 2 July 2012, at para. 65.

<sup>331</sup> United Nations Human Rights Council *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences E/CN.4/2006/61*, 2 July 2012, at para. 85.

<sup>332</sup> Some movements in Islam, such as the Al-Fatiha Foundation, accept and consider homosexuality as natural and work towards the acceptance of non-heterosexual love-relationships within the global Muslim community. Progressive Muslim scholars around the world argue that Qur’anic verses on homosexuality are obsolete in the context of modern society and point out that, while the Qur’an speaks out against homosexual lust, it is silent on homosexual love, for example, see O. Safi (ed.) *Progressive Muslims: On Justice, Gender and Pluralism* (Oxford University Press, 2003, Oxford).

<sup>333</sup> *Supra* Sunder n.9.

The NGO reports on Bangladesh assert that sexual and gender minorities are being arrested and charged under Section 54 of the penal code, and not Article 377: effectively the police have been given oversight on how to determine what constitutes immorality, a phenomenon noted in regard to Egypt in 2010,<sup>334</sup> with devastating effects on people's lives.<sup>335</sup> The Australian Refugee Review Tribunal in assessing the case of a Bangladeshi applicant who claimed that there was a fatwah against him calling for his stoning,<sup>336</sup> noted the rise of religious fundamentalism and quoted a report that spoke of "the government law enforcers stand as mute spectators fearing the wrath of religious fanatics and society members for obstructing justice to the sodomisers".<sup>337</sup>

The process of engagement with the UPR does seem to have yielded some interesting, albeit modest, results in Bangladesh. A brief indication from the Minister of Foreign Affairs at the 16<sup>th</sup> session of the HRC that the government endorses the NHRC's statement that SOGI needs to be protected from discrimination stands in stark contrast to earlier iterations by Bangladesh on the "traditional values of humankind" as codified most lately in Resolution 16/3. Perhaps more importantly, the process of

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<sup>334</sup> A parallel situation was commented on by the Working Group on Arbitrary Detention regarding Egypt in 2010; "This wide discretion given to the Police to determine what constitutes "immoral" actions, does not bode well for basic human rights such as right to privacy, right to own liberty, freedom of opinion and freedom of expression" in United Nations Human Rights Council Working Group on Arbitrary Detention *Re: Egypt Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development. Addendum: Opinions adopted by the Working Group on Arbitrary Detention A/HRC/13/30/Add.1*, 2 March 2010 at para. 25.

<sup>335</sup> Again, similar to Egypt and elsewhere, in Bangladesh the effects on a person's life and reputation of being accused or convicted for same sex sexual relations can be immense, so the Working Group commented in 2011 that "extreme caution and sensitivity" is demanded in this area", see United Nations Human Rights Council Working Group on Arbitrary Detention *Report of the Working Group on Arbitrary Detention. Addendum: Opinions adopted by the Working Group on Arbitrary Detention: Opinion No. 25/2009 (Egypt)* (Communication addressed to the Government on 18 May 2009).A/HRC/16/47/Add.1, 2 March 2011.

<sup>336</sup> *Supra RRT Case n.279*, at para..51.

<sup>337</sup> *Supra LGBTI Bangladesh n.284*.

UPR engagement has to some extent unified various SOGI-related CSOs and activists, as well as extended their connections into wider coalitions, that are increasingly able to analyse and document their situations through the lens of human rights. Whether CSO work with the Bangladesh NHRC will reflect into legal or policy change in the national setting is unclear. But it is significant to the setting of the SOGI norm at the HRC if Bangladesh starts to accept some UPR recommendations and at least begin a sensitisation process domestically that may result in decriminalisation at least by the country's 3<sup>rd</sup> UPR process in 2017.<sup>338</sup>

### 2.3.3 Russia - case study 3

#### *Recommendation Response*<sup>339</sup>

“The Russian Federation does not accept this recommendation [recommendation 28], since there is no policy of discrimination on the grounds of sexual orientation.

The Russian Federation [recommendation 31] has already established and is operating a system of educational establishments providing staff with further professional training in the needs of the institutions and bodies of the penal correction system, taking account of the requirements of international

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<sup>338</sup> Reportedly, but not yet documented on the OHCHR website, Bangladesh has rejected all the SOGI recommendations in its 2013 UPR session on 19 September 2013, despite utterances previously expressed, *supra* n.317, in private correspondence (on listserv) with Bangladeshi human rights activist, 19 September 2013 (file with author).

<sup>339</sup> United Nations Human Rights Council *Final report Universal Periodic Review Report of the Working Group on the Universal Periodic Review: Russian Federation A/HRC/11/19*, 3 March 2009, at paras. 28 and 31: “28. Increase its efforts and take concrete policy measures in order to promote tolerance and non-discrimination of lesbian, gay, bisexual, transsexual and transgender persons (Sweden)”; “31. Provide prison guards and law enforcement officials in general, with human rights training specifically focusing on protection of human rights of women, children, national minorities and persons of minority sexual orientation or gender identity; and further to ensure investigation and punishment of all cases of violation of human rights by this personnel (Czech Republic)”.

legal standards and rules relating to the protection of human and civic rights and freedoms. The Russian Federation is thus already implementing this recommendation and therefore does not accept it.<sup>340</sup>

Unlike Cameroon and Bangladesh, same sex sexual activity is no longer criminalised in Russia following reform of its legal code in 1993,<sup>341</sup> and since 1997 it is possible to change the gender marker on all official documents, although problematic,<sup>342</sup> and gender reassignment surgery is available in Russia. In the context of the newly democratised State 20 years ago, that decriminalisation of homosexuality can be viewed as an effort on the part of the State to come into line with European standards and increase its sphere of influence, as it had not yet become a member of the Council of Europe (joined in 1996, having applied in 1992).<sup>343</sup>

However, an amalgamation of conservative forces in the country has developed during this period that could best be described as waging a ‘culture war’ particularly

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<sup>340</sup> United Nations Human Rights Council *Report of the Working Group on the Universal Periodic Review Russian Federation: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review A/HRC/11/19/Add.1/Rev.1*, 5 June 2009.

<sup>341</sup> “The dignity of the person is protected by the State. Nothing may be used as a basis for its diminution”, Article 21.1 (1993).

<sup>342</sup> It should be noted, however, under Federal law (On Acts of Civil Status: Federal Law: passed by the State Duma on 22 October 1997; endorsed by the Federation Council on 5 November 1997 // Rossiyskaya Gazeta. 1997. November 20. Art. 70), the record of that change often remains on official documents, thereby constituting an invasion of privacy. Further, evidence of surgery is often required by officials in direct contravention of rulings set down by the ECtHR; see European Court of Human Rights *Van Kück v. Germany* (Application no. 35968/97), 12 June 2003; European Court of Human Rights *B. v. France* (Application no. 13343/87), 25 March 1992; European Court of Human Rights *I. v. the United Kingdom* (Application no. 25680/94), 11 July 2001; European Court of Human Rights *L. v. Lithuania* (Application no. 27527/03), 11 September 2007; also see Council of Europe: Committee of Ministers, *Recommendation 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*, 31 March 2010, the Appendix to which, at para. 19 stipulates: ‘Member states should ensure that personal data referring to a person’s... gender identity are not collected, stored or otherwise used by public institutions... except where this is necessary for the performance of specific, lawful and legitimate purposes; existing records which do not comply with these principles should be destroyed’.

<sup>343</sup> See generally, P. Jordan “Russia's Accession to the Council of Europe and Compliance with European Human Rights Norms” 11(2) *Demokratizatsiya* (2003) 281.



on liberal, or human rights, values concerning sexuality, gender and family, in which SOGI is on the front line. Sozayev describes it as “an alliance of ultra nationalists, conservatives, Christian Orthodox and Protestant fundamentalists are seeking to impose an ideological monopoly. It is safe to say that today, Russian society is going through a period of traditionalist revanchism”.<sup>344</sup> Rather than focusing on a sexual act, or indeed the sexual or gender identity of an individual, the law focuses on anything that “promotes” such identities to children and young people. The present paper contends that not only is that discriminatory to people of diverse SOGI, but also to young people who themselves are grappling with their own identities.

#### ***“No policy of discrimination” in Russia***

The first response of the Russian delegation at its first cycle UPR in 2009, made the extraordinary claim that “there is no policy of discrimination” based on sexual orientation. Perhaps the authors of this response felt they were being accurate – in 2009, although there had been many cases of discrimination and other HRVs documented and reported to various UN mechanisms,<sup>345</sup> at the federal level no ‘policy document’ that blatantly codified SOGI discrimination existed at that time. But the claim appears disingenuous at best. At the time of writing that response the delegation could not have been unaware of the three ECtHR cases concerning the blocking,

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<sup>344</sup> V. Sozayev “Russia in the 21st Century: A Culture War Caused by Traditionalist Revanchism” in *The Situation of Lesbian, Gay, Bisexual and Transgender People in the Russian Federation: Last Three Months 2011 – First Half 2012* (Moscow Helsinki Group, 2012, Moscow) at 6, (online) <http://www.mhg.ru/files/012/LGBTeng2012.pdf> (date accessed: 16 August 2013).

<sup>345</sup> The first SOGI human rights monitoring report for Russia was produced by the Moscow Helsinki Group, see I. Kochetkov, & X. Kirichenko *Situation of lesbians, gays, bisexuals and transgenders in the Russian Federation* (Moscow Helsinki Group, 2008, Moscow) (online) [http://www.ilga-europe.org/home/guide/country\\_by\\_country/russia/situation\\_of\\_lesbians\\_gays\\_bisexuals\\_and\\_transgenders\\_in\\_the\\_russian\\_federation\\_2008](http://www.ilga-europe.org/home/guide/country_by_country/russia/situation_of_lesbians_gays_bisexuals_and_transgenders_in_the_russian_federation_2008) (date accessed: 23 July 2013) reporting SOGI issues from 2007 and before; see The Danish Institute for Human Rights. (2010i). *Study on homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity: sociological report: Russian Federation* (Council of Europe, 2010, Brussels) at 15 (online) [http://www.coe.int/t/Commissioner/Source/LGBT/RussiaSociological\\_E.pdf](http://www.coe.int/t/Commissioner/Source/LGBT/RussiaSociological_E.pdf) (date accessed: 23 July 2013).

violence and human rights violations at Moscow Prides in 2006, 2007 and 2008 by Nikolay Alekseyev,<sup>346</sup> who had mobilised maximum publicity when lodging each case, and it must be said triggered huge and violent responses in the process.<sup>347</sup> Also a number of Treaty Bodies had already specified SOGI-discrimination at the time of the first response.<sup>348</sup> Only two NGO submissions referenced SOGI in the 2009 UPR.<sup>349</sup>

Likewise, the second claim that they rejected regarding training (recommendation 31). Again, carefully worded, the fact is that Russia did not consider SOGI cognisable in IHRL, and as such the use of the words “taking account of the requirements of international legal standards and rules” evades outlining this position. However,

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<sup>346</sup> European Court of Human Rights *Alekseyev v. Russia* (Application nos. 4916/07, 25924/08 and 14599/09), 11 April 2011 (the applications were lodged on 29 January 2007, 14 February 2008 and on 10 March 2009 respectively).

<sup>347</sup> For example, see Scott Long “Doug Ireland and the Nikolai Alekseev Circus: Lone Ranger Fantasies in the Wild, Wild West” *A Paper Bird*, 21 September 2013 (web blog) <http://paper-bird.net/2013/09/21/doug-ireland-and-the-nikolai-alekseev-circus-lone-ranger-fantasies-in-the-wild-wild-west/> (date accessed 21 September 2013) (speaking about the strategy employed during these Prides by what he calls “Lone Ranger” activists, including Alekseyev).

<sup>348</sup> United Nations Committee on Economic, Social and Cultural Rights *General Comment No.19* E/C.12/GC/19, 4 Feb 2008, at para. 29 (social security); United Nations Committee on Economic, Social and Cultural Rights *General Comment No. 18* E/C.12/GC/18, 6 Feb 2006, at para. 12(b)(1) (work); United Nations Committee on Economic, Social and Cultural Rights *General Comment No. 15* E/C.12/2002/11, 30 Jan 2001, at para. 13 (water); United Nations Committee on Economic, Social and Cultural Rights *General Comment No. 14* E/C.12/2000/4, 11 August 2000, at para. 18 (health); United Nations Committee on the Rights of the Child *General Comment 4* CRC/GC/2003/4, 1 July 2003, at para. 6 (health and development); United Nations Committee on the Rights of the Child *General Comment 3* CRC/GC/2003/3, 17 March 2003, at para. 8 (HIV/AIDS); United Nations Committee Against Torture *General Comment 2* CAT/GC/2 24 January 2008, at para. 21 (implementation of Article 2).

<sup>349</sup> Amnesty International *Russian Federation: Submission to the UN Universal Periodic Review Fourth session of the UPR Working Group of the Human Rights Council February 2009* 8 September 2008 at 6 (online) [http://www.upr-info.org/IMG/pdf/AI\\_RUS\\_UPR\\_S4\\_2009\\_AmnestyInternational.pdf](http://www.upr-info.org/IMG/pdf/AI_RUS_UPR_S4_2009_AmnestyInternational.pdf) (date accessed: 30 July 2013) [reference to ‘gay’ under ‘Freedom of Expression’]; SOVA Center for Information and Analysis, Center for the Development of Democracy and Human Rights, “Public Verdict” Foundation, “Memorial” Human Rights Center, Institute for Human Rights, Moscow Helsinki Group, Center for Social and Labor Rights, “Golos” Association, Glasnost Defense Foundation, Youth Human Rights Movement, Center “Demos,” “Social Partnership” Foundation, “Perspektiva,” “Civic Assistance to Refugees and Forced Migrants” Committee, and Interregional Committee Against Torture (Joint Report) *Materials produced by Russian NGOs for the Universal Periodic Review of Russia in the United Nations Human Rights Council*, October 2008, at 10, (online) [http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/RU/RussianNGOs\\_RUS\\_UPR\\_S4\\_2009\\_RussianNGOs\\_Etal\\_JOINT.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/RU/RussianNGOs_RUS_UPR_S4_2009_RussianNGOs_Etal_JOINT.pdf) (date accessed: 30 July 2013).

during the same session where it rejected these two recommendations, Russia introduced its first Traditional Values of Humankind resolution at the 11<sup>th</sup> session of the HRC in June 2009.<sup>350</sup> Throughout the debate in UN fora over the cognisable status of SOGI in relation to IHRL, Russia has come out at the forefront against the proposal (discussed in Section 1.4), a position it has repeatedly stated both in and outside the UN.<sup>351</sup>

Over the three years prior to the first cycle UPR of Russia, SOGI activism in Russia had significantly cohered, particularly with the assistance of overseas and regional funding. In 2006, the INGO ILGA-Europe assisted in the formation of the NGO, the “Russian LGBT Network” (hereafter the Network), and in 2008 received a 3 year-grant from the European Commission for the support and capacity-building of this organisation, particularly in regards to IHRL.<sup>352</sup> This was the first time that a LGBT NGO in Russia received training and capacity-building as well as a mid-term core funding for their work. The Network which originally comprised 11 groups from across the country,<sup>353</sup> has assisted in setting up SOGI groups in over 20 regions in Russia. Staffed with some skilled lawyers, it carries out socio-legal research that it

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<sup>350</sup> *Supra* A/HRC/11/L.1 n.143.

<sup>351</sup> For example, at the G8 Foreign Ministers Meeting in Washington on April 2012, Russia disassociated itself (on the official record) from that part of the Statement where Ministers reaffirmed that LGBT people face death, violence, harassment and discrimination based on their status, and are deserving of human rights protection: “[t]he Russian Federation disassociates itself from this language given the absence of any explicit definition or provision relating to such a group or such persons as separate rights holders under international human rights law.” see paragraph on ‘Human Rights’. G8 Information Centre “G8 Foreign Ministers Meeting Chair's Statement” (Washington), 12 April 2012 (online)<http://www.g8.utoronto.ca/foreign/formin120412.html> (date accessed: 2 August 2103)

<sup>352</sup> International Gay and Lesbian Association – Europe “The Russian LGBT Network” (n.d.) (online) [http://ilga-europe.org/home/how\\_we\\_work/previous\\_projects/russian\\_project/the\\_russian\\_lgbt\\_network](http://ilga-europe.org/home/how_we_work/previous_projects/russian_project/the_russian_lgbt_network) (date accessed: 22 August 2013).

<sup>353</sup> "LGBT organisation Exit" (St. Petersburg), "LesbiPARTYya" (St. Petersburg), "Serving Nuntiare et Recreare (LGBT Christians)" (St. Petersburg), "Perspective" (Arkhangelsk) “Ural-positive” (Ekaterinburg), "Anti-Dogma. Info" (Chelyabinsk), "League" (Volgograd), "Human Rights Center of Krasnoyarsk (Krasnoyarsk), "The walls need to talk" ("SDG") (Krasnoyarsk), "Circle-Karelia (Petrozavodsk), Rainbow House" (Tyumen).

presents to UN Treaty Bodies, Council of Europe and policy-makers in various regions of the country. Concurrently in 2006, the first Pride in Moscow happened and was greeted with unprecedented violence,<sup>354</sup> seemingly failing in its intention to “promote tolerance and respect for human rights”.<sup>355</sup>

Unfortunately, the aim of drawing attention to the LGBT community is exactly what has happened, but in ways that are mostly deeply negative.<sup>356</sup> Since the first cycle of the UPR, the LGBT Network with other INGOs has produced shadow reports through 2009, 2010, 2011 and 2012 to the CCPR,<sup>357</sup> CEDAW,<sup>358</sup> CESCR,<sup>359</sup> and CAT,<sup>360</sup> each

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<sup>354</sup> See report of the event Human Rights Watch & ILGA-Europe “*We Have the Upper Hand*” *Freedom of Assembly in Russia and the Human Rights of Lesbian, Gay, Bisexual, and Transgender People* (HRW, 2007, New York) (online): <http://www.hrw.org/legacy/background/lgbt/moscow0607/moscow0607web.pdf> (date accessed: 8 August 2013).

<sup>355</sup> *Supra Alekseyev v. Russia* n.346, at para. 6.

<sup>356</sup> Amongst a huge amount of well-publicised material on increasing homophobia in Russia, including terrible video imagery from the fascist group Occupy-Gerontofiliay or example, recently on 5 September 2013, a deputy in the State Duma from Voronezh Alexei Zhuravlev announced he is proposing an amendment to Article 69 of the Family Code to remove parental rights to parents of “non-traditional sexual orientation”. Amongst his comments in a recent interview he said “[h]omosexuals must not raise children. They corrupt them” and regarding the movement across Europe towards same-sex marriage and partnerships, he said “[w]e view Europe as Sodom and Gomorrah ... they mustn’t tell us what to do”, see Olga Pavlikova, Interview “Alexei Zhuravlev: “A homosexual should not raise a child”” *Slon.ru*, 5 September 2013, (website) [http://slon.ru/russia/aleksey\\_zhuravlev\\_gomoseksualist\\_ne\\_dolzen\\_vospityvat\\_rebenka-987035.xhtml](http://slon.ru/russia/aleksey_zhuravlev_gomoseksualist_ne_dolzen_vospityvat_rebenka-987035.xhtml) (date accessed: 8 September 2013).

<sup>357</sup> Global Rights, ILGA-Europe, Russian LGBT Network, FtM Phoenix Group, Russian Transgender Fund. *Submission to the Human Rights Council: Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in Russia; A Shadow Report*. October 2009, (online) [http://www2.ohchr.org/english/bodies/hrc/docs/ngos/JointStatement\\_Russia97.pdf](http://www2.ohchr.org/english/bodies/hrc/docs/ngos/JointStatement_Russia97.pdf) (date accessed: 8 August 2013).

<sup>358</sup> LGBT Network *Submission to the CEDAW Committee: Discrimination and Violence Against Lesbian, Gay, Bisexual and Transgender Persons in Russia; A Shadow Report*. July 2010, (online) [http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/LGBTNetwork\\_RussianFederation46.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/LGBTNetwork_RussianFederation46.pdf) (date accessed: 8 August 2013).

<sup>359</sup> LGBT Network *Submitted for the 46<sup>th</sup> CESCR Session. Discrimination on Grounds of Sexual Orientation and Gender Identity in Health Care, Education, Employment and Social Security in the Russian Federation: an Alternative Report* May 2011, (online) [http://www2.ohchr.org/english/bodies/cescr/docs/ngos/IRSM\\_RussianFederation\\_CESCR46\\_en.pdf](http://www2.ohchr.org/english/bodies/cescr/docs/ngos/IRSM_RussianFederation_CESCR46_en.pdf) (date accessed: 8 August 2013).

<sup>360</sup> Russian LGBT Network *Alternative Report Implementation of the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment in the Russian Federation in relation to Sexual Orientation and Gender Identity* September 2012, (online) [http://www2.ohchr.org/english/bodies/cat/docs/ngos/LGBT\\_RussianFederation\\_CAT49.pdf](http://www2.ohchr.org/english/bodies/cat/docs/ngos/LGBT_RussianFederation_CAT49.pdf) (date accessed: 8 August 2013).

of which presented information on the country situation in terms of the appropriate covenant obligations. But in July 2012 draft legislation 102766-6 was introduced to curb NGO activity, stipulating that any NGO receiving funding from outside the State be registered as ‘foreign agents’,<sup>361</sup> producing a stigmatising effect that curbs NGO activity.<sup>362</sup> Combined with some sizeable surveys over these years a significant body of documentary work has been produced, and perhaps of more importance, alliances with other human rights actors have been forged, and the international support at the institutional level has been mobilised.<sup>363</sup>

### ***Blatant contravention of IHRL***

The second cycle UPR presents quite a different picture as regards NGO concern for the human rights implications connected with the suppression of diverse SOGI in

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<sup>361</sup> Russian Federation, Federal Draft Law 102766-6, 13 July 2012.

<sup>362</sup> Thorbjorn Jagland, Secretary-General of the Council of Europe stated that the new law “can have a chilling effect on the NGO community, particularly if this law is not being put into practice in the right manner”, D. Dyomkin "Council of Europe Tells Putin of Concern over Russian NGO law", *Reuters*, 25 May 2013 (website) <http://www.reuters.com/article/2013/05/20/us-russia-europe-ngos-idUSBRE94J0S120130520> (date accessed: 1 September 2013); Catherine Ashton, the High Representative of the Union for Foreign Affairs and Security Policy at the European Union said, “[t]he inspections and searches launched against the Russian NGO community and conducted on vague legal grounds are worrisome since they seem to be aimed at further undermining civil society in the country”, M. Elder "Russia Raids Human Rights Groups in Crackdown on 'Foreign Agents'", *The Guardian*, 27 March 2013 (website) <http://www.theguardian.com/world/2013/mar/27/russia-raids-human-rights-crackdown> (date accessed: 1 September 2013); United States Assistant Secretary of State Michael Posner stated, “We are deeply concerned about the worsening climate for media freedom in Russia. Earlier this month the Duma passed laws enabling Internet censorship and re-criminalising defamation. The Duma has also discussed labeling news outlets that are funded internationally as “foreign agents” – a stigmatising term now also applied to NGOs” RIA Novosti "U.S. Criticises Russian Foreign Agent NGO Law". *RIA Novosti*, 1 June 2013, (website) <http://en.rian.ru/russia/20120726/174784572.html> (date accessed: 1 September 2013).

<sup>363</sup> For example, three days before the federal homosexual propaganda law was enacted the Parliamentary Assembly of the Council of Europe (PACE) voted to appeal to the Russian government not to pass the law, see Parliamentary Assembly of the Council of Europe “PACE Says No to Legislation on Prohibiting 'Homosexual Propaganda’” 27 June 2012 (webpage) [http://assembly.coe.int/ASP/NewsManager/EMB\\_NewsManagerView.asp?ID=8917&L=2](http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=8917&L=2) (date accessed: 18 August 2013); and on 6 September 2013, U.S. President Barack Obama met a number SOGI human rights defenders in St Petersburg while there attending the G20 summit (a meeting, it is reported in the article, that, President Putin said he had no problem with), see LGBT Network, “Russian LGBT Network Chair meets Barack Obama” 8 September 2013, (webpage) <http://www.lgbtnet.ru/en/content/russian-lgbt-network-chair-meets-barack-obama> (date accessed: 7 September 2013).

Russian society, including rights to expression, assembly, expression, privacy, work, and non-discrimination, as well as calls for hate crime legislation and the protection of HRDs. Eleven organisational or joint submissions included SOGI in their content, six of these making substantial comments.<sup>364</sup> Similarly, the number of recommendations by States at the interactive dialogue, as reported in the Working Group's *Final Report*,<sup>365</sup> that directly reference SOGI is 13 (compared with two in 2009). But what is very interesting in the second cycle of the UPR is the number of State recommendations that do not directly mention the words 'homosexuality', 'LGBT', or 'SOGI', but the issue being brought up applies exactly to SOGI: these range is subject from increasing human rights training, protection of human rights defenders, removing restrictions on NGOs, repeal of the 'foreign agents' law, freedom of expression and assembly, and many that recommend bringing national laws into conformity with IHRL and standards. In total, there are 47 further recommendations, and 11 comments made at the Interactive Dialogue that fit this category (10 of which come from the European Region, and one from Japan).<sup>366</sup>

In June 2013, the State Duma codified in countrywide legislation, which instead of employing the term 'homosexuality' as recorded in all three stages of the Bill, at the

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<sup>364</sup> Article 19 "Submission to the UN Universal Periodic Review of Russian Federation 16th Session, April – May 2013", 9 October 2012; ILGA-Europe "Homosexual Propaganda Bans in Russia", 9 October 2012; International Commission of Jurists, "Submission to the Universal Periodic Review of the Russian Federation", October 2012; Joint Submission 6 "Economic and Social Rights of Vulnerable Groups - *Materials produced by Russian NGOs for the Universal Periodic Review of the Russian Federation in the United Nations Human Rights Council in 2013*", October 2012; Russian LGBT Network "The Universal Periodic Review," October 2012; and Amnesty International "Submission to the Universal Periodic Review, 16<sup>th</sup> session of the UPR Working Group". All of these are available on the UPR-info "Russian Federation – Review 2013" (n.d.) (website) <http://www.upr-info.org/Review-2009,1049.html> (date accessed: 23 August 2013).

<sup>365</sup> United Nations Human Rights Council *Final Report of the Working Group on the Universal Periodic Review: Russian Federation A/HRC/24/14*, 8 July 2013, paras. 140.84, 140.86-140.97.

<sup>366</sup> By working through the document, I have calculated these keeping in mind the probable intention of recommending States, based on their voting histories. For example, it is unlikely that Afghanistan in recommending non-discrimination legislation has included SOGI in the ambit of the intended protection, and so is not counted in this calculation (there are 24 such examples), *ibid* A/HRC/24/14.

last minute replaced that term with ‘non-traditional sexual relationships’.<sup>367</sup> The law has been widely criticised as incompatible with international and European human rights law.<sup>368</sup> The first law that pre-echoed this Federal Law of 2013 within this mode was enacted when Ryazan Region Duma passed its first law on the “protection” of minors’ morality in 2006, whereby any individuals or organisations mentioning homosexuality would be fined.<sup>369</sup> This and similar formulations in the phrasing of law would be picked up by ten other regions in the coming years,<sup>370</sup> until on 30 June 2013 Russia’s State Duma voted 436-0, with one abstention, for the federal law which bans “propaganda of non-traditional sexual relations” came into effect.<sup>371</sup> However, as a LGBT Network summary to the OHCHR on ‘traditional values’ shows, the rise of the Orthodox Church ideas entering public policy has been coming about since the

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<sup>367</sup> The Explanatory Note to the Bill N.135.FZ, before the term ‘homosexual’ was excised, that was voted on in late-June 2013 is reproduced at the following: Human Dignity Trust *Explanatory Note to the Bill N.135.FZ* (n.d.) (webpage) [http://www.humandignitytrust.org/uploaded/Library/Other\\_Material/2013.06.29\\_unofficial\\_translation\\_Russia\\_Explanatory\\_Note\\_Federal\\_bill\\_N\\_135-FZ.pdf](http://www.humandignitytrust.org/uploaded/Library/Other_Material/2013.06.29_unofficial_translation_Russia_Explanatory_Note_Federal_bill_N_135-FZ.pdf) (date accessed: 12 August 2013) (both in Russian and English). It appears the actual Act has not yet been made available.

<sup>368</sup> For example, see the Opinion issued by the European Commission for Democracy through Law (the Venice Commission), the purpose of this law and those like them in Moldova and Ukraine, “is not so much to advance and promote traditional values and attitudes towards family and sexuality but rather to curtail non-traditional ones by punishing their expression and promotion”, European Commission for Democracy through Law (Venice Commission) *Opinion: On the Issue of the Prohibition of so-called “propaganda of Homosexuality” in Light of Recent Legislation in some Member States of the Council of Europe* Opinion 707 / 2012 (CDL-AD(2013)022), 18 June 2013 at 21 [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)022-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)022-e) (date accessed 2 September, 2013).

<sup>369</sup> Ryazan Regional Law on the Protection of Morality and Health of Minors, adopted by the Ryazan Region Duma on 22 March 2006.

<sup>370</sup> Ryazan (May 2008 – Ryazan Region Law, section 3.10 : “propaganda of homosexuality (sexual act between men or lesbianism) among minors”), Bashkortostan (August 2012), Krasnodar (July 2012), Kostroma (February 2012), Magadan (June 2012), Novosibirsk (July 2012), Samara (July 2012), Saint Petersburg (March 2012), Arkhangelsk (September 2011) and Kalingrad (2013).

<sup>371</sup> Graeme Reid, Director of the LGBT Rights Program of Human Rights Watch, places ‘traditional values’ encoded in the legislation in the following terms, “Russia has made much of its leadership on “traditional values” at the United Nations, but this bill shows what “traditional values” actually means in Russia. This bill makes clear that in Russia, “traditional values” means the state decides what is acceptable and what is not when it comes to personal identity. That is something that anyone – gay or straight – concedes at their peril.”

Graeme Reid “Russia: Reject Discriminatory Bill” *Human Rights Watch*, 1 July 2013 (webpage) <http://www.hrw.org/news/2013/06/23/russia-reject-discriminatory-bill> (date accessed: 2 September 2013)

end of the Soviet era,<sup>372</sup> and this law is a logical progression on the trajectory of that influence.

In *Fedotova v. Russian Federation*<sup>373</sup> the Human Rights Committee held that the ban on homosexual propaganda in the Ryazan Region violated Irina Fedotova's rights to freedom of expression<sup>374</sup> and non-discrimination. In doing so, the Human Rights Committee reversed its 1982 decision in the case of *Hertzberg v. Finland*.<sup>375</sup> A key line of defence in this case involved the concept that a law must be neutral, and not specify a particular sexual orientation (without a countering reason of greater import), otherwise it is discriminatory,<sup>376</sup> as was also asserted in *Romer v Evans*,<sup>377</sup> although denied in Botswana and Zimbabwe national courts.<sup>378</sup> Of further consequence this law has implications for the right of children to receive information on sexuality which

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<sup>372</sup> Russian LGBT Network "'Best Practice' of Using the Concept of "Traditional Values" in Russia" 28 February 2012 (on OHCHR website) <http://www.ohchr.org/Documents/Issues/HRValues/RussianLGBTNetwork.pdf> (date accessed: 2 September 2013) [presents very informative milestones of Church successes of insinuating values into regional and federal legislations, including the current legislation].

<sup>373</sup> *Supra Fedotova* n.228.

<sup>374</sup> Under Article 19.2 of the ICCPR, as found in United Nations Human Rights Committee *Laptsevich v. Belarus*, Communication No.780/1997, 20 March 2000, at para. 8.1.

<sup>375</sup> United Nations Human Rights Committee *Hertzberg et al. v. Finland*, Communication No. 61/1979, 2 April 1982: this case, the first sexual orientation ever before the UN Human Rights Committee, was found in favour of the Finnish government that whoever "publicly encourages indecent behaviour between persons of the same sex" was subject to a six-month prison sentence or a fine, under Article 19, paragraph 3, of the Covenant. *Fedotova* eventually overturned this because jurisprudence "has developed" (para. 5.9(a)), the by 2012 well-recognised principle of non-discrimination in IHRL (para. 5.9(b)), and conceptions of public morality are open to change, here reflecting *supra Toonen*, n.77; and *Dudgeon* n.74, para. 5.9(c).

<sup>376</sup> United Nations, Economic and Social Council *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, annex, E/CN.4/1985/4 (1985), principle 2; United Nations Human Rights Committee's *General Comment No. 22 on the Right to Freedom of Thought, Conscience and Religion, Supplement No. 40 (A/48/40)*, annex VI (1993), at para. 8; Individual Opinion of Torkel Opsahl in *Hertzberg et al. v. Finland*, *supra* n.375.

<sup>377</sup> *Supra Romer v. Evans* n.86.

<sup>378</sup> *Supra* cases n.94 and n.95.



has been established in IHRL in the context of the ICCPR, and education and health.<sup>379</sup>

In terms of citable legislative or policy change in Russia, it does not appear possible to directly assign any benefit to the NGO involvement in the UPR process at all. With a remarkable belligerence, Russia has maintained a stance,<sup>380</sup> both nationally and at the HRC, that information to children and minors regarding non-traditional sexual relationships is dangerous to their wellbeing, and that the status of SOGI is most certainly not within the ambit of IHRL or the mandate of the HRC. Since 2006, violence towards, and stigmatisation and discrimination of, sexual and gender minorities has increased, both in State and private settings, and there is no signs that the State intends any kind of intervention despite a large body of IHRL that obligates them to.<sup>381</sup> In fact, through the introduction of the “foreign agents” and the

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<sup>379</sup> United Nations Committee on the Rights of the Child *General Comment No. 3 of the on HIV/AIDS and the Rights of the Child*, Supplement No. 41 (A59/41), annex IX, (2003) para. 16; United Nations Committee on the Rights of the Child *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, CRC/C/15/Add.188, (2002) para. 44(d); United Nations Special Rapporteur on the Right to Education, *Summary of Communications to Governments*, A/HRC/8/10/Add.1, 13 May 2008, paragraphs 79–84, and United Nations Special Rapporteur on the Right to Education, *Summary of Communications to Governments* A/HRC/4/29/Add.1, 15 March 2007, paras. 34–37; European Committee of Social Rights, *INTERIGHTS v. Croatia* (complaint No. 45/2007), 30 March 2009.

<sup>380</sup> See for example, Pink News “Russian Official: The EU should fix its own problems before criticising Russia over LGBT issues” 20 September 2013 (website) [http://www.pinknews.co.uk/2013/09/20/russian-official-the-eu-should-fix-its-own-problems-before-criticising-russia-over-lgbt-issues/?utm\\_content=buffer1da72&utm\\_source=buffer&utm\\_medium=facebook&utm\\_campaign=Buffer](http://www.pinknews.co.uk/2013/09/20/russian-official-the-eu-should-fix-its-own-problems-before-criticising-russia-over-lgbt-issues/?utm_content=buffer1da72&utm_source=buffer&utm_medium=facebook&utm_campaign=Buffer) (date accessed: 20 September 2013) (“At a Beijing forum on human rights last week, he said Russia “cannot but be concerned about the aspiration of the Western countries to impose their neo-liberal values as a universal basis for life-sustaining activity on other members of the international community.” Konstantin Dolgov, the human rights commissioner for the Russian Foreign Ministry responding to Amnesty International 2013 report *Because of Who I Am: Homophobia, Transphobia and Hate Crimes in Europe*”); and regarding the Convention on the Rights of the Child, a spokesperson for the Foreign Ministry is reported as saying “This convention aims in part to protect children from harmful information, and we believe that promotion of homosexuality could harm them”, Pink News “Russian Foreign Ministry: Anti-gay laws do not violate any ‘international obligations’”, 8 August 2013 (website) <http://www.pinknews.co.uk/2013/08/08/russian-foreign-ministry-anti-gay-laws-do-not-violate-any-international-obligations/> (date accessed: 27 August 2013).

<sup>381</sup> See for example, *supra Toonen*, n.77; *supra Young v. Australia* n.78; *supra X v. Colombia* n.101; *supra* General Comment 20 n.70; United Nations Committee on Economic, Social and Cultural Rights *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian*

‘homosexual propaganda’ laws, the State has entrenched its position at the HRC. Worryingly, the concept has been picked up in Moldova, Belarus, Lithuania, Uganda, Nigeria, Ukraine and various other States, in all of which similar proposals have been brought to the parliamentary level. The stance been taken appears to perfectly exemplify the core issue spoken about at the start of this paper regarding the *politics of human rights* obliterating the voices of those who do the *politics for human rights*. The scale of the offence against IHRL that Russia is currently implementing combined with its relentless efforts to establish the primacy of ‘traditional values’ over human rights threatens the entire human rights framework quite seriously.

## **Conclusion**

This paper has argued that the *politics of human rights* in regard to SOGI inhere an exceptionalism at the expense of the universalist foundation that lies at the heart of the international human rights system. It is based on the age-old universalist/relativist debate around which the larger question of the reach, or autonomy, of sovereignty is negotiated. Despite the very clear endorsement of universal application of IRHL to SOGI, supported by expanding jurisprudence and various other sources of law, like the soft law elaborations presented in the *Yogyakarta Principles*, the ‘culture war’ is

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*Federation E/C.12/RUS/CO/5*, 1 June 2011, “The Committee requests information concerning the extent of the practice of discrimination against lesbian, gay, bisexual and transgender persons in particular in employment, health care and education in the State party (Art. 2, para. 2) at para. 36; United Nations Committee on the Rights of the Child *General Comment 13* CRC/GC/2011/13, 4 November 2011, at paras 60 and 72(g) (freedom from violence); United Nations Committee Against Torture *Concluding Observations on the Fifth Periodic Report of the Russian Federation* CAT/C/RUS/CO/5, 11 December 2012 (instructs protection measures, police training, recommends enhanced monitoring, awareness raising and data collection); United Nations CEDAW *General Recommendation No.28* CEDAW/C/GC/28, 16 December 2010, at para. 18 (core obligations under Art 2); *ibid* at para. 13 (older women and rights); *supra* *Salgueiro da Silva Mouta* n.76 (sexual orientation covered by Art 14 of the Convention); European Court of Human Rights *P.V. v. Spain* (Application No. 35159/09), 30 November 2010 (gender identity covered by Art 14 of the Convention).

going strong at the HRC. The denial of acknowledgement at the HRC functions to act as a delay-tactic by ‘opposing States’, of something that seems inevitable; the fact that SOGI advocates are bringing actual credible evidence of HRVs forward in the UPR testifies to their reality and validity to be viewed under States’ human rights obligations. This impasse regarding refusal of acknowledgement challenges and compromises the foundations on which the international human rights system is built.

The *politics for* human rights is concurrently producing results both within and without the HRC. On the one hand, it seems clear that the tide has turned in increasing numbers of UN Member States in terms of recognition of that status of SOGI, where support that the principles of the universalism of IHRL be applied without exception. Yet as more data and more ‘friendly State’ support to NGO advocacy at the UN is evident in the UPR process, exposing the misdeeds of States intensifies the polarising effect triggered by this issue. Dangerously, that State negation in effect sanctions violence and discrimination in national settings, and certainly appears to do nothing to curb it.

As the world’s central hub for the recognition and setting of human rights norms, the work at the HRC is of great significance to SOGI advocacy. The modalities of the UPR are more suitable to processing issues that cause contention because of their dialogic nature than the heavily polemic and politicised space of the HRC. The UPR offers the best chance for SOGI CSOs to speak their truths in their own voices about the discrimination they face under the traditional matrices in which they live, but from the perspective of universal human rights. As such, the *politics for* human rights should be strengthened by more active ‘friendly State’ support in monitoring practices

on the ground level. The periodic nature of the UPR sets very useful timeframes for both States' and advocates' action and strategic cohesion.

Despite State refusal to accept UPR recommendations, and the evident danger to HRDs, the work at the HRC and engagement in the UPR feeds into the elaboration of a SOGI norm: the very act of engagement resituates the State's sovereign voice, and CSOs can use the process to dialogue with, and within, their own traditions about sexual and gender diversity. The UPR empowers sexual and gender minorities to build their capacity to more effectively politic *for* human rights, and resituate the State's autonomy in representing that State's normative meaning while they do the politics *of* human rights.

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## ANNEX – DATA CHARTS

TABLE 1. EXPRESSION OF PRIME CONCEPTS IN CRIMINALISING COUNTRIES' LEGISLATIONS BY REGIONAL BLOC (OIC MEMBERS NOTED)						
	Homosexual (act)	Unnatural offences	Against order of nature	Sodomy	Buggery	Other
1	Afghanistan (AS+PAC) [OIC]	Belize (GRULAC)	Angola (AF)	Algeria (AF) [OIC]	Antigua and Barbuda (GRULAC)	Burundi (AF) ('same sex')
2	Ethiopia (AF)	Botswana (AF)	Bangladesh (AS+PAC) [OIC]	Iran (AS+PAC) Shari'a law [OIC]	Barbados (GRULAC)	Cameroon (AF) ('same sex') [OIC]
3	Ghana (AF)	Brunei (AF) [OIC]	Bhutan (AS+PAC)	Lesotho (AF)	Dominica (GRULAC)	Guinea (AF) ('same sex') [OIC]
4	Maldives (AS+PAC)	Comoros (AF) [OIC]	India (AS+PAC)	Liberia (AF)	Kiribati (no grouping)	Kuwait (AS+PAC) ('transvestitism') [OIC]
5	Oman (AS+PAC) [OIC]	Eritrea (AF)	Kenya (AF)	Mauritius (AF)	Saint Kitts and Nevis (GRULAC)	Libya (AF) (Shari'a law of Zina) [OIC]
6	Uzbekistan (AS+PAC) [OIC]	Gambia (AF) [OIC]	Lebanon (AS+PAC) [OIC]	Namibia (AF)	Saint Lucia (GRULAC)	Qatar (Shari'a law of Zina)
7	Yemen (AS+PAC) [OIC]	Grenada (GRULAC)	Malaysia (AS+PAC) [OIC]	Saudi Arabia (AS+PAC) [OIC]	Sierra Leone (AF) [OIC]	Somalia (AF) ('same sex') [OIC]
8		Guyana (GRULAC) [OIC]	Mauritania (AF) [OIC]	Swaziland (AF)	St. Vincent & Grenadines (GRULAC)	
9		Jamaica (GRULAC)	Mozambique (AF) [OIC]	Tonga (AS+PAC)	Trinidad & Tobago (GRULAC)	
10		Malawi (AF)	Myanmar (AS+PAC)	Tunisia (AF) [OIC]		
11		Morocco (AF) [OIC]	Nigeria (AF) [OIC]	Turkmenistan (AS+PAC) [OIC]		
12		Nauru (AS+PAC)	Cyprus (northern) (AS+PAC)	UAE ((AS+PAC) [OIC]		
13		Palau (AS+PAC)	Pakistan (AS+PAC) [OIC]	Zimbabwe (AF)		
14		Senegal (AF) [OIC]	Papua New Guinea (AS+PAC)			
15		Solomon Islands (AS+PAC))	Sao Tomé (AF)			
16		Syria	Seychelles			

		(AS+PAC) [OIC]	(AF)			
17		Tuvulu (AS+PAC)	Singapore (AS+PAC)			
18		Zambia (AF)	South Sudan (AF) [OIC]			
19			Sri Lanka (AS+PAC)			
20			Sudan (AF) [OIC]			
21			Tanzania (AF)			
22			Togo (AF) [OIC]			
23			Uganda (AF) [OIC]			

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TABLE 2 – THEMATIC BREAKDOWN OF RESPONSES TO RECOMMENDATIONS						
SuR response	Action type	Content of Recommendation to SuR				Total
	Action Type	Discrimination	Decriminalisation	Awareness	Other	Totals Action Type
Accepted All action types – total = 171	1	1	0	0	1	2
	2	8	0	1	3	12
	3	3	1	0	7	11
	4	55	2	10	16	83
	5	37	10	10	6	63
Rejected All action types – total = 227	1	0	0	0	0	0
	2	0	1	0	0	1
	3	11	12	2	5	24
	4	24	14	6	19	46
	5	43	99	1	8	156
General response All action types – total = 62	1	0	0	0	0	0
	2	0	0	0	0	0
	3	5	2	1	1	9
	4	10	3	5	3	21
	5	11	12	5	4	32
No response All action types – total = 47	1	0	0	0	0	0
	2	0	1	0	1	2
	3	2	2	2	1	5
	4	4	0	1	3	7
	5	12	12	5	4	33