

NORMALIZING SEX AND ITS DISCONTENTS: ESTABLISHING SEXUAL RIGHTS IN INTERNATIONAL LAW

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Human rights struggles are symbolic and political: their immediate battleground is the meaning of words, such as “difference” and “equality” or “similarity” and “freedom.” However, if successful, they have ontological consequences—they radically change the constitution of the legal subject and affect peoples’ lives. If we accept the psychoanalytic insight that people have no essential identities outside of those constructed in symbolic discourses and practices, what follows is that, “[h]uman rights do not belong to humans and do not follow the dictates of humanity; they construct humans. A human being is someone who can successfully claim human rights.”¹

[Man has no] dominion over his specifically sexual faculties, for these are concerned by their very nature with the generation of life, of which God is the source.²

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¹ Costas Douzinas, *Critique and Comment: The End(s) Of Human Rights*, 26 MELB. U. L. REV. 445, 457 (2002).

² Encyclical Letter *Humanae Vitae* of the Supreme Pontiff Paul VI (July 25, 1968), available at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_pvi_enc_25071968_humanae-vitae_en.html.

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I. INTRODUCTION

People, individually and collectively, have been declaring "sexual rights" in one form or another for the better part of modern history—Olympe de Gouge's 1791 Declaration of the Rights of Women; Elizabeth Cady Stanton's 1848 Seneca Lake Declaration of Sentiments; and the Gay Liberation Front's 1971 Gay Manifesto, to name a few. These declarations had multiple constituencies and diverse claims; they were as much a part of consolidating social movements and their underlying identity politics in their various historical moments, as they were advocating for governments to respect the rights enunciated. Some of these claims, such as votes for women regardless of marital status, now have been realized almost universally, while others less so, such as equal and substantive protection of the law for same-sex behavior. The most radical claims of all—limited legal regulation of sex, sexual liberation, and free love—are just dim reminders of the revolution manqué.³ All of these efforts, however, lay claim to sex and sex-

³ See generally MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME 1: AN INTRODUCTION* (Robert Hurley trans., 1st ed. 1978) (discussing the presumed liberating force of sexuality). The term "revolution manqué" means a "missed revolution," or in this context, a missed, yet longed for, opportunity. For an example of its use, see James M. McPherson, *The Civil War and Reconstruction: A Revolution of Racial Equality*, in *SEVEN ON BLACK: REFLECTIONS ON THE NEGRO EXPERIENCE IN AMERICA* 49, 71 (William G. Shade & Roy C. Herrenkohl eds., 1969) ("The Civil War and Reconstruction, therefore, were a revolution manqué. The Union was restored and the slaves freed, but

uality as an essential element of “the human” who might claim rights,⁴ as well as an element of human personhood that concerns society at large. Most importantly, this “socialization” of sexuality highlights the potentials for justice or injustice in how societies organize sexuality.⁵

Sexuality is one of the contemporary “master narratives” of humanity: ever since Sigmund Freud posited the sexual as the basis for the construction of personality, to be modern is to believe that knowing about one’s sexuality is revelatory of some essential aspect of oneself.⁶ Such an understanding is reflected in a string of gender, sexuality, and sexual orientation discrimination cases that have been brought before regional human rights courts. What was at stake in these cases, in part, was the development of personality.⁷ That human rights forums have become constitutive sites of sexual per-

the Negro did not achieve equality. . . . A genuine revolution of equality would have required a revolution in institutions and attitudes which did not occur.”)

⁴ See generally DENNIS ALTMAN, *GLOBAL SEX* (2003) (addressing the rise of sex as a salient feature of the modern human, particularly in the globalized world); SONIA CORRÊA, ROSALIND PETCHESKY & RICHARD PARKER, *SEXUALITY, HEALTH AND HUMAN RIGHTS* (2008) (articulating a human rights vision of sexual self-determination in which true sexual citizenship guarantees not only the right to pursue a satisfying, safe sexual life but also full participation in society); Oliver Phillips, *Constituting the Global Gay: Issues of Individual Subjectivity and Sexuality in Southern Africa*, in *SEXUALITY IN THE LEGAL ARENA* 17, 24–26, 32–33 (Carl Stychin & Didi Herman eds., 2000) (reviewing the historical and political contingencies involved in constructing sexual identities and exploring the interplay in post-Colonial law between developments on legal recognition of individual responsibility and sexual subjectivity); RANDALL WILLIAMS, *THE DIVIDED WORLD: HUMAN RIGHTS AND ITS VIOLENCE* (2010) (questioning human rights as the privileged site to defend the human and to counter the global injustices of imperialism and neo-colonialism); Diane Richardson, *Constructing Sexual Citizenship: Theorizing Sexual Rights*, 62 *CRITICAL SOC. POL’Y* 105, 123, 128 (2000) (arguing that dominant theories of sexuality have framed sexuality as a “pregiven need in all human beings,” and attempting to analyze human citizenship through the concept of sexual rights); Ara Wilson, *The Transnational Geography of Sexual Rights*, in *TRUTH CLAIMS: REPRESENTATION AND HUMAN RIGHTS* 251, 252–53 (Mark Philip Bradley & Patrice Petro eds., 2002) (considering the dynamics of sexuality as having meaning to human rights across cultures). *But see* JOSEPH MASSAD, *DESIRING ARABS* 160–61, 183 (2007) (criticizing the cultural imperialism in assumptions about the relationship between humanity and “gay” identity by global advocates).

⁵ The history of laying claim to “erotic justice,” as Gayle Rubin termed it in her groundbreaking essay, is highly variable. Gayle Rubin, *Thinking Sex: Notes for a Radical Political Theory of the Politics of Sexuality*, in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* 267, 275, 302–03, 310 (Carole S. Vance ed., 1984).

⁶ For a general introduction tying sexuality, following and moving beyond Freud, to contemporary politics, see generally JEFFREY WEEKS, *SEXUALITY* (2d ed. 2003).

⁷ See, e.g., *Christine Goodwin v. United Kingdom*, 6 Eur. Ct. H.R. 1, 31 (2002) (“[T]he right of transsexuals to personal development . . . in the full sense enjoyed by others in society cannot be regarded as a matter of controversy”); *Salgueiro Da Silva Mouta v. Portugal*, 9 Eur. Ct. H.R. 309, 325–26 (1999). *Goodwin* altered the doctrine on gender identity, while *Mouta* did the same for sexual orientation, as the Court accepted that the rights involved were both private and public (nondiscrimination) rights. In *Goodwin*, for instance, the court noted that, “[a] conflict between social reality and law . . . places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.” 6 Eur. Ct. H.R. at 27. *See also* *M.C. v. Bulgaria*, 12 Eur. Ct. H.R. 1, 33 (2003) (addressing the necessity of effective rape prosecutions since rape infringes essential aspects of private life).

sonhood is due to, at least in part, the hegemonic nature of human rights discourse and its success in displacing other narratives of dignity and being.⁸ From the 1970s in Europe and the Americas, and now through globalized, diffused conversations facilitated by technology, the human person who bears rights is a sexual person.⁹ Yet this very thing—“sexuality”—that is being named and fought over as central to “knowing yourself” has itself only been sporadically and incoherently elaborated in human rights norms, laws, and treaties.¹⁰

This Article is an attempt to account for why sexual rights claims are being made now, and why, even as they are being made, they are fragmented. We argue that today we are in an identifiable period of normative claim-making around sexuality and sexual rights, akin but distinct from ef-

⁸ See generally DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2004) (explaining how the language of human rights has colonized the imagination).

⁹ For example, we note that there is increased attention to and concern about HIV/AIDS, sexual violence, and sexual abuse of children, insofar as a sense that “something must be done” can be noted in popular media and culture. These sources relay calls for criminalization on the one hand, and human rights protections on the other. Compare Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, *opened for signature* Oct. 25, 2007, CETS No. 201 (entered into force Jan. 7, 2010) (the first international treaty to address all forms of sexual violence against children, including within the family, child prostitution, pornography, and sex tourism), with HUMAN RIGHTS WATCH, *NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US* (2007), available at <http://www.hrw.org/en/reports/2007/09/11/no-easy-answers> (arguing that state and federal sex offender registries and residency restrictions do more harm than good and violate the basic rights of former offenders).

¹⁰ See, e.g., Stefano Fabeni & Alice M. Miller, *The Importance of Being Perverse: Troubling Law, Identities, Health and Rights in Search of Global Justice*, in *THE HEALTH OF SEXUAL MINORITIES: PUBLIC HEALTH PERSPECTIVES ON LESBIAN, GAY, BISEXUAL, AND TRANSGENDER POPULATIONS* 93, 93 (Ilan H. Meyer & Mary E. Northridge eds., 2007) (advocating for an integrated approach to sexuality that links to health, law, and human rights, and thereby improves the currently limited understandings of sexuality); Alice M. Miller, *Sexual but Not Reproductive: Exploring the Junction and Disjunction of Sexual and Reproductive Rights*, 4 *HEALTH & HUM. RTS.* 68, 75–76, 85–86 (2000) (reflecting on the emergence of sexual rights out of the discourses on human rights and reproduction); Rosalind P. Petchesky, *Sexual Rights: Inventing a Concept, Mapping an International Practice*, in *FRAMING THE SEXUAL SUBJECT: THE POLITICS OF GENDER, SEXUALITY, AND POWER* 81, 82, 90 (Richard Parker, Regina Maria Barbosa & Peter Aggleton eds., 2000) (constructing an argument for an affirmative conception of sexual rights in order to bolster a fuller understanding of human being and behavior, and arguing that even feminist and human rights groups have been responsible for suppressing affirmative definitions of sexual rights); Ignacio Saiz, *Bracketing Sexuality: Human Rights and Sexual Orientation—A Decade of Development and Denial at the UN*, 7 *HEALTH & HUM. RTS.* 48, 64 (2004) (surveying the development of, and challenges to, sexual rights norm development and arguing that, with regard to sexual orientation claims, “norms and mechanisms created to combat gender discrimination have been disappointingly underused within the UN system”). See also Special Rapporteur on the right to health, *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Comm’n on Human Rights, U.N. Doc. E/CN.4/2004/49 (Feb. 16, 2004) (by Paul Hunt) [hereinafter Special Rapporteur on the right to health (by Paul Hunt)] (illustrating the ways that human rights organizations attempt to define the category of sexual rights, and recommending that more attention be devoted to a proper, more expansive understanding of sexual health and sexual rights).

forts of the recent past. Moreover, we argue that “sexual rights” as a coherent category informs the development of that law, even as our analysis will demonstrate that its content is still evolving and fractured. It appears to us that the stakes of rights-claiming today are both different and possibly more realizable than those of the past. A few of today’s claims are pitched purely in the style of manifestos, which make broad aspirational demands similar to the earlier declarations.¹¹ But, most notably since the early 2000s, there has been a concerted effort by advocates to use the formalities of human rights to require governments to enact laws, policies, and programs in order to realize sexual rights (however defined).¹² One can also map a new discourse on human rights and sexuality coming from political and legal bodies located in intergovernmental organizations (“IGOs”) whose mandates include contributing to the development of international human rights norms generally.¹³ This explosion in discourse and normative acts on sexuality and rights is enabled by the unprecedented elaboration and expansion of the formal international human rights systems since 1989, as well as the advocacy and engagement of feminist, queer, postcolonial, and other critical theorists and activists—informed and participating in related social movements.¹⁴

¹¹ See, e.g., WORLD ASS’N FOR SEXOLOGY, VALENCIA DECLARATION ON SEXUAL RIGHTS (June 1997), available at <http://www.iub.edu/~kinsey/resources/valencia.html>; WORLD ASS’N OF SEXUAL HEALTH, DECLARATION ON SEXUAL RIGHTS (Aug. 1999), available at <http://wass.org.au/downloads/DecSexualRights.pdf>.

¹² For our sketch of the content of sexual rights, see discussion *infra* Part II. For the use of human rights formalities and systems to realize sexual rights, see discussion *infra* Parts III, IV, and V.

¹³ For the discourse coming from IGOs, see discussion *infra* Part III. We are using “norms” as an umbrella term to capture a solidified principle of guidance in international law, an “ought to” or prescriptive guide, which may take the form of law, but may also be found in policy statements (“soft law” as discussed in Part III below). The term “norm” is distinct from a standard, which is a norm adopted in formal text, through a recognized UN or other IGO process. See especially Makau Mutua, *Standard Setting in Human Rights: Critique and Prognosis*, 29 HUM. RTS. Q. 547 (2007) (asserting the primacy of standard-setting through human rights institutions). We are aware of, but not centrally focusing on, the way in which norms as standards are also related to the concept of the normal, as if ‘norms’ describe the most frequently occurring practices. See generally MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS AND THE ETHICS OF QUEER LIFE* (1999) (explicating the many ways in which claims to the “normal” hide deviations within hegemonic institutions such as marriage, as the author critiques the push toward same-sex marriage within the U.S. gay rights movement).

¹⁴ See generally Kenneth Cmiel, *The Recent History of Human Rights*, 109 AM. HIST. REV. 117 (2004) (tracking the growth of human rights and describing its most recent wave of activism, beginning in the late 1980s, as an expansive movement that included health rights and women’s rights). There has also been a reaction from conservative forces (if not quite as equal in force). For example, the Catholic Family & Human Rights Institute (“C-FAM”) was established in 1997 with the aim of “reestablishing a proper understanding of international law, protecting national sovereignty and the dignity of the human person.” *About C-FAM*, CATHOLIC FAMILY & HUMAN RIGHTS INST., http://www.c-fam.org/about_us/ (last visited Mar. 5, 2011). Further, C-FAM promotes “the proposition that the UN and other international institutions harm a true understanding of international law and in the process undermine the family and other institutions man requires for a just, free and happy life.” *Id.*

These endeavors represent a definable and historically specific project of consolidating and centralizing sexual rights norms through efforts to incorporate them in the formal international legal and political mechanisms of the late twentieth and early twenty-first century. As Michael Reisman first noted thirty years ago, “[t]he international system produces documents in the legalistic genre with promiscuous abandon.”¹⁵ In the case of the push for sexuality and human rights, we argue that the production has not been so much wanton as much as it has been decentralized, and sometimes, inconsistent and controversial. The sexual rights project is aimed at creating authoritative global standards, but so far it has been in the realm of mostly soft (and as we will argue, “soft soft”) law—not only in “soft soft” law forms, but in forms sometimes insensible to other aspects of sexual rights. Our purpose here is to present and reflect on centripetal and centrifugal forces in the global legalizing of claims related to sexuality, and to highlight the contradictory interactions between the processes and the regimes in international lawmaking that create the “new normal” for sexuality and rights.

As a project, sexual rights at the global level are simultaneously utopian, pragmatic, and dangerous. They are utopian in that they partake of the human rights language of humanity, universality, conscience, freedom, equality, and dignity. They are pragmatic (and somewhat dangerous) in their incorporation through the international law regime, with its language of sovereignty, international agreement, rules of interpretation, entry and exit, state responsibility, and state consent.¹⁶ Moreover, as with any rights-developing process in international law, delineating the scope of state obligations toward sexual rights (i.e., what is the package of guarantees and promises for action which the state will undertake as part of accepting sexual rights as human rights?) becomes a key part of the process of norm-making.¹⁷

Yet, while sexual rights represent to many an apotheosis of human rights as “progress,” they also partake of historical contingency and legal fragmentation.¹⁸ The confluence of various global factors—the end of the

¹⁵ W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC'Y INT'L L. 101, 102 (1981).

¹⁶ See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention on the Law of Treaties] (articulating fundamental agreements for interpreting and applying international treaties, the responsibilities of states, and consent between states). See generally IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (7th ed. 2008) (providing a classic exposition of the doctrines and principles of international law).

¹⁷ See, e.g., Donna J. Sullivan, *The Nature and Scope of Human Rights Obligations Concerning Women's Right to Health*, 1 HEALTH & HUM. RTS. 368, 378–80 (1995) (arguing that state obligations on the rights to reproductive education, prenatal services, and nondiscrimination, among others, can be further understood by reference to international norms and practice concerning the general right to health).

¹⁸ For a critical approach to the history of international law, see generally ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2004) (arguing that the history of international law is a history of Western domination and postcolonial subordination, and critiquing the liberal human rights model as a tool used to impose Western economic policies on the Third World).

Cold War; the rise of communications technologies such as the internet, mobile phones, and social network technologies; increasing ease of idea-transport across borders, and the advent of HIV/AIDS—are unique late-twentieth-century developments. These developments both shape the context in which sexual rights are evolving into global standards, and are, in part, central to the specific claims of sexual rights.

Even as sexuality has been moved into the international law arena, there has been a resurgence of ontological challenges to international human rights lawmaking itself, albeit at a post-ideological moment where the concept of “human rights” has prevailed.¹⁹ Writes Makau Mutua, Dean of Buffalo School of Law and a leading human rights critic out of the Third World Approaches to International Law (“TWAIL”) movement, “[t]he usefulness of some new [human rights] standards has been questioned, and there is evidence that disenchantment is growing. . . . Both governments and non-governmental organizations (NGOs) are divided over the value of undertaking negotiations on new texts.”²⁰ The questioning of human rights law is linked, on the one hand, to its content (*what is the value of a universal claim to a human right?*) and on the other, to the system of international law, which is itself rethinking the dichotomies out of which it was produced (e.g., *what is the relationship between the public and the private; between the state and the individual?*).²¹

Coinciding with anxiety about sovereignty and international law, the “sexualization” of the rights-bearing human, especially the woman, reflects a resurgence in anxiety surrounding sex and gender hierarchies. This anxiety is redolent of other historical moments, such as the “sex panics” surrounding alleged “white slavery” rings in the early-nineteenth-century or so-

¹⁹ See generally SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010) (explaining that the origins of human rights are only very recent, and using country-specific examples to illustrate how contingent the birth of human rights has been).

²⁰ Mutua, *supra* note 13, at 548; see also MICHAEL IGNATIEFF, *PRAEMIUM ERASMIANUM: WHOSE UNIVERSAL VALUES? THE CRISIS IN HUMAN RIGHTS* 12 (1999):

[S]ince 1989, there has been a single human rights culture in the world, and nothing stands in the way to defy its moral imperium. Russia and China no longer have the power to do anything but deny Security Council approval to Western coalitions of the willing. Their veto power may deny legitimacy to actions by coalitions of the willing, but as the NATO operation in Kosovo shows, determined coalitions simply bypass the Security Council altogether. This momentous shift has combined with the coming of age of human rights advocacy from the grassroots in Western countries. . . . But the impact of this shift has not necessarily been to the benefit of oppressed individuals, but rather to the benefit of the states which intervene in other states in the name of human rights.

²¹ See *105th ASIL Annual Meeting Theme Statement: Harmony and Dissonance in International Law*, AM. SOC'Y OF INT'L LAW, <http://www.asil.org/am11/about.cfm> (last visited Mar. 5, 2011). As suggested by its title, “Harmony and Dissonance,” the focus of the meeting was a litany of concerns for segmentation, incoherence, competition of principles, both assuaged and exacerbated by the collapsing of boundaries between public and private international law, between non-state actors and principles of state responsibility, etc. *Id.*

called (homo)sexual predators of the 1950s.²² While the twenty-first century world may seem more fluid and smaller, and the stakes more politicized, the discourse aimed towards reestablishing sex and gender to its “natural” order is uncannily similar. This is manifestly apparent in the political theatre that takes place at the United Nations (“UN”). “Speaking sex” in the UN today is therefore both productive yet challenging to international human rights lawmaking as a modern project. In many venues of the UN, “speaking about sex” has proceeded with surprising speed as well as resistance—examples of a Foucauldian “incitement to discourse,” in which states and advocates, in both proposing and opposing sexual rights, serve to expand the attention and validation of the topic as a human rights issue.²³

What we hope to suggest in this Article is that the moves to locate claims around sexual diversity, freedom, and equal access to material and cultural resources can best be understood in light of not only the cultural politics of sex, but also contemporary struggles over standards in the human rights system. Much of the literature on “sexual rights as human rights” focuses on the geopolitical culture wars: we shift that attention by injecting international human rights law doctrine and institutional questions into the discussion.²⁴ We focus here on the United Nations as a centralizing site of global claims-making, although a similar exercise could be done for each regional system and for the intersections and cross-regional dynamics.²⁵ We argue that contemporary sexual rights-claiming is a project with a practice

²² See Estelle Freedman, “*Uncontrolled Desires*”: *The Response to the Sexual Psychopath 1920–1960*, 74 J. AM. HIST. 83 (1987) (discussing the construction of male sexual pathology in response to expressions of female sexual agency). See generally JUDITH R. WALKOWITZ, *CITY OF DREADFUL DELIGHT: NARRATIVES OF SEXUAL DANGER IN LATE-VICTORIAN LONDON* (1992) (describing the relationship of prostitution, female virtue, sexual violence, and the politics of Victorian England).

²³ See FOUCAULT, *supra* note 3, at 17–18 (discussing the “incitement to discourse,” a concept coined by Foucault in attacking the “repressive hypothesis” of Victorian sexual manners, suggesting that rather than not speak about sexuality, Victorian England witnessed an explosion in writings about sex and its dangers); see also Francoise Girard, *Negotiating Sexual Rights and Sexual Orientation at the UN*, in *SEX/POLITICS: REPORTS FROM THE FRONT LINES* 311, 315–16, 318–19 (Richard Parker, Rosalind Petchesky & Robert Sember eds., 2007), available at www.sxpolitics.org/frontlines/book/index.php (conducting a Foucauldian analysis of sex speech at the UN, which engages with world conferences as well as Charter bodies on abortion, sexual orientation, and sexuality generally).

²⁴ See, e.g., MASSAD, *supra* note 4, at 362–65, 382–85 (2007) (locating much of the work of global LGBT rights advocacy in North African/Arab states as an “incitement to discourse” driven by Orientalist trans-cultural imperatives); Petchesky, *supra* note 10, at 84, 87–89 (discussing the geopolitical and cultural debates over including sexual rights in formal human rights programs and conferences); WILLIAMS, *supra* note 4, at 25, 29 (using the case of a Mexican national’s application for sexual asylum in the U.S. as an illustration of the strong yet imaginary geopolitical divide between first and third world nations).

²⁵ For an advocate’s guide to the complexities and specificities of these cross-regional dynamics, see GLOBAL RIGHTS: PARTNERS FOR JUSTICE, DEMANDING CREDIBILITY AND SUSTAINING ACTIVISM: A GUIDE TO SEXUALITY-BASED ADVOCACY (2008), available at http://www.globalrights.org/site/DocServer/Guide_sexuality_based_initiative.pdf.

and a purchase on international law, connected to but distinct from reproductive rights, drawing from but not subsumed by gay and lesbian rights. This project is contingent on the development of positive claims in human rights, that is, both rights to the material conditions to live with dignity, as well as to freedoms from interference. Those claims, in turn, are contingent on the validity of international law as the regime from which they draw power.

In this Article, we attempt to answer our questions of why now and under what circumstances does sexuality enter international human rights law. We see this form of exploration of institutional sites as a constructive prerequisite to projects seeking to establish the weight and status of emerging international human rights standards on sexuality, which can, if and when hardened into law, guide state action and give recognition to new legal claims. Part II contextualizes the sexual rights norm explosion, fleshing out our thinking about the contemporary timing for sexual rights-claiming and clarifying the sought-after objectives and obligations in a kind of genealogy. We do this with some attention to the asymmetrical and yet concomitant streams of claims in health, privacy/bodily integrity, and nondiscrimination. Each stream is partly channeled by its defining issues: sex in the reproductive process, coerced versus desired sex, and partner choice. Part III further maps some of the claims themselves as rights claims propounded by specific NGO and IGO actors seeking to influence the formal process of rights elaboration. Part IV examines the specific formal international human rights sites in which these claim formations are occurring. We examine the elaboration of the proposed General Comment on the right to sexual and reproductive health by the Committee on Economic, Social, and Cultural Rights (“CESCR”) and contrast it with the much more limited developments at the Committee on the Elimination of Discrimination Against Women (“CEDAW”). We contrast and reflect on the impact of the CESCR’s and CEDAW’s specific histories and frames in light of the efforts of other treaty bodies, and other international human rights mechanisms, on sexual rights claims. In this global mapping, we finally consider the options for normative coherence, at least within the world of treaty bodies.

Part V continues our mapping and analysis, contrasting the more tightly constrained role of the so-called “independent expertise” of these UN treaty bodies with the politically freighted role of the UN Human Rights Council (and its special procedures) and the UN General Assembly (“UNGA”). Part VI concludes our Article, speculating on why even a modest claim to human rights based on sexuality creates a major fissure for international law and rights in today’s post-9/11, securitized, and anxiously globalized world.

II. A PARTIAL GENEALOGY AND TOPOGRAPHICAL MAP OF SEXUAL RIGHTS CLAIMS

Accounting for the sexual rights norm resurgence, especially its tether to health, requires some contextualization in both social movements and global institutionalization. It requires holding onto multiple stories: stories about violence, about lesbian and gay identity formation, about reproduction and sexuality, and their intersecting engagements with health and rights. In this story, health continues to be the dominant site of norms evolution around sexuality in the United Nations, with both liberating and constraining effects.

A. *The Constellation of Sexualities and Rights at Issue in Sexual Rights*

This Article works from the premise that human rights related to sexuality are linked to fundamental questions of personhood, equality, dignity, justice, and citizenship. We work specifically with the notion that the “ideal category” of sexual rights includes (but is not limited by) sexual and reproductive health and that it includes rights of sexual orientation (but is not solely attentive to these rights).²⁶ As norms that engage with reproduction and sexuality, sexual rights claims are shaped by the various beliefs that hold sway in the minds of NGO advocates, governmental representatives, and inter-governmental bureaucrats; they are also shaped by the geopolitics of culture that we describe in Parts III, IV, and V. Bringing human rights to sexuality therefore engages with the human rights doctrines and institutions, as those doctrines and institutions are also shaped by and with strongly held doctrines regarding gender binaries and certainties about “sex” being easily read in the body.²⁷ Because sexual rights are developing in the twenty-first century, advocates supporting their formation have also begun to integrate,

²⁶ For a discussion of early advocacy attempts to draft a list of sexual rights claims, see Karen Newman & Judith F. Helzner, *IPPF Charter on Sexual and Reproductive Rights*, 8 J. WOMEN'S HEALTH & GENDER-BASED MED. 459, 460 (1999) (reviewing the International Planned Parenthood Federation [IPPF] Charter, which contains a list of sexual and reproductive rights that are grounded in fundamental human rights); see also *Gender and Human Rights: Sexual Health*, WORLD HEALTH ORG., http://www.who.int/reproductivehealth/topics/gender_rights/sexual_health/en/ (last visited Mar. 6, 2011) [hereinafter *Gender and Human Rights*] (delineating the World Health Organization's 2002 working definition of “sexual rights”). See generally ALICE MILLER, INT'L COUNCIL ON HUMAN RIGHTS POLICY, SEXUALITY AND HUMAN RIGHTS: DISCUSSION PAPER (2009), available at http://www.ichrp.org/files/reports/47/137_web.pdf [hereinafter MILLER, ICHRP DISCUSSION PAPER] (arguing for a unifying and coherent concept of sexual rights that incorporates the right to sexuality and the right to sexual and reproductive health, as well as concerns regarding LGBT issues, HIV/AIDS, sexual violence against women, and child abuse).

²⁷ While feminism has critiqued the gender bias of public international law (starting with the foundational article by Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991)), it has not done as much for the sexuality bias of international law.

often inconsistently, contemporary theory on the historically contingent and locally informed social construction of gender and sexuality.²⁸

Furthermore, it is important to underscore the flexible, protean nature of the rubric “sexual rights.” Taken as a whole, we would argue that the common thread is a rejection of the policies, conditions, and practices that deny the full and equal enjoyment of the right of all persons to determine their own sexual lives, not only specific conduct but also the meaning of sexuality to them and to their communities. In addition, sexual rights address the ability of persons to link or separate sexual conduct from procreation and the relevance of sexuality to accessing the full measure of citizenship in order to thrive locally and globally.²⁹ As they are developed in the discussion below, sexual rights therefore include not only rights exercised by the individual, such as decisions regarding sexual conduct and partner choice, but also protections of bodily and mental integrity, including equality before the law and access to health services and information. Because these rights are not limited to conduct but are about engaging with meanings of sexuality, they also include equal rights to entry into and participation in politics, equality of resources in communities and families, and other rights supporting the formation of opinions and determination of identity and belief.³⁰

Three concerns have dominated the sexual rights conversations globally: (1) sexual autonomy and protection from sexual violence; (2) protection for sexual conduct in the context of reproductive sex, as well as rights to access contraception and abortion as an aspect of determining the meaning of sexual activity; and (3) freedom of sexual orientation, primarily the pro-

²⁸ For an early and lucid introduction to the social construction theory of sexuality, see Carole S. Vance, *Anthropology Rediscovered Sexuality: A Theoretical Comment*, 33 *SOC. SCI. & MED.* 875 (1991). For concerns regarding the reification of sexual orientation as a category, see Matthew Waites, *Critique of ‘sexual orientation’ and ‘gender identity’ in human rights discourse: global queer politics beyond the Yogyakarta Principles*, 15 *CONTEMP. POL.* 137, 152 (2009) (arguing that ‘sexual orientation’ and ‘gender identity’ do not refer to fixed characteristics of individuals but “hold a range of potential meanings that are subject to contestation”). See also Sonia Katyal, *Exporting Identity*, 14 *YALE J.L. & FEMINISM* 97, 100, 168–70 (2002) (arguing that the global LGBT movement must move beyond traditional identity-based protections and develop a framework that encompasses sexual autonomy).

²⁹ See generally DAVID T. EVANS, *SEXUAL CITIZENSHIP: THE MATERIAL CONSTRUCTION OF SEXUALITIES* (1993) (interrogating the material parameters and marketized processes through which contemporary sexual citizenship is simultaneously built and contained, offering only partial citizenship rights to sexual minorities); KENNETH PLUMMER, *TELLING SEXUAL STORIES: POWER, CHANGE AND SOCIAL WORLDS* (1995) (exploring how the narrative form of the “sexual story”—for instance, rape survivor stories, coming-out stories, and abuse recovery stories—plays a role in contemporary [Western] politics in making spaces for new modes of participation and citizenship).

³⁰ See, e.g., Special Rapporteur on the right to health (by Paul Hunt), *supra* note 10, at ¶¶ 7, 54; MILLER, *ICHRP DISCUSSION PAPER*, *supra* note 26, at 9–10 (describing the WHO’s definition of sexual rights as somewhat incomplete since it fails to refer to public and participatory rights); Petchesky, *supra* note 10, at 93; Katyal, *supra* note 28, at 168–70; Richardson, *supra* note 4, at 116, 120; *Gender and Human Rights*, *supra* note 26.

tection from discrimination on the basis of (homo)sexual orientation. Because much of our exploration of how norms are evolving focuses on how health, rather than discrimination or violence, has proved a fruitful, if caged, site for sexual rights claims, we very briefly address violence and sexual orientation and then move to a much more in-depth consideration of sexual and reproductive health as a site for generating sexual rights.

Articulating the harms to women caused by violence has been a key move in the development of norms on sexual rights.³¹ Advocates began calling out sexual violence as a human rights violation for women in the late 1980s.³² Sexual violence denied its targets their rights to nondiscrimination, health and bodily integrity, and especially autonomy, completely vitiating their right to consent to sex.³³ One can view the last fifteen or so years of global attention to human trafficking, the (often sensational and counter-productive) focus on “trafficking for forced prostitution” within that frame, and the adoption of a new international treaty on trafficking (the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children) as additional evidence that international law has woken up to the conditions of coerced sex.³⁴ Notably, work on sexual violence

³¹ See generally Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1 (2002) (arguing that the international women’s rights movement’s focus on violence against women (“VAW”) has helped reinforce women as the victim subject); Alice M. Miller, *Sexuality, Violence against Women, and Human Rights: Women Make Demands and Ladies Get Protection*, 7 HEALTH & HUM. RTS. 16 (2004) (exploring the hyper-visibility of sexual violence against women in the women’s rights movements).

³² See Charlotte Bunch, *Women’s Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUM. RTS. Q. 486 (1990) for one of the first articles to make this claim on the terrain of human rights.

³³ The work to highlight all of the barriers to consent, and all of the forms of coercion, duress, and other threats destroying this right to consent, is ongoing and immensely contested: when and according to what tests should the law recognize constraints sufficient to vitiate consent? This call for a new standard arises in the midst of judicial decisions, human rights advocacy, and scholarly work condemning as “patriarchal” prior legal standards that required proof of “utmost force” or “utmost resistance.” See, e.g., Karen Engle, *Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT’L L. 778, 804 (2005) (noting that the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) has found that force or threat of force is not necessary to prove lack of consent in sexual assault cases); Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT’L L. 1, 115, 118 (2008–2009) (explaining that the ICTY Rules of Procedure and Evidence provide that “[c]onsent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual offense”); see also MILLER, ICHRP DISCUSSION PAPER, *supra* note 26, at 12, 15.

³⁴ See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Jan. 8, 2001). See generally ANNE T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* (2010) (providing a comprehensive account of the international law of trafficking and articulating the need to address the previously neglected phenomenon of human trafficking); Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655 (2009) (discussing the dynamics driving the tension between the traditional anti-trafficking view, with its focus on sex and protecting women from prostitution, and a more robust concern with trafficking as

tends to be reduced to gender-based violence as directed against women, although men can be targets of sexual violence especially in conflict and in custody.³⁵

Naming and bringing new human rights standards to bear against violence that led to coerced or unwanted sex has been foundational in establishing a new standard to judge sexual legitimacy: the standard of consent, now widely used for heterosexual, and increasingly homosexual, sex.³⁶ Under this new standard of legitimacy, consent to a sexual activity is possible under certain conditions—namely that the person is not coerced and decides to engage in sex. The consent standard in human rights pushes for law to validate and protect the decision of a woman (or any other person), regardless of the identity of her partner and whatever the nature of their sexual conduct; additionally, it pushes to ensure that she is provided with any necessary information or services.³⁷ When framed in this way, protection from sexual violence is quite expansive, supporting autonomy for heterosexuals as well as homosexuals, and for persons deemed female as well as persons deemed male.

The development of sexual orientation and, more recently, gender identity as sexual rights claims follows a slightly different trajectory. It is almost always produced when talking about homosexual orientation as an aspect of a person who is claiming rights, and rarely as an aspect of heterosexual orientation, although the two are interdependent.³⁸ Defined as affective preference for a particular gender/sex of one's sexual partner, sexual orientation

exploited labor). For an analysis of why contemporary trafficking law's concern for sex does not necessarily translate into a concern for sexual autonomy, see Miller, *supra* note 31, at 33–34.

³⁵ The International Criminal Court (“ICC”)’s Statute accepts that sexual violence can be done by either women or men, to either women or men: gender is irrelevant to the crime’s core elements. See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

³⁶ For support of the proposition that Carole Vance should be credited with the phrase “standard of legitimacy,” see MILLER, ICHRP DISCUSSION PAPER, *supra* note 26, at 55 n.114.

³⁷ See INT’L PLANNED PARENTHOOD FED’N, SEXUAL RIGHTS: AN IPPF DECLARATION, at v, available at <http://www.ippf.org/NR/rdonlyres/9E4D697C-1C7D-4EF6-AA2A-6D4D0A13A108/0/SexualRightsIPPFdeclaration.pdf> [hereinafter IPPF DECLARATION ON SEXUAL RIGHTS]. For one of the first articulations of this connection in an international human rights frame, see generally Bunch, *supra* note 32. See also Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Dec. 20, 1993) (analyzing how violence against women is a form of gendered discrimination); Rep. of the Comm. on the Elimination of Discrimination against Women, 11th Sess., Jan. 20–30, 1992, at 1, U.N. Doc. A/47/38; GAOR, 47th Sess., Supp. No. 38 (1993) (exploring the ways in which violence against women constitutes gendered discrimination under CEDAW).

³⁸ See Michael O’Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, 8 HUM. RTS. L. REV. 207 (2008) (emphasizing homosexual and transgender identities as sexual orientation). But see ERIC HEINZE, SEXUAL ORIENTATION: A HUMAN RIGHT: AN ESSAY ON INTERNATIONAL HUMAN RIGHTS LAW (1995) (discussing the construction of homosexuality and heterosexuality as sexual orientations, a social organization which is then reflected in international law).

is also understood to be an essential attribute of a person; though it is not necessarily “immutable” in the biological sense, it is nonetheless, like an aspect of conscience, something that one should not be forced to change.³⁹

HIV/AIDS—hailed as a threat to global order and security, as well as to public health and development, particularly in the absence of accessible treatment—compelled a public and global discussion of sex as it actually happens, including homosexual sex, framed as “prevention.”⁴⁰ The conversation about men who have sex with men (“MSM” in the public health literature) intersected with burgeoning “gay identity” claims in the late 1980s in global venues.⁴¹ Although the advocacy movement claimed the acronym of LGBT, the focus of the work was gay men. The “T” of transgender has emerged only relatively recently into public advocacy and indeed references gender, not sexual practice per se.⁴² From this complex of attention to practices and abuses against people associated with these practices, the new rubric of nondiscrimination on the basis of “sexual orientation and gender identity” (now referenced as “SOGI”) has emerged.⁴³ The lack of conceptual clarity about the relationships between sex, gender, and sexuality in the developing international standards is not merely a product of the ad hoc nature of advocacy but also due to the limited “folk knowledge” of many experts in human rights bodies.⁴⁴ It also reflects some actual strains and stresses within claims and among claimants. A number of splits, tensions, and direct oppositions among advocates about the proper content of sexual rights have been visible for over a decade.⁴⁵ Two of the splits have

³⁹ For a U.S. asylum decision that acknowledges this approach, see *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092–93 (9th Cir. 2000) (finding that a gay man with female sexual identity should not be forced to change it since sexual identity is fundamental to one’s identity and conscience). See also UNITED NATIONS HIGH COMM’R FOR REFUGEES (“UNHCR”), UNHCR GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO SEXUAL ORIENTATION AND GENDER IDENTITY ¶ 32 (Nov. 21, 2008) [hereinafter UNHCR GUIDANCE NOTE ON REFUGEE CLAIMS], available at <http://www.unhcr.org/refworld/pdfid/48abd5660.pdf> (explicating the UNHCR agreement with this approach).

⁴⁰ See LAURIE GARRETT, COUNCIL ON FOREIGN RELATIONS, *HIV and National Security: Where Are The Links?* (2005), available at <http://www.cfr.org/national-security-and-defense/hiv-national-security-links/p8256> (introducing “national security” analysis to the consequences of an unchecked AIDS epidemic).

⁴¹ See generally Saiz, *supra* note 10 (detailing a short history of international human rights efforts on sexual orientation protections).

⁴² For concerns regarding the elision of sexuality and gender, see generally Dean Spade, *Introduction: Transgender Issues and the Law*, 8 SEATTLE J. SOC. JUST. 445 (2009–10).

⁴³ See THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY 6–7 (Mar. 2007) [hereinafter THE YOGYAKARTA PRINCIPLES], available at http://www.yogyakartaprinciples.org/principles_en.pdf.

⁴⁴ See LINDA MEALEY, SEX DIFFERENCES: DEVELOPMENT AND EVOLUTIONARY STRATEGIES, at xii–xiv (2000) (illustrating how the “folk knowledge” of gender and sex differences is often inaccurate, incomplete, and perpetuates sexual stereotypes).

⁴⁵ See PINAR ILKKARACAN & SUSIE JOLLY, BRIDGE, GENDER AND SEXUALITY: OVERVIEW REPORT 9–11, 22–25 (2007), available at <http://www.bridge.ids.ac.uk/reports/CEP-Sexuality-OR.pdf>. See also MILLER, ICHRP DISCUSSION PAPER, *supra* note 26, at

long histories of dispute within feminism: different understandings of the rights surrounding sexual expression (also known as “the sex wars” in the U.S.)⁴⁶ and complicated, if not conflicting positions, on sex work.⁴⁷ Lately, a new tension has tugged at the cohesion of sexual rights claims, with dissent hovering over the word “gender.” Gita Sen argues that this tension results from the assimilation of gender to identity politics (therefore using gender as a substitute for women), rather than the use of gender as a relational concept and a critique of power exercised differentially on the basis of sex.⁴⁸ This replacement of “gender-as-relational” with “gender-as-women” is now firmly rooted in NGO, UN, and other IGO bureaucratic speech (e.g., gender-mainstreaming, gender-based sexual violence, and gender-based persecution).⁴⁹

However, with the emergence of transgender rights claims at the global level, tensions tug “gender as identity” in yet another direction: to whom (as identity) does gender (as subordination) attach?⁵⁰ When the United Nations Development Programme (“UNDP”) develops a rights-based “Gender Gui-

32–33 (discussing the differing views on sex work among women’s rights activists); Kate Sheill, *Losing out in the Intersections: Lesbians, Human Rights, Law and Activism*, 15 CONTEMP. POL. 55, 57–60 (2009) (reviewing the differential treatment of the right to lesbian sexuality in human rights treaties and conferences).

⁴⁶ Compare LISA DUGGAN & NAN D. HUNTER, *SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE* (1995) (engaging with the covert and overt politics of sexuality, gender, class, and race that defined the “sex wars” in the U.S. between 1980 and 1990, from the American perspective of feminists committed to a liberatory politics of sexual diversity), with *THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY* (Laura J. Lederer & Richard Delgado eds., 1995) (arguing for increased state intervention into harms linked to speech and expression and describing the gender-based harms of material containing a sexual content), and *IN HARM’S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS* (Catharine A. MacKinnon & Andrea Dworkin eds., 1997) (promoting and analyzing debates in the 1990s on proposed anti-pornography legislation, which defined pornography and its effects as a violation of civil rights and providing civil, and in some cases criminal, remedies).

⁴⁷ See MILLER, ICHRP DISCUSSION PAPER, *supra* note 26, at 32 (criticizing the traditional understanding of the debate over sex work as a stark dispute between anti-subordination views and liberal choice views, and instead suggesting that advocates take a varied, more comprehensive view in terms of “exploitative” labor, gender, power and agency, strategic decision-making, and the conditions for safe migration). See generally *TRAFFICKING AND PROSTITUTION RECONSIDERED: NEW PERSPECTIVES ON MIGRATION, SEX WORK, AND HUMAN RIGHTS* (Kamala Kempadoo et al. eds., 2005) (challenging the commonly-made equation of prostitution with trafficking, and positing alternatives for understanding sex work, transnational migrations, and forced labor).

⁴⁸ GITA SEN & PIROSKA ÖSTLIN, *WOMEN & GEND. EQUITY KNOWLEDGE NETWORK, UNEQUAL, UNFAIR, INEFFECTIVE AND INEFFICIENT GENDER INEQUITY IN HEALTH: WHY IT EXISTS AND HOW WE CAN CHANGE IT* 6–7 (Sept. 2007). See generally Joanna Regulska & Mindy Roseman, *What is Gender*, 5 TRANSITIONS 24 (1998) (describing the history of the “apolitical” use of the word gender).

⁴⁹ See Valerie Oosterveld, *The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 HARV. HUM. RTS. J. 55, 71 (2005) (raising concerns about a definition of gender that conflates biological sex and gender, thereby eliminating the understanding of gender as socially constructed).

⁵⁰ Alice Miller has referred to this as the “territorialization of gender”—where groups fight over the right to determine what gender designates, as if they were in a turf

dance for National AIDS Programs,” does this policy address the concerns of girls and women, or also men who have sex with men and persons identifying as transgender?⁵¹ Moreover, the historic weighting of (non-exclusive) mandates among the treaty bodies has had cabining effects on gender and sexuality as well. Thus, for example, matters related to women (understood only as biological females) get addressed mostly in reviews conducted by CEDAW, race and ethnicity by the Committee on the Elimination of Racial Discrimination (“CERD”), disability inquiries by the Committee on the Rights of Persons with Disabilities, and so on, as if discrimination were not a matter of lived intersectional experiences.⁵²

Throughout the 1990s, international institutions, such as the United Nations and its agencies, traditional bilateral and private donors, and new “philanthrocapitalists,” provided spaces and revenues for global governance projects on human rights that were instigated, supported, and overseen by a new global civil society.⁵³ These spaces and institutions multiplied and fragmented: UN conferences on human rights, women’s empowerment, population and development, and HIV/AIDS, as well as the creation of new or reformed international bodies, such as the World Trade Organization, inter-

war. See, e.g., Alice M. Miller, *The Figure of Gender*, 31 PACE L. REV. (forthcoming 2011).

⁵¹ 22nd Meeting of the UNAIDS Programme Coordinating Board, Chiang Mai, Thai., Apr. 23–25, 2008, *Draft Gender Guidance for National AIDS Responses* 7, 10, UNAIDS/PCB(22)/08.3/Rev.1 (Apr. 11, 2008):

The guidance encourages countries to understand how harmful gender norms and gender inequality contribute to the spread of HIV, and how HIV differentially affects women, men, girls and boys. It also points to the specific impact of gender norms on HIV amongst men who have sex with men, which affect this population directly as well as contributing to the broader epidemic, because many men have sex with both men and women. . . . [The question was raised as to] the degree to which the guidance should include attention to men who have sex with men and to transgender populations. . . . [Some] expressed concern that attention to men who have sex with men detracts from the importance of focusing on women and girls and their unequal relationships with men and boys, and suggested that it would be more appropriate to keep the guidance focused on the needs of girls and women and to develop separate guidance documents addressing sexual minorities.

⁵² Conversely, the Human Rights Committee (“HRC”), CESCR, and the Committee Against Torture (“CAT”) can use discrimination to appeal broadly to denials of rights based on sex, race, or age (and now disability, health status, and sexual orientation). For an early article articulating the way that the structure of the UN treaty bodies, including the policy of allowing reservations, separates race and gender and defies intersectional analysis, see Lisa A. Crooms, *Indivisible Rights and Intersectional Identities or, “What Do Women’s Human Rights Have to Do with the Race Convention?”*, 40 How. L.J. 619, 635–36 (1997) (using Black feminist theory on the intersections between race and gender systems to show how the drawbacks of the UN single-issue approach, capitalized on by the U.S. in CERD, jeopardize the effective protection of basic human rights).

⁵³ Philanthrocapitalism is a “new” phenomenon of wealthy individuals setting up private foundations, outside of conventional institutional channels, to promote certain goals (largely related to social entrepreneurship). See *Synopsis*, PHILANTHROCAPITALISM, <http://www.philanthrocapitalism.net/about/synopsis/> (last visited Mar. 6, 2011).

national criminal tribunals,⁵⁴ and the Human Rights Council. Thus, issues and institutions have proliferated, in tandem with institutional dynamics that have centrifugal, often divergent tendencies, while the advocates addressing these institutions are themselves not united. It is to these dynamics that we now turn.

*B. The Emergence of Sexuality from Under Cover of
Reproductive Health*

Reproduction and sexuality have long been within the domain of health and medicine, connected as they are to biology and embodiment. There certainly have been benefits to such “medicalization”—for example, tangible improvements in maternal health outcomes and the provision of relevant and respectful health services to sexually diverse persons.⁵⁵ However, with medicalization came “pathologization”—the rendering of pregnancy, for example, into a disease—and physician control.⁵⁶ HIV/AIDS and the attention it both allowed and demanded to non-heteronormative sexuality (“silence equals death”) has played a critical role in simultaneously enabling and constraining gay (male) “rights talk,” opening up space for queer sexuality (especially funding spaces), while marking them as disease-ridden.⁵⁷ In tandem with the modern state’s police powers, which include promoting and protecting the public’s health, the nineteenth and twentieth centuries witnessed the rise of “biopower” over individuals’, especially women’s, reproductive and sexual lives.⁵⁸ The human rights regime in health is a descendant of this mixed legacy of health control and promotion.

Nonetheless, national and transnational women’s health activism, and the emergence of national and transnational HIV activism in the latter part of the twentieth century, provided key sites for the development of the human

⁵⁴ The International Criminal Court (“ICC”) and the International Criminal Tribunals for the former Yugoslavia and for Rwanda (“ICTY” and “ICTR,” respectively) are some examples.

⁵⁵ For a standard perspective on the benefits of medicalization on maternal health, see IRVINE LOUDON, *DEATH IN CHILDBIRTH: AN INTERNATIONAL STUDY OF MATERNAL CARE AND MATERNAL MORTALITY 1800–1950* (1992). See also ALLAN BRANDT, *NO MAGIC BULLET: A SOCIAL HISTORY OF VENEREAL DISEASE IN THE UNITED STATES SINCE 1880* (1985) (arguing that the social construction of venereal disease is essential to understanding efforts to deal effectively with the diseases from a medical standpoint).

⁵⁶ For a classic view on this topic, see generally ANN OAKLEY, *THE CAPTURED WOMB: A HISTORY OF THE MEDICAL CARE OF PREGNANT WOMEN* (1984) (exploring the politics of gender through the medical management of pregnancy).

⁵⁷ See Vance, *supra* note 28, at 880 (representing an early concern for the repathologization of homosexuality through HIV/AIDS). For one of the critical tracts analyzing this issue, see generally Paula Treichler, *AIDS, Homophobia, and Biomedical Discourse: An Epidemic of Signification*, in *CULTURE, SOCIETY AND SEXUALITY: A READER* 357 (Richard Parker & Peter Aggleton eds., 1999). See also FRAMING THE SEXUAL SUBJECT: THE POLITICS OF GENDER, SEXUALITY, AND POWER, *supra* note 10 (addressing the significance of marking gayness with HIV through a global collection of essays).

⁵⁸ See, e.g., FOUCAULT, *supra* note 3 (articulating how the modern state exercises its power over its subjects through techniques of bodily discipline).

rights claims for bodily autonomy and the means to exercise it.⁵⁹ International population conferences also became a site for women's health and rights activism, especially after the 1984 Conference on Population and Development in Mexico City where the U.S. famously announced its "Mexico City Policy" (prohibiting U.S. foreign assistance awards to any organization engaged in providing abortion services, information, or advocacy).⁶⁰ The 1990s witnessed a huge spike in international advocacy, occasioned by UN conferences on human rights (1993), population and development (1994), and women (1995).⁶¹ It was at these conferences—particularly the latter two—that the notion of reproductive rights as an aspect of reproductive health was formulated and agreed to by the vast majority of UN member states.⁶²

The shift away from population control towards reproductive health and rights was made possible, in part, by the concurrent solidification of claims to health as a human right throughout the 1990s.⁶³ The issues that drove the conversation ranged from HIV/AIDS,⁶⁴ reproductive health, violence against

⁵⁹ National movements were partly influenced by international developments, such as the UN Decade for Women (1976–1985). See G.A. Res. 31/136, U.N. Doc. A/RES/31/136 (Dec. 16, 1976).

⁶⁰ Memorandum of March 28, 2001—Restoration of the Mexico City Policy, 66 Fed. Reg. 17301 (March 29, 2001).

⁶¹ World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 (July 12, 1993); International Conference on Population and Development, Cairo, Egypt, Sept. 5–13, 1994, *Report of the International Conference on Population and Development*, U.N. Doc. A/CONF.171/13 (Oct. 18, 1994) [hereinafter ICPD Programme of Action]; Fourth World Conference on Women, Beijing, China, Sept. 4–15, 1995, *Report of the Fourth World Conference on Women*, U.N. Doc. A/CONF.177/20/Rev.1 (Oct. 17, 1995) [hereinafter Beijing Declaration and Platform for Action].

⁶² ICPD Programme of Action, *supra* note 61, ¶ 7.2; Beijing Declaration and Platform for Action, *supra* note 61, ¶ 94. The term "reproductive health" had been coined by internationally-renowned obstetricians as a means of broadening what, at the time, was a narrow approach to maternal and child health. Picked up by the global women's health movement, the terminology "reproductive health" and "reproductive rights" found its way into the International Conference on Population and Development ("ICPD") and reflected already agreed-to compromises within the global women's health movements. See Sonia Corrêa, *From Reproductive Health to Sexual Rights: Achievements and Future Challenges*, 5 REPROD. HEALTH MATTERS 107, 107–09 (1997).

⁶³ See generally Virginia A. Leary, *The Right to Health in International Human Rights Law*, 1 HEALTH & HUM. RTS. 24 (1994). Leary's piece is a seminal essay that begins by noting the unfamiliarity of the "right to health" as a term, but proceeds to methodically—and succinctly—root the claim in the WHO constitutional text, as well as in international human rights treaty texts. *Id.* For foundational analyses of the right to health, see also Jonathan M. Mann, Lawrence Gostin, Sofia Gruskin, Troyen Brennan, Zita Lazzarini & Harvey Fineberg, *Health and Human Rights*, in HEALTH AND HUMAN RIGHTS: A READER 7, 11 (Jonathan M. Mann, Sofia Gruskin, Michael A. Grodin & George J. Annas eds., 1999) (establishing the basic mutually dependent relationships between the promotion of health and the protection of human rights).

⁶⁴ See Sofia Gruskin, Aart Hendriks & Katarina Tomasevski, *Human Rights and Responses to HIV/AIDS*, in AIDS IN THE WORLD II: GLOBAL DIMENSIONS, SOCIAL ROOTS, AND RESPONSES 326, 326–27 (Jonathan Mann & Daniel Tarantola eds., 1996). See generally AIDS IN THE WORLD II, *supra*.

women as a health issue,⁶⁵ and concerns for equity in health resources within and across nations.⁶⁶ Doctrinal resistance emerged, in part, due to the seemingly indeterminate claim to health.⁶⁷ Such resistance had been bolstered by the Cold War ideological splintering of rights into, on the one hand, so-called negative, enforceable rights (liberal civil and political rights) and positive rights (the allegedly aspirational and programmatic economic, social, and cultural rights).⁶⁸ However, by 2000, the Committee that monitors the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) had sufficiently synthesized a framework of review in health to issue an interpretive statement on state obligations.⁶⁹ The Committee prioritized nondiscrimination as a core claim within health, including on grounds of sex and sexual orientation, and laid the groundwork for what is now a flourishing “right to health” discourse and practice in human rights.⁷⁰

As reproductive health as a *right* gained currency, sexual health slowly emerged as well, linked but somehow distinct, under the umbrella of reproduction. In the ICPD consensus agreements, reproductive health includes sexual health, “the purpose of which is the enhancement of life and personal relations, and not merely counselling and care related to reproduction and sexually transmitted disease.”⁷¹ Reproductive health is predicated on the ability of men and women to have a

satisfying and safe sex life [in which] they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this . . . are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice⁷²

Reproductive health also requires, “[e]qual relationships between men and women in matters of sexual relations and reproduction, including full respect

⁶⁵ World Health Org. Consultation, Violence Against Women, Feb. 5–7, 1996, U.N. Doc. FRH/WHD/96.27 (1996).

⁶⁶ See Tony Evans, *A Human Right to Health?*, 23 THIRD WORLD Q. 197, 204–06 (2002).

⁶⁷ Eleanor D. Kinney, *Recognition of the International Human Right to Health and Health Care in the United States*, 60 RUTGERS L. REV. 335, 336, 352–53 (2008) (surveying the difficulty in defining the scope and content of the “right to health,” particularly from the constitutional rights tradition of the United States).

⁶⁸ See Evans, *supra* note 66, at 200; see also LOUIS HENKIN, THE AGE OF RIGHTS 2–3 (1990) (describing a classic statement on negative and positive rights).

⁶⁹ Comm. on Econ., Soc. and Cultural Rights (“CESCR”), General Comment No. 14 (2000): The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), ¶ 8, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter CESCR General Comment No. 14 on health].

⁷⁰ *Id.*

⁷¹ ICPD Programme of Action, *supra* note 61, ¶ 7.2; Beijing Declaration and Platform for Action, *supra* note 61, ¶ 94.

⁷² ICPD Programme of Action, *supra* note 61, ¶ 7.2; Beijing Declaration and Platform for Action, *supra* note 61, ¶ 94. See also *Health Topics: Reproductive Health*, WORLD HEALTH ORG., http://www.who.int/topics/reproductive_health/en/ (last visited Mar. 6, 2011).

for the physical integrity of the person, [and] mutual respect and willingness to accept responsibility for the consequences of sexual behaviour.”⁷³ Women should “have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination, and violence.”⁷⁴

Two maneuvers in these definitions should be noted: the term “reproduction” stands in for “sexual” and “sexuality,” while health becomes instrumentalized to rights (and vice versa). Both of these rhetorical achievements reflect a deep, ongoing political struggle, and ultimately, a matter of strategy. Writes Sonia Corrêa:

The main expression of this . . . start[ed] with the debate on systematic rape in conflict situations that took place in [the] Human Rights Conference of Vienna in 1993. In 1994, during the International Conference on Population and Development (ICPD) in Cairo, I heard a male African delegate saying emphatically to a colleague: “*There is too much sex in this document.*” This was not actually the case, as Cairo language is predominantly on “reproductive rights” (even if sexual rights was in brackets in the text). But a year later, in Beijing, a paragraph (96) was adopted that defines the human rights of women in matters related to sexuality.⁷⁵

Notably, the ICPD addressed HIV/AIDS in a very limited fashion. As noted earlier, HIV, by the mid-1990s, had galvanized global attention as if it were

⁷³ ICPD Programme of Action, *supra* note 61, ¶ 7.34.

⁷⁴ Beijing Declaration and Platform for Action, *supra* note 61, ¶ 96. There have been several efforts by intergovernmental agencies, such as the WHO and Pan American Health Organization (“PAHO”), to further refine the definition of sexual health:

Sexual health is the experience of the ongoing process of physical, psychological and, socio-cultural well being related to sexuality. Sexual health is evidenced in the free and responsible expressions of sexual capabilities that foster harmonious personal and social wellness, enriching individual and social life. It is not merely the absence of dysfunction, disease and/or infirmity. For Sexual Health to be attained and maintained it is necessary that the sexual rights of all people be recognized and upheld.

PAN AM. HEALTH ORG. & WORLD HEALTH ORG., PROMOTION OF SEXUAL HEALTH: RECOMMENDATIONS FOR ACTION 6 (2000), available at <http://www.paho.org/English/HCP/HCA/PromotionSexualHealth.pdf>.

⁷⁵ Sonia Corrêa, Sexual Rights: Much has been said, much remains to be resolved, Lecture in the Sexuality, Health and Gender Seminar, Department of Social Sciences, Public Health School, Columbia University (Oct. 2002), available at <http://www.eldis.org/vfile/upload/1/document/0708/DOC19699.pdf>. Corrêa also noted:

In addition, the very last debate of the Beijing conference (negotiated at 3am) concerned the inclusion of sexual orientation in a list of unjustified grounds for discrimination against women. Evan [sic] though the majority of member states expressed their support for the text, sexual orientation was dropped because Islamic countries, the Holy See and [sic] few other delegations did not accept it.

Id.

the new polio—only more stigmatized, since the HIV epidemics in most places were largely sexually transmitted and understood to be concentrated in “pariah” populations, such as sex workers, gay men and MSM, and injecting drug users. These populations, however, were not visible in the ICPD frames of reproduction and development.⁷⁶

For progressive advocates, these UN debates erected a political Maginot line between “sexual” and “reproductive” and between “health” or “rights” as the touchstone of legitimacy.⁷⁷ Those favoring “reproductive health” often tend towards more traditional and heteronormative approaches to programming and politics.⁷⁸ Many of those staking out “sexual rights” gravitate towards unconventional, often queer theory-inflected perspectives, while others insist on fixed sexual identities (“gay” or “straight”). A panoply of other political viewpoints are reflected in vocabularies of “sexual health,” “reproductive and sexual health” (or “sexual and reproductive health”), “reproductive rights,” and “sexual and reproductive rights.”⁷⁹ At times even the terms reproductive health and reproductive rights, which tended to provoke less hostility from states and NGOs than any phrase with the words “sexual” or “sexual rights,” have been condemned by another subset of opponents as the stalking horse for abortion.⁸⁰

C. *Sexual Rights and Sexual Health in Tandem and in Tension*

Many advocates of sexual rights seek cover under “health” to avoid the politics of sex and sexuality; this cover, however, is impossible to sustain, especially in light of the public (association, expression) as well as private (decision-making, autonomy) aspects of sexual rights that advocates have advanced.⁸¹ In the context of accessing the institutions of human rights, par-

⁷⁶ The debates over the rights and health of these communities arose most starkly in the UN General Assembly Special Session on HIV/AIDS in 2001. For an illustration, see Declaration of Commitment on HIV/AIDS, G.A. Res. S-26/2, ¶¶ 1, 62, U.N. Doc. A/RES/S-26/2 (Aug. 2, 2001) [hereinafter Declaration of Commitment on HIV/AIDS].

⁷⁷ See Mindy Jane Roseman & Laura Reichenbach, *Global Reproductive Health and Rights: Reflecting on ICPD*, in REPRODUCTIVE HEALTH AND HUMAN RIGHTS: THE WAY FORWARD 3, 5–8 (Laura Reichenbach & Mindy Jane Roseman eds., 2009) [hereinafter REPRODUCTIVE HEALTH AND HUMAN RIGHTS] (discussing this terminology and its political valences).

⁷⁸ *Id.* at 6.

⁷⁹ *Id.* at 5.

⁸⁰ For a discussion of abortion and reproductive health in the context of the ICPD Programme of Action, see generally Marge Berer, *The Cairo “Compromise” on Abortion and Its Consequences for Making Abortion Safe and Legal*, in REPRODUCTIVE HEALTH AND HUMAN RIGHTS, *supra* note 77. For a discussion of how conservative politicians transformed the discourse around reproductive health into one of abortion, see Francoise Girard, *Advocacy for Sexuality and Women’s Rights: Continuities, Discontinuities, and Strategies Since ICPD*, in REPRODUCTIVE HEALTH AND HUMAN RIGHTS, *supra* note 77, at 172.

⁸¹ For a country-specific analysis of this failed subterfuge, see Arvind Narrain, *The Articulation of Rights around Sexuality and Health: Subaltern Queer Cultures in India in the Era of Hindutva*, 7 HEALTH & HUM. RTS. 142, 144, 148 (2004).

ticularly in the political bodies of the UN that we discuss in Part V, the choice of terminology becomes a matter of political strategy, a matter of assessing the odds for advancing a norm against the costs of leaving some concepts (and individuals) behind.

Thus, a challenge for “sexual rights” has been avoiding ad hoc advocacy approaches to their recognition, in which one set of rights claims is advanced to the detriment of others. Because access to resources and privileges in social power are pegged to sexual respectability for a majority of persons,⁸² partial sexual rights claims often seek to raise one set of persons up through the (sexual) denigration of others. For example, NGOs have argued that women falsely accused of sex outside of marriage should not be prosecuted by states or face so-called “honor killings,” implying that women who did in fact engage in extramarital sex were fair game for such reprisals.⁸³ Additionally, gay and human rights activists in the U.S., before *Lawrence v. Texas*, sought to win validation for decriminalizing “mere” same-sex sexual behavior by invoking the acceptability of criminalizing sex for money or sadomasochistic (“S/M”) sex.⁸⁴ The disagreement within advocacy circles about how best to address the health and rights of persons in sex work produced two distinct lobbying groups in the UN Trafficking Protocol negotiations, split over the definition of trafficking: one working to criminalize all movement into prostitution as trafficking, and the other focusing on force, fraud, or coercion.⁸⁵

Avoiding the construction of sexual hierarchies and revising those rules of sexual regulation, such that a diversity of persons can flourish, generates the conceptual power of the contemporary sexual rights movement.⁸⁶ NGO

⁸² See generally George L. Mosse, *Nationalism and Respectability: Normal and Abnormal Sexuality in the Nineteenth Century*, 17 J. CONTEMP. HIST. 221 (1982) (providing insight on the tying of respectability with sexual restraint, and arguing that nationalism in nineteenth-century Europe promoted ideals of restraint that were congenial to the bourgeois lifestyle). For a discussion of “sexual hierarchies” more generally, see Alice M. Miller & Carole S. Vance, *Sexuality, Human Rights, and Health*, 7 HEALTH & HUM. RTS. 5 (2004) [hereinafter Miller & Vance] (describing sexual hierarchies as akin to a class system that ranks sexual practices and identities as legitimate and illegitimate, and distributes valued social resources according to ranking).

⁸³ For example, in Amnesty International’s campaign report on violence against women, the argument is framed as: “This incident [of attacks on women living apart from their families in Algeria] illustrates society’s fear of independent women, the *false presumption* that women who have acquired a degree of economic independence are sexually autonomous, and how easily such fears can erupt in violence.” AMNESTY INT’L, IT’S IN OUR HANDS: STOP VIOLENCE AGAINST WOMEN 17 (2004) (emphasis added), available at <http://graduateinstitute.ch/faculty/clapham/hrdoc/docs/womenai2004.pdf>.

⁸⁴ See Brief for Mary Robinson et al. as Amici Curiae Supporting Petitioners at 16, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 164151, at *16.

⁸⁵ Anne Gallagher, *Human Rights and the New Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 984–86, 1002 (2001).

⁸⁶ See, e.g., Rubin, *supra* note 5, at 309–10. For a critical analysis of the divisions between global North and South, exacerbated by certain forms of sexual rights advocacy more generally, see WILLIAMS, *supra* note 4, at 29–30, 40–42; see also Sonia Corrêa & Rosalind Petchesky, *Reproductive and Sexual Rights: A Feminist Perspective*, in FEMINIST THEORY READER: LOCAL AND GLOBAL PERSPECTIVES 88, 88, 101 (Carole R. Mc-

coalitions have formed precisely to work on this constellation of rights and sexuality in a non-exclusionary way, such as the Sexual Rights Initiative, which works at the global level.⁸⁷ Scholars and experts have added their insights to this concept as well. Each uses the concept of “sexual rights” to delineate a full range of rights (economic, civil, cultural, political, and social) that engage with protecting aspects of the sexual (as an embodiment, as well as a product of ideas, operating at the intra-personal, interpersonal, and social levels). These scholars advocate for the protection of sexual rights for all persons: adults and minors, across genders, embracing but not limited to questions of identity, conduct, and status. Ignacio Saiz, a leading advocate, writes:

sexual rights enable[] us to address the intersections between sexual-orientation discrimination and other sexuality issues—such as restrictions on all sexual expression outside marriage or abuses against sex workers—and to identify root causes of different forms of oppression. . . . Sexual rights make a strong claim to universality, since they relate to an element of the self common to all humans: their sexuality. . . . The concept . . . proposes an affirmative vision of sexuality as a fundamental aspect of being human, as central to the full development of the human health and personality as one’s freedom of conscience and physical integrity. Sexual rights offer enormous transformational potential, not just for society’s “sexual minorities” but for its “sexual majorities” as well.⁸⁸

Yet the fractured structure and processes of human rights (international and regional IGOs, state actors and independent experts, courts and quasi courts) and the multiple sources of those rights (customs, treaties, and general principles) mitigate against unity of development, just as globally diverse politi-

Cann & Seung-Kyung Kim eds., 2003) (advocating for the integration of sexual rights with health and development agendas in order to give women the power to make decisions about reproduction and sexual activity, thereby transforming the distribution of resources in society). For an edited volume focusing on the possibilities of coalition in sexual rights work in South and South East Asia, see generally *SEXUALITY, GENDER AND RIGHTS: EXPLORING THEORY AND PRACTICE IN SOUTH AND SOUTHEAST ASIA* (Geetanjali Misra & Radhika Chandiramani eds., 2005). See also Susanna T. Fried & Ilana Landsberg-Lewis, *Sexual Rights: From Concept to Strategy*, in 3 *WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW* 91, 92 (Kelly D. Askin & Dorean M. Koenig eds., 2001) (framing claims for sexual rights as affirmative demands for both women’s right to fully enjoy their citizenship and for protection against human rights violations).

⁸⁷ The Sexual Rights Initiative (“SRI”) is a global association of NGOs, like Action Canada for Population and Development (“ACPD”), Creating Resources for Empowerment in Action (“CREA”), International Centre for Reproductive Health and Sexual Rights (“INCREASE”), Mulabi—Espacio Latinoamericano de Sexualidades y Derechos, and the Polish Federation for Women and Family Planning. *Reframing Sexual Rights at the Human Rights Council*, CREA, <http://web.creaworld.org/publiceducation.asp> (last visited Mar. 6, 2011) (noting that SRI seeks to broaden the dialogue on sexual rights by incorporating a feminist and global South perspective).

⁸⁸ Saiz, *supra* note 10, at 65–66.

cal contexts and experiences tend toward diffuse claims. Nevertheless, it is out of all of these tensions that some concrete norms in sexual rights have emerged.

III. MAPPING THE SEX BOOM IN VOICE AND VENUE: “SOFT SOFT,” SOFT, AND HARD LAW

What follows is a highly abridged outline of the boom of sexual rights articulations in the world of global human rights, with a focus on standards generated in the UN. In addition to some of the indeterminacy of the content of sexual and reproductive rights, the generation of human rights norms occurs in multiple sites and results from different processes. These results have differing levels of purchase on states, nationally, transnationally, and internationally. This Article draws on the recent literature that both describes the fragmentation of international law and marks the moments of its “constitutionalist” traction.⁸⁹

We proceed from an understanding that norms develop as a result of an informal “cascade” or accumulation of statements, agreements, and documents that energizes, influences, and engages with the formal processes of state-to-state formal negotiations.⁹⁰ One of the more successful examples of this process can be seen in the realization of the standards around violence against women. Identifying violence as a cause and consequence of discrimination against women and obliging the state to protect against such violations by private actors under the standard of “due diligence,” came about by concerted advocacy in UN conferences, treaty bodies, the UN General Assembly, regional courts, and civil society venues.⁹¹

⁸⁹ See John Tobin, *Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretations*, 23 HARV. HUM. RTS. J. 1, 9–11, 14–15 (2010) (elaborating on efforts to synthesize formalism with contemporary practices of NGOs and other actors through articulating values to be served); see also Stephen Gardbaum, *Human Rights and International Constitutionalism*, in RULING THE WORLD?: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 233, 245, 252 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009) [hereinafter RULING THE WORLD?] (arguing that the human rights system can fruitfully be analyzed as a constitutionalized regime of international law, an analysis which would enrich the study of global constitutionalism); Mutua, *supra* note 13, at 606–12 (critiquing the democratic and participatory deficit in recent norms adoption). See generally RULING THE WORLD?, *supra* (providing an introductory discussion of “global constitutionalism,” the framing of current developments in international legal governance as processes and norms resembling constitutional practices).

⁹⁰ For a discussion of the term “norm cascade,” see Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, in 52 INT’L ORG. 887, 895, 898, 902 (1998). See generally MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998) (describing how the activities of transnational advocacy networks, in both formal and informal settings, have contributed to the development of human rights norms and campaigns).

⁹¹ See generally Charlotte Bunch, Peggy Antrobus, Samantha Frost & Niamh Reilly, *International Networking for Women’s Human Rights*, in GLOBAL CITIZEN ACTION 217 (Michael Edwards & John Gaventa eds., 2001) (recounting the process of norm development in the international movement for women’s human rights, from the perspective of

The “piling up of norms” phenomenon engaged in by state and non-state actors is distinct from, but linked to, formal processes of norms generation at the UN. Formal norms can come into being through the drafting of texts for adoption by states. These texts can be “hard” law (if given the form of a treaty or international agreement), evidence of the law (as when text is evidence of custom), or soft law (a text of persuasive or hortatory weight).⁹² However, the establishment of formal norms often comes only after an accretion of norms through informal mechanisms—as if states decide to package human rights material properly only after so much of it has washed up on inter-governmental shores. We therefore take it as given that the creation of international human rights norms assumes complex and multidirectional processes, both transnationally and internationally. Furthermore, this creation involves a wide range of active players: states, NGOs, scholars, UN bureaucrats, journalists, and foundations, among others.⁹³

We begin with NGOs and address their explicit articulation of sexual norms. While NGO-enunciated norms do not bind states (and therefore are the softest of all norms, or as we say, “soft soft law”), they can be inducements, or even models, for governments to oblige themselves, through soft or hard law, to respect, protect, and fulfill sexual rights.⁹⁴ At the same time, not all NGOs think or act alike; they often have different objectives that can work at cross purposes. As the genealogy above stressed, there are distinct interests and tropes among NGOs, which sometimes work together and other times apart from one another.

some of its key advocates); Donna J. Sullivan, *The Public/Private Distinction in International Human Rights Law*, in *WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 126 (Julie Peters & Andrea Wolper eds., 1995) (delineating an early analysis of the doctrinal steps needed in this process).

⁹² For a precise discussion on how norms are built and linked to the jurisprudence of regional human rights and national constitutional courts, see generally *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* (Hurst Hannum ed., 4th ed. 2004). See also Mutua, *supra* note 13 (discussing the spread of human rights norms). See generally Dinah Shelton, *Introduction: Law, Non-Law and the Problem of 'Soft Law'*, in *COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM I* (Dinah Shelton ed., 2000) (providing an elaborate taxonomy of soft law and exploring whether and how soft law norms can effectively enhance or substitute for legally binding obligations).

⁹³ See, e.g., Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT'L L. 348, 361–62 (2006) (describing NGOs as transnational “norm entrepreneurs”); Christine Chinkin, *Human Rights and the Politics of Representation: Is there a Role for International Law?*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* 131, 135 (Michael Byers ed., 2000) (elaborating on the role that NGOs play in norm construction).

⁹⁴ See generally *NGOS AND HUMAN RIGHTS: PROMISE AND PERFORMANCE* (Claude E. Welch ed., 2001) [hereinafter *NGOS AND HUMAN RIGHTS*] (detailing numerous perspectives on the ways that NGOs have influenced governments and states in promoting human rights, including standard-setting, helping to develop agendas for action, and providing assistance to victims). See also Makau Mutua, *Human Rights International NGOs: A Critical Evaluation*, in *NGOS AND HUMAN RIGHTS*, *supra*, at 151 (noting, from a TWAIL perspective, that international NGOs have played the most influential role in universalizing human rights norms even while the formal creation of human rights law occurs at the state level).

A. “Soft Soft” Law Norms: NGOs

International NGOs have been at the forefront of issuing normative sexual rights statements, and have grounded them in international human rights. These statements are both models and inducements. The 2008 International Planned Parenthood Federation’s (“IPPF”) Declaration on Sexual Rights builds on a synthesis of already existing and recognized international human rights, as applied to aspects of sexuality.⁹⁵ The Declaration represents an effort by an international sexual and reproductive health NGO, which focuses on women and youth, to ensure a strong claim to sexuality in the context of member associations whose focal area of work has traditionally been reproductive health.⁹⁶

The 2006 Yogyakarta Principles, which focus on (homo)sexual orientation and gender expression,⁹⁷ have an even higher profile in formal standard-setting venues: they were signed by a number of notable international human rights and legal scholars, and have a relatively well-funded strategy behind them. The Principles interpret existing treaty-based human rights standards so as to apply them to promote and protect sexual orientation and gender identity.⁹⁸ The IPPF Declaration seeks primarily to educate and empower local and national advocates in order to increase both their advocacy work on sexual rights and to encourage more thoughtful rights-based provision of sexual health services.⁹⁹ The Yogyakarta Principles, in contrast, were drafted with an eye toward formal incorporation into “hard” human rights law.¹⁰⁰ In fact, some governments and transnational NGOs have attempted to get legal recognition for them: the Principles have been cited as evidence of the applicability of international law to sexual orientation and gender identity (“SOGI”) by the UN High Commissioner for Refugees (“UNCHR”) in guidelines for asylum protection on the grounds of SOGI, as well as referenced as expert guidance in national court decisions.¹⁰¹

⁹⁵ IPPF DECLARATION ON SEXUAL RIGHTS, *supra* note 37, at i–iv.

⁹⁶ See MILLER, ICHRP DISCUSSION PAPER, *supra* note 26, at 45–46 (engaging with the gaps in global advocacy around sexual rights from the perspective of stimulating next steps in doctrinal research).

⁹⁷ See AN ACTIVIST’S GUIDE TO THE YOGYAKARTA PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY (2010), available at http://www.ypinaction.org/files/02/85/Activists_Guide_English_nov_14_2010.pdf [hereinafter AN ACTIVIST’S GUIDE TO THE YOGYAKARTA PRINCIPLES] (elaborating on the implementation of the Yogyakarta Principles); see also THE YOGYAKARTA PRINCIPLES, *supra* note 43.

⁹⁸ See generally O’Flaherty & Fisher, *supra* note 38, at 232–35 (explaining that the Yogyakarta Principles were intended to map the experiences of LGBT persons who suffered human rights violations, in a manner that reflected the procedures and theories of UN human rights treaties).

⁹⁹ IPPF DECLARATION ON SEXUAL RIGHTS, *supra* note 37, at 11, 15, 21.

¹⁰⁰ AN ACTIVIST’S GUIDE TO THE YOGYAKARTA PRINCIPLES, *supra* note 97, at 36.

¹⁰¹ UNHCR GUIDANCE NOTE ON REFUGEE CLAIMS, *supra* note 39; see also Sunil Babu Pant v. Nepal Government, 59 Writ No. 917 (S. Ct. 2007) (Nepal), available at http://njanepal.org.np/Anex_2.pdf (using the Yogyakarta definition of sexual orientation

In 2008, the International Council on Human Rights Policy (“ICHRP”) also embarked on a sexuality and human rights project.¹⁰² In commissioning a discussion paper, the Council stated, “[t]he theme is both vast and controversial, and the Council’s initial aim is to clarify the essential elements of a policy discussion of sexuality and sexual rights from a human rights perspective, and by doing so perhaps enable discussion to progress.”¹⁰³ At the regional level, advocates in the Latin and South American regions have been continually working to articulate the elements of what they will propose as the draft Inter-American Convention on Sexual and Reproductive Rights.¹⁰⁴ This Convention will be presented to states for adoption as a binding legal norm.¹⁰⁵

B. More “Soft Soft” Law Norms: UN Agencies

In an attempt to consolidate norms, UN agencies have undertaken research projects relating to human rights and sexuality, such as UNESCO’s 2009 International Technical Guidance on Sexuality Education,¹⁰⁶ and WHO’s work using international law, including human rights, to establish standards in relation to sexual health.¹⁰⁷ In the case of WHO, its objective is to amass authoritative human rights standards in international, regional, and

and gender identity in upholding the right of a variety of non-hetero-normative persons, including some deemed a “third gender,” to nondiscrimination and privacy in their sexual lives); *Naz Foundation v. Gov’t of NCT of Delhi & Others*, No.7455/2001 (Delhi High Ct. 2009) (India), available at <http://lobis.nic.in/dhc/APS/judgement/02-07-2009/APS02072009CW74552001.pdf> (also using the Yogyakarta definition of SOGI in holding that the criminalization of consensual homosexual sex between adults violated fundamental rights protected by India’s Constitution).

¹⁰² *Sexuality and Human Rights Project*, INT’L COUNCIL ON HUMAN RIGHTS POLICY, <http://www.ichrp.org/en/projects/137> (last visited Mar. 8, 2011).

¹⁰³ *Id.*

¹⁰⁴ For the text of the advocates’ proposal, see CAMPAIGN FOR AN INTER-AM. CONVENTION ON SEXUAL AND REPROD. RIGHTS, PROPOSAL FOR AN INTER-AMERICAN CONVENTION ON SEXUAL AND REPRODUCTIVE RIGHTS (May 2010), available at http://www.convencion.org.uy/01campana/Documentos/Convencion_2010/prop2010-lima-ingl.pdf. For the only regional treaty on women’s rights that includes some aspects of sexual rights, see Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the African Union, Maputo, July 11, 2003, CAB/LEG/66.6 (entered into force Nov. 25, 2005), available at <http://www.achpr.org/english/women/protocolwomen.pdf> [hereinafter Maputo Protocol].

¹⁰⁵ See *Campaign for an Inter-American Convention on Sexual and Reproductive Rights*, INT’L WOMEN’S HEALTH COAL., http://www.iwhc.org/index.php?option=com_content&task=view&id=205&Itemid=110 (last visited Mar. 8, 2011) (detailing the objectives of the Inter-American Convention campaign).

¹⁰⁶ UNITED NATIONS EDUC., SCI. & CULTURAL ORG., 1 THE RATIONALE FOR SEXUALITY EDUCATION: INTERNATIONAL TECHNICAL GUIDANCE ON SEXUALITY EDUCATION: AN EVIDENCE-INFORMED APPROACH FOR SCHOOLS, TEACHERS AND HEALTH EDUCATORS (Dec. 2009), available at <http://unesdoc.unesco.org/images/0018/001832/183281e.pdf>.

¹⁰⁷ MINDY J. ROSEMAN & ALICE M. MILLER, WORLD HEALTH ORG.: PROJECT ON SEXUAL HEALTH AND HUMAN RIGHTS, INTERNATIONAL LEGAL NORMS/STANDARDS RELATED TO SEXUAL AND REPRODUCTIVE HEALTH (forthcoming 2012) (on file with authors).

national laws to clarify normative guidance for states, and thus facilitate state efforts to improve protection of rights relating to sexual health—health being WHO’s mandate.¹⁰⁸ The project is ambitious and politically fraught: not only does WHO not have official positions on many of these topics, but international law itself may have no authoritative stance.¹⁰⁹ But there is no doubt that WHO’s work partakes of and contributes to the contemporary zeitgeist around sexual rights: WHO’s trial balloon of a “working definition” on sexual rights, promulgated in 2002, has been central to many national-level policy discussions, even as it has been partially disowned by its progenitors.¹¹⁰

It is notable that many different nongovernmental entities¹¹¹ and UN agencies have found this moment opportune to gather and interpret (and re-interpret) existing international human rights in order to further sexual rights. As NGOs and UN agencies, their insistence on the legitimacy of sexual rights does not by itself confer legitimacy on a subject of international human rights law, but it does mark the field as worthy of attention, and in many cases, it has helped to create the content of key doctrinal frames. The status of their norms is indeed “soft soft.” However, non-state actors cannot claim too much: the argument that through persistent repetition of these nongovernmental statements, these soft standards contribute to establishing international law in the manner of customary law formation is dubious. Moreover, at times, NGO and UN agency assertions can be an irritant, even a counter-stimulus to governments that, for political and other reasons, resolutely oppose sexual rights. Nonetheless, a site of debate produces attention, and perversely, validates the importance, if not the legitimacy, of a claim.

¹⁰⁸ The WHO research encompasses issues as diverse as laws (de)criminalizing consensual (hetero and homo)sexual activity, laws regulating access to sexual health information, laws regulating sexual expression, prostitution laws and the criminalization of sex work, and laws responding to sexual violence. Miller and Roseman were invited to participate as expert researchers for the WHO research project. They are authoring an international law survey that will be published jointly by WHO and ICJ. The original research documents from the regions will be published as working papers by the ICHRP in 2012, as stated on its website: *Sexuality, Health and Human Rights*, INT’L COUNCIL ON HUMAN RIGHTS POLICY, <http://www.ichrp.org/en/projects/140#health.html> (last visited Mar. 8, 2011).

¹⁰⁹ ROSEMAN & MILLER, *supra* note 107.

¹¹⁰ See, e.g., MILLER, ICHRP DISCUSSION PAPER, *supra* note 26, at 9–10.

¹¹¹ These entities include an established reproductive health service provider (IPPF), an amalgamated grouping of scholars and sexuality, health, and human rights NGOs (Yogyakarta), a leading human rights think-tank (ICHRP), and a group of women’s rights activists (proposed Inter-American Convention).

IV. UN HUMAN RIGHTS TREATIES: FROM SILENCE TO SOFT LAW ON SEXUALITY

Sexual rights have been emerging in an ad hoc, episodic fashion in the UN for almost two decades,¹¹² with, we argue, notable intensification over the past five to ten years. The development has arisen in parallel yet myopic practice in the various venues of the UN. We focus here on the UN human rights treaty system, before turning to the political bodies in Part V. On the one hand, the range of issues presented in the various UN bodies are the same, in part because the many NGO advocates work in a wide range of UN spaces. On the other hand, the rules of norm development are radically different in the two UN domains that are charged with normative work: the treaty system and the political bodies. Although states, and state consent, sit at the center of both systems, their practices are quite different. In the UN political bodies,¹¹³ the states continuously develop soft norms by resolutions, which are decisions adopted by vote or consensus. These resolutions can be the means by which the UNGA adopts a treaty or hard law, or the resolutions of the UNGA or the Human Rights Council can be hortatory statements of state obligation.¹¹⁴ It is generally accepted that “soft” law has not only a communicative, validating power, but also a constructive power by being incorporated into a treaty text or by influencing state practice in the manner of customary law.¹¹⁵ Votes on “soft law” resolutions are likely to

¹¹² For a general overview of gender-based violence as a rights issue at the UN, see, for example, Bunch, *supra* note 32, at 495–96. For an analysis of the progress of sexual violence norms, see Miller, *supra* note 31, at 24–26. For a discussion on the progress of norms protecting sexual orientation, see Laurence R. Helfer & Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 HARV. HUM. RTS. J. 61, 61–63 (1996); see also Saiz, *supra* note 10 (assessing the status of sexual orientation rights at the UN).

¹¹³ The UN political bodies include the United Nations General Assembly (“UNGA”), Security Council (“SC”), and the UN Human Rights Council (“HRC”).

¹¹⁴ See, e.g., UN Charter arts. 10; 11, para. 2; 13, para. 1; 62, available at <http://www.un.org/en/documents/charter/> (setting out the powers of the UNGA in general and its relations with the Economic and Social Council, vis-à-vis the adoption of treaties). Additionally, the General Assembly does not have the power to make binding resolutions, though it can make “recommendations” to states. *Cf.* Uniting for Peace Resolution, G.A. Res. 377 (V), ¶ 1, U.N. Doc. A/RES/377(V) (Nov. 3, 1950) (declaring that the UNGA can authorize the use of force for breaches of the peace or acts of aggression if the Security Council, owing to the negative vote of a permanent member, fails to act to address the situation; also including collective measures where there are “threats to the peace”); see also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, ¶ 105 (June 21) (depending on interpretation of language and intent, UNGA resolutions can be mandatory under Article 24(2)). For an overview of the authority of the resolutions in each UN body, see HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 737–42 (3d ed. 2008).

¹¹⁵ See LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 180–81 (1995) (discussing optimistically the power of “soft law” on state compliance). *But see* Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Polit-*

follow behind-the-scenes negotiations on issues unconnected to the substance of the resolution, such as energy agreements or geopolitical double-teaming.¹¹⁶

Human rights treaties of the UN, adopted by resolution of the UNGA, are drafted by states; when ratified and in force, they become binding agreements.¹¹⁷ The rights and obligations are enumerated in articles, and the meaning and effect of the treaty is developed through application of the written standards to facts and circumstances presented to the treaty-monitoring bodies, operating on a country-by-country reporting methodology, in an officially non-politicized manner.¹¹⁸ In the treaty body system, the process is a hybrid of monitoring and quasi-jurisprudence.¹¹⁹ States parties ratify and commit to the obligations contained within the terms of the treaties. To the extent that the treaty monitoring bodies develop the textual obligations by interpretation, the States parties, by their acquiescence in practice to the guidance of the treaty bodies, thereby solidify the soft norms.¹²⁰ Sexual rights advocacy is engaging with this process of soft law development, but, we

ics, 70 MOD. L. REV. 1, 19 (2007) (providing a more skeptical view of the power of “soft law”).

¹¹⁶ See ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 141–61 (2007) (discussing the ad hoc consensus and voting procedures in the negotiation and adoption of soft law instruments).

¹¹⁷ See ANNE F. BAYESKY, *THE UN HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS* 4–6 (2001) (describing the development of human rights treaties in the UN).

¹¹⁸ See *Enhancing the human rights treaty body system: The treaty bodies' response to the Secretary-General's Agenda for Further Change*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (“OHCHR”), <http://www2.ohchr.org/english/bodies/treaty/reform.htm> (last visited Mar. 10, 2011) [hereinafter OHCHR, *Enhancing the human rights treaty body system*] (describing the treaty monitoring system). Each treaty is monitored by a committee of experts; states that ratify these treaties report to them on a periodic basis. Following a public dialogue, treaty body committees issue non-binding concluding comments or observations to the state, suggesting, among other things, what the state can do to better comply with the treaty. When states incorporate the standards or refer to the duties set out in these comments as they reform their national laws and policies, these international standards are reborn as binding national standards. Insofar as national incorporation is the primary mechanism for human rights enforcement, states often attempt to modify treaties by making reservations or understandings and declarations. These devices permit a state to condition its endorsement of certain aspects of a treaty. Reservations suspend the legal operation of specific articles of treaties; declarations and understandings qualify interpretations of articles of the treaty as applied to the state. See Vienna Convention on the Law of Treaties art. 19, *supra* note 16; see also Sandra Coliver, *International Reporting Procedures*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 173, 176–79 (Hurst Hannum ed., 2d ed. 1992); Alice M. Miller, *Realizing Women's Human Rights: Nongovernmental Organizations and the United Nations Treaty Bodies*, in *GENDER POLITICS IN GLOBAL GOVERNANCE* 161, 166–67 (Mary K. Meyer & Elisabeth Prügl eds., 1999).

¹¹⁹ See generally *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* (Hurst Hannum ed., 4th ed. 2004) (for a solid overview of the mandates and methods of work of the UN's human rights bodies, including treaty bodies and the various procedures of the Charter-based bodies); Tobin, *supra* note 89 (engaging in a detailed investigation of the methods of work of the treaty bodies, in service to more rigorous doctrinal development of human rights norms by these bodies).

¹²⁰ See Tobin, *supra* note 89, at 20.

argue, in a myopic and often severely cabined way. The interaction of the strictures of NGO advocacy described above, and the limitations of the frame of each treaty, are the parameters to which we now turn.

None of the human rights treaties by their original texts address the expression of sexuality as a human right.¹²¹ Thus, the project of norm-building in sexual rights becomes one of interpretation of the treaty through an interplay between state practice and expert guidance in the dynamic alluded to above; NGOs, participating as key interlocutors, and their models of sexual rights contribute key dynamism, as well as templates for norm-creation.¹²² Each of the UN human rights treaties has engaged with sexual rights, but each treaty in turn has employed a slightly different approach to sexual rights. None has supported an autonomous claim to sexual rights,¹²³ though the various angles are promising, even as the approaches themselves are products of each treaty's specific mandate, history, and the advocacy circles engaged with it. While we devote most of our attention to two treaty bodies, the CESCRC and CEDAW, we briefly characterize the mechanisms at play in producing soft law in the treaty bodies as a whole: communications, general comments, and concluding comments.

Among the mechanisms of interpretation and supervision at use by the treaty bodies, the communications, or complaints mechanism, is considered by scholars to be the most authoritative of the three key mechanisms.¹²⁴ De-

¹²¹ *But see* Convention on the Rights of the Child ("CRC") arts. 19 & 34, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) (calling for protection of children from sexual abuse and exploitation); *see also* Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") art. 6, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) (calling on states to suppress the "exploitation of prostitution"). With the exception of the CRC and CEDAW, none of the human rights treaties' original texts address sexuality as a human right. *See also* Maputo Protocol, *supra* note 104 (including articles related to sexual and reproductive health and the protection of women from sexual violence).

¹²² *See generally* INT'L LAW COMM'N, <http://www.un.org/law/ilc/> (last visited Mar. 9, 2011). The UNGA established the International Law Commission ("ILC") in 1947 in order to have recourse to a body of experts who could provide guidance to the UN and its member states on the development of international law. The ILC's reports have included studies relating to the interpretation of treaties, including human rights treaties. *See, e.g.*, Chairman of the Study Grp. of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 487, U.N. Doc. A/CN.4/L.682 A (Apr. 13, 2006) (finalized by Martii Koskeniemi) (addressing the tension between states' powers and the role of other actors in interpreting treaty norms). *See generally* Vienna Convention on the Law of Treaties, *supra* note 16 (encompassing the foundational rules on treaty development, interpretation, breach, and termination).

¹²³ However, there is some support for an autonomous claim around certain aspects of sexual rights. *See* CRC arts. 19 & 34, *supra* note 121 (requiring States parties to protect children from sexual abuse may imply a right to sexual activity without abuse); CEDAW art. 6, *supra* note 121 (requiring States parties to suppress exploitation of prostitution may also imply a right to sexual autonomy).

¹²⁴ David Weissbrodt, *The Role of the Human Rights Committee in Interpreting and Developing Humanitarian Law*, 31 U. PA. J. INT'L L. 1185, 1190 (2009–2010) (discussing the authoritativeness of the Human Rights Committee's complaints mechanism in the context of international humanitarian law). Individual nations "opt in" to communica-

cisions rendered in these quasi-judicial settings are understood to be authoritative judgments for the state in question and also provide guidance for other states.¹²⁵ Thus far, however, out of all the relevant treaties, very little case law has touched on sexual rights. The most notable cases have arisen in the past fifteen years under the International Covenant on Civil and Political Rights (“ICCPR”). These cases addressed and criticized laws that criminalized same-sex behavior or failed to recognize same-sex partnerships on an equal basis with different-sex partnerships.¹²⁶ There are no cases that address marital rape, the denial of services to unmarried women that are granted to married women, or the criminalization of heterosexual sex outside of marriage, to name a few issues that advocates routinely raise concerns about under the sexual rights umbrella.

A wide range of committees have addressed sexual rights, as an aspect of reproductive rights, in the context of equality of women and men, primarily using the mechanism of promulgating general comments or recommendations. Most of the treaty bodies issue such comments or recommendations regularly to inform States parties of new understandings of the legal implications of relevant treaties.¹²⁷

tions under a particular treaty, allowing an additional form of accountability—namely, that individuals can bring claims against States parties, which are adjudicated by treaty bodies and result in public findings of violations. *See 23 FAQ about Treaty Body Complaint Procedures*, OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/bodies/petitions/individual.htm#against> (last visited Mar. 10, 2011) (“[In order for an individual to bring a claim against a State, t]he State must be a party to the treaty in question, having ratified or otherwise accepted it. . . . The State party must have recognized the competence of the committee established under the relevant treaty to consider complaints from individuals.”). The complaints mechanism is the most court-like procedure in the human rights system and also the most contingent (i.e., driven by specific facts and not necessarily binding precedent). Accordingly, it is important not to over-read implications from the distribution of cases *per se*.

¹²⁵ *See* OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, FACT SHEET NO.7/REV.1, COMPLAINTS PROCEDURE [hereinafter OHCHR COMPLAINTS PROCEDURE FACT SHEET No. 7], available at <http://www.ohchr.org/Documents/Publications/FactSheet7Rev.1en.pdf> (<http://www2.ohchr.org/english/bodies/treaty/reform.htm> (discussing the communications procedures under various UN treaties and the implications of decisions)).

¹²⁶ Human Rights Comm., *Toonen v. Australia*: Commc’n No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994) (Australia’s criminal sodomy law violates ICCPR Articles, which prohibit discrimination on the grounds of sexual orientation and protected private sexual activity); Human Rights Comm., *Young v. Australia*: Commc’n No. 941/2000, ¶¶ 11–12, U.N. Doc. CCPR/C/78/D/941/2000 (Aug. 6, 2003) (State’s refusal to provide pension benefits to same-sex dependent was unlawful discrimination based on sexual orientation under article 26); Human Rights Comm., *X v. Colombia*: Commc’n No. 1361/2005, ¶¶ 8–9, U.N. Doc. CCPR/C/89/D/1361/2005 (Mar. 30, 2007) (discrimination in granting pension transfer for same-sex couple was unlawful discrimination under article 26); *but see* Human Rights Comm., *Joslin v. New Zealand*: Commc’n No. 902/1999, ¶ 8.2, U.N. Doc. CCPR/C/75/D/902/1999 (July 17, 2002) (States parties to ICCPR do not have an obligation to recognize same-sex marriages).

¹²⁷ *See* Rep. on the Working Methods of the Human Rights Treaty Bodies Relating to the State Party Reporting, June 20–24, 2005, U.N. Doc. HRI/MC/2005/4 (May 5, 2005) [hereinafter Rep. on the Working Methods of the Human Rights Treaty Bodies].

General comments are proving to be a productive site for the generation of explicit sexual rights norms, in part because they are meant to sum up the knowledge gained from the country-by-country reviews and in part because, as a process, the treaty bodies increasingly include NGO and scholarly participation.¹²⁸ However, sexual rights as currently delineated in the general comments, are marked with deep limitations: the basic right to engage in sexual conduct is not fully affirmed, and the paradigm remains that (heterosexual) women get partial sexual rights in the context of reproduction (mostly health, with some civil rights' aspects of nondiscrimination and violence protection).¹²⁹ On the other hand, gay and transsexual persons get sexual orientation and gender identity rights, in light of nondiscrimination norms and protections from extrajudicial executions and torture, and rights to privacy, including freedom from criminal regulation of consensual sex.¹³⁰ Until recently, attention to lesbians seemed to fall outside of both domains (sexual and reproductive rights or "gay rights").¹³¹ In this constellation of rights emerging in the general comments, the connections between gender and sexuality are under-theorized. In the subparts below, which focus on two general comments central to sexual rights arising in the work of the CESCR and CEDAW, we revisit this concern.

Finally, much more numerous and indicative (but not conclusive) of the emerging norms on sexual rights are the references in the concluding observations. These comments arise in the process of review of state reports and reflect a Committee's *country-specific* concerns about barriers to rights or

¹²⁸ See, e.g., Comm. on the Rights of the Child, General Comment No. 3 (2003): HIV/AIDS and the rights of the child, U.N. Doc. CRC/GC/2003/1 (Mar. 17, 2003) [hereinafter CRC General Comment No. 3 on HIV/AIDS]; Comm. on the Rights of the Child, General Comment No. 4 (2003): Adolescent health and development in the context of the Convention on the Rights of the Child, U.N. Doc. CRC/GC/2003/4 (July 1, 2003) [hereinafter CRC General Comment No. 4 on adolescent health] (providing an example of progressive sexual rights incorporation into a treaty body comment, including both protections for adolescents to generally receive accurate and unbiased information on sexual conduct and health, as well as protections for sexual orientation diversity among young people and freedom from gender-stereotyping for girls and young women). See also Dianne Otto, "Gender Comment: Why Does the UN Committee on Economic, Social and Cultural Rights Need a General Comment on Women," 14 CAN. J. Women & L. 1, 3 (2002) (discussing the role of general comments in treaty body development).

¹²⁹ See O'Flaherty & Fisher, *supra* note 38, at 216; see also Miller & Vance, *supra* note 82, at 6–8 (discussing the differential and hierarchical treatment of the two sexual practices as inconsistent and marginalizing).

¹³⁰ See, e.g., Miller & Vance, *supra* note 82, at 8 (arguing that "sexual rights" is not merely a synonym for rights "connected to gays and lesbians or sexual orientation or women's reproductive health," but rather includes all individuals); O'Flaherty & Fisher, *supra* note 38, at 216; Saiz, *supra* note 10, at 52.

¹³¹ See Saiz, *supra* note 10, at 76 n.68 (quoting the statement made by Palesa Beverlie Ditsie on behalf of the International Gay and Lesbian Human Rights Commission, regarding the Beijing Platform for Action) ("If these words [sexual orientation] are omitted from the relevant paragraphs, the Platform for Action will stand as one more symbol of the discrimination that lesbians face and of the lack of recognition of our very existence."); see also Sheill, *supra* note 45, at 60–61 (attempting to explain why lesbians fell outside of the sexual and reproductive rights and gay rights domains).

failed state action.¹³² These concluding observations comprise a set of standards-based benchmarks that national advocates can use in pressuring for change in law and practice.¹³³ They also constitute a kind of wishing well of inchoate doctrinal claims, as close reading can point to fruitful areas of doctrinal evolution. Treaty bodies often decide to issue general comments in order to synthesize key principles articulated in concluding observations on a particular topic.¹³⁴ In fact, the CESCR has recently begun to research and draft a general comment related to sexual and reproductive rights to clarify to States parties their obligations under the treaty.¹³⁵

What all of this normative activity amounts to is a source of contention. Advocates have gained a great deal of ground in their national work by pointing to the cumulative weight of concluding comments expressing concern on an issue, even as the specific guidance in the language is not clear.¹³⁶ The question of what status to give the interpretive statements of the treaty bodies—especially general comments and communications—looms large and is governed by the rules of interpretation and the mechanisms by which treaties evolve.¹³⁷ There is great contest as to who is the authoritative voice in interpretation of treaties: the expert treaty body that monitors compliance by States parties, or the States parties themselves.¹³⁸ While the authority of

¹³² See Rep. on the Working Methods of the Human Rights Treaty Bodies, *supra* note 127.

¹³³ For a compendium of relevant concluding observations, see *Bringing Rights to Bear Anew: 2008 Update*, CTR. FOR REPROD. RIGHTS, <http://reproductiverights.org/en/press-room/bringing-rights-to-bear-anew-2008-update> (last visited Mar. 9, 2011) (compiling concluding observations on abortion, sexual violence, sexual health information, and maternal mortality, to name a few topics covered).

¹³⁴ See OHCHR, *Enhancing the human rights treaty body system*, *supra* note 118.

¹³⁵ *Day of General Discussion on “the right to sexual and reproductive health,”* OFFICE OF THE UNITED NATIONS HIGH COMM’R ON HUMAN RIGHTS (Nov. 15, 2010), <http://www2.ohchr.org/english/bodies/cescr/discussion15112010.htm> [hereinafter *Day of General Discussion*, CESCR General Comment] (discussing the upcoming formulation of a CESCR general comment on the right to sexual and reproductive health).

¹³⁶ See *Bringing Rights to Bear Anew: 2008 Update*, *supra* note 133; see also INT’L COMM’N ON JURISTS, SEXUAL ORIENTATION AND GENDER IDENTITY IN HUMAN RIGHTS LAW: REFERENCES TO JURISPRUDENCE AND DOCTRINE OF THE UNITED NATIONS HUMAN RIGHTS SYSTEM 3–4 (4th ed. 2010), available at <http://www.icj.org/dwn/database/UN-Compilations2010.pdf>.

¹³⁷ See OHCHR COMPLAINTS PROCEDURE FACT SHEET No. 7, *supra* note 125 (noting that treaty bodies’ decisions may guide states and NGOs in interpreting the contemporary meaning of the treaties).

¹³⁸ See, e.g., Human Rights Comm., General Comment No. 24(52): Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994) (noting that a State’s reservation that rejects the Committee’s authority to interpret the provisions of the ICCPR would be incompatible with the object and purpose of the treaty); see also *Report of the International Law Commission to the General Assembly*, 52 U.N. GAOR Supp. No. 10, at 48–49, U.N. Doc. A/52/10 (1997), reprinted in [1997] 2 Y.B. Int’l L. Comm’n 1, U.N. Doc. A/CN.4/SER.A/1997/Add.1 (Part 2) [hereinafter ILC 1997 Report] (discussing the role of States parties and human rights treaty monitoring bodies in determining the validity of reservations). Traditional public international law favors the states parties as final interpreters. See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 15–16 (6th ed. 2003) (stat-

the UN treaty bodies' voice is in ascendancy in human rights circles, the viability of this claim is more tenuous in inter-governmental settings and with key experts.¹³⁹ This contest over authority at the international level underlines the importance of the incorporation and interpretation of human rights treaties at the national level.

A. *Formalizing Norms as Soft Law: The Case of the CESCR General Comment and its Listing Toward Health*

As the UN treaty bodies have issued concluding comments and observations about compliance with the human rights treaties they oversee, their comments bundle issues and cut across rights related to nondiscrimination, freedom from torture, cruel and degrading treatment, education, health, information, and association. This bundling is an act of selection and analysis; it is predicated on already existing ideas of what constitutes sexuality and reproduction. The arrest of HIV outreach workers,¹⁴⁰ failure to provide medical treatment for imprisoned women who are suspected of obtaining abortions,¹⁴¹ failure to provide protection on the basis of sexual orientation,¹⁴² or

ing that the foundation of international law rests on "the general principles of law recognized by civilized nations"). The UN expert bodies are quasi-judicial in their powers, as distinct from the juridical powers granted to the regional courts in the Council of Europe, Organization of American States, and the African Union systems. Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 VAND. J. TRANSNAT'L L. 905, 908 (2009) (noting the differences between courts and UN treaty bodies).

¹³⁹ While no one today questions the ability of the treaty bodies to give guidance to states parties, and many states follow and incorporate the guidance of the treaty bodies in their practice (thus giving it the weight of hard law), the ILC, the authoritative legal body of the UN, is proceeding grudgingly toward some of the positions of the treaty bodies. Regarding the evaluation of reservations by the Human Rights Committee, see ILC 1997 Report, *supra* note 138, at 49, 54.

¹⁴⁰ The most notorious incidence of this occurred in India with the arrest of outreach workers for the Naz Foundation, an HIV/AIDS and sexual health NGO. This incident eventually led to the overturning of the anti-sodomy statute in India. See *Naz Foundation v. Gov't of NCT of Delhi & Others*, No.7455/2001, at 19, 82 (Delhi High Ct. 2009) (India), available at <http://lobis.nic.in/dhc/APS/judgement/02-07-2009/APS02072009CW74552001.pdf>. For concerns about the increase in HIV/AIDS rates among young women, see, for example, Comm. on Econ., Soc. and Cultural Rights, Concluding observations of the Committee on Economic, Social and Cultural Rights ("CESCR"): Brazil, ¶38, U.N. Doc. E/C.12/1/Add.87 (June 26, 2003); Comm. on Econ., Soc. and Cultural Rights, Concluding observations of CESCR: Chile, ¶ 27, U.N. Doc. E.C.12/1/Add.105 (Dec. 1, 2004); Comm. on Econ., Soc. and Cultural Rights, Concluding observations of CESCR: Trinidad and Tobago, ¶ 24, U.N. Doc. E/C.12/1/Add.80 (June 5, 2002).

¹⁴¹ See Comm. Against Torture, Conclusions and recommendations of the Committee against Torture: Chile, ¶¶ 6(j), 7(m), U.N. Doc. CAT/C/CR/32/5 (June 14, 2004).

¹⁴² See, e.g., Comm. on Econ., Soc. and Cultural Rights, Concluding Observations of CESCR: People's Republic of China (including Hong Kong and Macao), ¶ 78, U.N. Doc. E/C.12/1/Add.107 (May 13, 2005) [hereinafter CESCR Concluding Observations: China]; Comm. on Econ., Soc. and Cultural Rights, Concluding Observations of CESCR: Kyrgyzstan, ¶ 17, U.N. Doc. E/C.12/1/Add.49 (Sept. 1, 2000) (Committee expressing concern over increased penalization of same-sex behavior by adding lesbianism to the country's list of sexual crimes).

the provision of misleading information about sexuality¹⁴³—these are some examples of what might be classified as sexual and reproductive rights matters. Not all treaty bodies issue general or concluding comments about all matters, but they are formally limited by the treaties' mandated focus (gender or racial discrimination, or civil and political rights, or the rights of disabled persons). It is the effect of these various issue silos, coupled with the treaty-specific practices of the NGOs and the specific culture of the treaty bodies, that we turn to with examples from CESC and CEDAW.

In 2010, the CESC, having issued scores of concluding observations on various aspects of sexual and reproductive health,¹⁴⁴ somewhat *sua sponte*, decided to simplify its task by giving States parties a clearer idea of the international human rights standards and obligations under the Covenant on sexuality and reproduction by drafting a General Comment.¹⁴⁵

The General Comment was to be entitled “on sexual and reproductive health.” At the Day of General Discussion, the title was revised to “the Right to Sexual and Reproductive Health.” Its primary grounding was in the right to health (ICESC Article 12), although attention to cross-cutting rights such as the benefits of scientific progress (Article 15), education (Article 13), social security (Article 11), protection of the family and children (Article 10), nondiscrimination (Articles 2 and 3)—as well as the work of other UN treaty bodies—was desired.¹⁴⁶ The terms of reference suggested

¹⁴³ See, e.g., Comm. on Econ., Soc. and Cultural Rights, Concluding observations of CESC: Benin, ¶ 42, U.N. Doc. E/C.12/1/Add.78 (June 5, 2002); Comm. on Econ., Soc. and Cultural Rights, Concluding observations of CESC: Bolivia, ¶ 43, U.N. Doc. E/C.12/1/Add.60 (May 21, 2001); CESC Concluding Observations: China, *supra* note 142, ¶¶ 88, 100; Comm. on Econ., Soc. and Cultural Rights, Concluding observations of CESC: Ukraine, ¶ 31, U.N. Doc. E/C.12/1/Add.65 (Sept. 24, 2001); Comm. on Econ., Soc. and Cultural Rights, Concluding observations of CESC: Jamaica, ¶ 30, U.N. Doc. E/C.12/1/Add.75 (Dec. 6, 2001).

¹⁴⁴ For a slightly outdated compilation of the output of all treaty bodies related to sexual and reproductive health, see JULIE STANCHIERI, ISFAHAN MERALI & REBECCA J. COOK, ACTION CANADA FOR POPULATION & DEV., *THE APPLICATION OF HUMAN RIGHTS TO REPRODUCTIVE & SEXUAL HEALTH: A COMPILATION OF THE WORK OF INTERNATIONAL HUMAN RIGHTS TREATY BODIES* (3d ed. 2005), available at <http://www.acpd.ca/compilation/2006/PDF-Version.pdf>.

¹⁴⁵ By way of background, Mindy Roseman, as an expert consultant to the United Nations Population Fund (“UNFPA”), submitted an outline to the Special Rapporteur in order to support CESC in its drafting of the General Comment, based on terms of reference (themselves the result of a prior consultative meeting). Comm. on Econ., Soc. and Cultural Rights (“CESC”), General Comment No. 22 on the Right to Sexual and Reproductive Health (draft submitted for June 2012 session).

¹⁴⁶ In their concluding observations and General Comments, other treaty bodies have built the corpus of international human rights norms relevant to sexual and reproductive health, interpreting various articles in their respective treaties. These include but are not limited to the following reports of the Committee on the Elimination of Discrimination Against Women (“CEDAW”), General Recommendation 18: Disabled women, 10th Sess., 3, U.N. Doc. A/46/38; GAOR, 46th Sess., Supp. No. 38 (1992); CEDAW General Recommendation 19: Violence against women, 11th Sess., 1–6, U.N. Doc. A/47/38; GAOR, 47th Sess., Supp. No. 38 (1993) [hereinafter CEDAW General Recommendation 19: Violence against women]; CEDAW General Recommendation 21: Equality in marriage and family relations, 13th Sess., 1–9, U.N. Doc. A/49/38; GAOR, 49th Sess., Supp.

that the General Comment should pay particular attention to certain human rights principles, such as dignity, as well as to the rights sensitive to those who, for historic and socially constructed reasons, are most vulnerable to abuse (e.g., disabled, indigenous, older women). Furthermore, the General Comment should comprehend all appropriate sexual and reproductive health topics, and should clearly lay out the states' obligations, especially their core ones, on respecting, protecting, and fulfilling "the right to sexual and reproductive health."¹⁴⁷

The Committee on Economic, Social, and Cultural Rights has chosen to approach these issues principally through Article 12, the right to the highest attainable standard of health.¹⁴⁸ Health, as already discussed, is a complex ground for sexuality, depoliticizing certain aspects while making others visible. Discourses about reproduction, sex, and sexuality can render these topics fit for public discussion and subordinate them to the state's governance apparatus—inviting the state in to regulate behavior, information, and provide services to promote public health, welfare, and civility. Yet, the CESCR has also stressed the freedom and well-being components of health. In its General Comment 14, interpreting obligations of States parties under the treaty, CESCR stated:

The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection

No. 38 (1994); CEDAW General Recommendation 24: Article 12—women and health, 20th Sess., 3–7, U.N. Doc. A/54/38/Rev.1; GAOR, 54th Sess., Supp No. 38 (1999) [hereinafter CEDAW General Recommendation 24: Women and health]. See also CRC General Comment No. 3 on HIV/AIDS, *supra* note 128; CRC General Comment No. 4 on adolescent health, *supra* note 128; Comm. on the Rights of the Child, General Comment No. 11 (2009): Indigenous Children and their rights under the Convention, U.N. Doc. CRC/C/GC/11 (Feb. 12, 2009). See also Comm. Against Torture, General Comment No. 2: Implementation of Article 2 by States parties, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008); Human Rights Comm., General Comment No. 19: Article 23 (Protection of the family, the right to marriage and equality of the spouses), U.N. Doc. HRI/GEN/1/Rev.9 (Vol. 1) (July 27, 1990); Human Rights Comm., General Comment No. 28: Article 3 (The equality of rights between men and women), U.N. Doc. HRI/GEN/1/Rev.9 (Vol. 1) (Mar. 29, 2000).

¹⁴⁷ See discussion *infra*, detailing the proposed topics covered by the CESCR general comment, such as access to information, contraception and family planning, violence against women, sexual orientation, and gender identity/expression, among others.

¹⁴⁸ INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS ART. 12, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 3 (entered into force Jan. 3, 1976). CESCR did take the lead in issuing a general comment on non-discrimination that identifies sexual orientation as a specific ground. See Comm. on Econ., Soc. and Cultural Rights ("CESCR"), General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), ¶ 32, U.N. Doc. E/C.12/GC/20 (July 2, 2009) [hereinafter, CESCR General Comment No. 20 on non-discrimination].

which provides equality of opportunity for people to enjoy the highest attainable level of health.¹⁴⁹

A great deal is at stake here. There would be little interest in a General Comment that simply reiterated all that has been stated before. Players on all sides of political and sexual hierarchies have an interest in seeing that the standards and duties embodied in a General Comment reflect their visions.¹⁵⁰ At the time of the writing of this Article, no draft of the General Comment has been publicly acknowledged as existing. While a number of small, invitation-only consultancies have been held, the process has been somewhat obscure.¹⁵¹ Divining the content of the General Comment, therefore, has become something of an anxious parlor game for sexual rights advocates and scholars. The anxiety stems in part from the need for a clear set of standards on highly charged and contentious issues. The prior governing norms, drawn from the ICPD's Programme of Action and Beijing's Declaration and Platform for Action, are coming to a close in 2015, with little clarity for future directions, if any, for such global inter-governmental projects.¹⁵² Even the Millennium Development Goals (MDGs), somewhat unloved by reproductive and sexual rights and health activists for its omission and then belated inclusion of reproductive health, are set to wrap up in 2015.¹⁵³ A norm emerging from a human rights treaty, outside the political bodies of the

¹⁴⁹ CESCR General Comment No. 14 on health, *supra* note 69, ¶8. It is important to stress that the definition of health in CESCR is based on that found in the Constitution of the WHO, namely that health is not merely the absence of disease, but also encompasses notions of well-being. Constitution of the World Health Organization pmb., *available at* http://www.who.int/governance/eb/who_constitution_en.pdf.

¹⁵⁰ Miller & Vance, *supra* note 82, at 7–8.

¹⁵¹ A few invitation-only meetings preceded the Day of General Discussion, and there was a perceived feeling that the process was deliberately non-consultative. This gave rise to a heightened level of anxiety that is still prevalent among sexual rights advocates. *See* Day of General Discussion, CESCR General Comment, *supra* note 135 (for the official announcement and papers submitted for the CESCR Day of General Discussion).

¹⁵² The UN General Assembly extended the effective end date of the ICPD Programme of Action indefinitely. *See* G.A. Res 65/234, ¶¶ 1–2, U.N. Doc. A/65/L.39/Rev.2 (Dec. 21, 2010) (adopting a consensus resolution, the GA emphasized the need for Governments to recommit, “at the highest political level,” to achieving the goals and objectives of the ICPD Programme of Action). The GA acknowledged that while the Programme of Action was set to formally end in 2014, its goals and objectives would remain valid beyond that date. Furthermore, since many Governments might not have met the goals by that time, it decided to extend the Programme of Action and the key actions for implementation beyond 2014, and ensure follow-up to achieve that end. *See also* Beijing Declaration and Platform for Action, *supra* note 61; ICPD Programme of Action, *supra* note 61. It is worth noting that neither of these political outcome documents is “perfect” in terms of sexual rights standards. Sex work and transgender and gender identity are not mentioned in these documents, which means that their approaches to HIV/AIDS are outdated. That abortion is left out, except in terms of a public health issue, has confounded sexual and reproductive rights advocates as well.

¹⁵³ For a list of the MDGs, see *What are the Millenium Development Goals?*, UNITED NATIONS DEV. PROGRAMME (“UNDP”), <http://www.undp.org/mdg/basics.shtml> (last visited Mar. 10, 2011) (enumerating the eight MDGs, including, *inter alia*, gender equality, improvement of maternal health and child mortality, and combating HIV/AIDS).

UN, with solid claims to authoritative purchase, would be welcomed by many rights and health advocates, UN agencies (such as UNFPA), and governments.

Moreover, among treaty bodies, the CESCR has been progressive on sexual and reproductive rights issues. The CESCR staked out sexual orientation as deserving of nondiscrimination and equal protection in its General Comment 20.¹⁵⁴ Both conceptually and normatively, the CESCR has affirmed the ICPD and Beijing approach in its General Comment 14: reproductive and sexual health is a fundamental aspect of many human rights that are well enshrined in international law, including the rights to bodily integrity and security of person, nondiscrimination and gender equality, and an array of economic and social rights.¹⁵⁵ This approach illustrates a promising aspect of treaty body development of sexual rights as an international norm, in that it is based in well-established institutional and jurisprudential consensus.

On the other hand, a General Comment drafted in this historical moment in the treaty body's practice may do the "cause" of expansive sexual and reproductive rights disservice. The last CESCR General Comment issued, the Right to Culture, has been overlooked and disregarded, primarily because it added very little to normative understanding.¹⁵⁶ Furthermore, there is an already visible lack of agreement on the scope of the Comment in the outline submitted to CESCR for consideration. The outline proposed a wide-ranging survey of health topics related to sexual and reproductive rights, from access to information, contraception and family planning, abortion, safe pregnancy, violence against women (including female genital mutilation and honor crimes), HIV and sexually transmitted infections, marriage and family, sexual orientation and gender identity/expression, and sex work.¹⁵⁷ Some of these topics already have clear human rights standards attached to them such as contraception, maternal mortality, and HIV/AIDS.¹⁵⁸ The divisive issues that are usually classified with sexual rights—abortion, sex work, and same-sex sexual practices—do not even have equal degrees of clarity in NGO advocacy and "soft soft law" at this point. Nor are these issues clear in the work of the WHO and other UN agencies, whose

¹⁵⁴ CESCR General Comment No. 20 on non-discrimination, *supra* note 148, ¶ 32.

¹⁵⁵ CESCR General Comment No. 14 on health, *supra* note 69, ¶ 2.

¹⁵⁶ Comm. on Econ., Soc. and Cultural Rights ("CESCR"), General Comment No. 21: Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009).

¹⁵⁷ ROSEMAN & MILLER, *supra* note 107 (explaining the methodology for selecting these sexual health topics as they relate to international law and human rights).

¹⁵⁸ See CTR. FOR REPROD. RIGHTS, BRINGING RIGHTS TO BEAR: AN ADVOCATE'S GUIDE TO THE WORK OF UN TREATY MONITORING BODIES ON REPRODUCTIVE AND SEXUAL RIGHTS 12–15 (Sept. 2006), available at http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_bp_BRB.pdf. We note that the existence of standards does not imply that these issues are implemented uniformly or sufficiently at national levels.

programmatic work contextualizes so much of what the Committee seeks to “normalize.”¹⁵⁹ These issues are low-hanging fruit, easily picked off, or rhetorically masked should “compromise” become the drafting methodology.

Notably, at this moment in the sexual rights project, there are also new countervailing forces in the independent treaty bodies, voices that are no longer simply present in the political bodies but now also in the independent bodies.¹⁶⁰ The Committee is contending with issues that face the vocal opposition of the Holy See and its allied member states (including a number of Islamic ones). There were representatives of anti-abortion civil society at the Day of General Discussion, signaling that there may be concerted pressure on CESCR to desist from issuing a General Comment on the “Right to Sexual and Reproductive Health.” This faction of actors denies that sexual rights exist, and equates reproductive rights solely with abortion.¹⁶¹ The sexual rights community is concerned that, if CESCR takes into consideration these positions, the norms already achieved in international human rights will be eroded. Graver still, it opens the door to a backlash: elaborating a norm that member states believe is “overreaching,” due to real or perceived domestic, political, and cultural deficits and sensitivities, can cause extreme opposition that forces a retreat from that norm. Our interest, in part, is to flag that this sexuality-specific attack on a treaty body may in turn be deployed, calculatedly, to increase the constraints on and de-legitimize the work of the UN human rights treaty bodies.

B. CEDAW: Sexual Rights at the Limit of Sex-Based Nondiscrimination

While CEDAW has a certain pride of place in women’s human rights work, paradoxically (or predictably) it has also been among the most constrained of the human rights treaty bodies in its failure to produce a liberatory doctrine on sexual rights. In the discussion that follows, we focus on two kinds of myopia that affect the development of sexual rights in CEDAW.¹⁶² The first myopia (we are tempted to say, “blinder”) is built into

¹⁵⁹ See discussion *supra* Part III. Even those NGOs that work together on other human rights issues disagree on sex work. Much of the traditional human rights advocacy is consistent on abortion and same-sex behavior but only decriminalization of same-sex behavior has received “soft law” blessing in other treaty bodies. MILLER, ICHRP DISCUSSION PAPER, *supra* note 26, at 27–33.

¹⁶⁰ See generally Girard, *supra* note 23 (describing the actors in these political bodies, such as the Holy See and its state-level Catholic allies, as well as some countries advocating conservative positions within Islam).

¹⁶¹ At the Fifth Asian and Pacific Population Conference, held in Bangkok in December 2002, the U.S. delegation lodged a formal objection to the terms “reproductive health” and “reproductive rights” (as articulated in ICPD and beyond), alleging that they imply promotion of abortion. See Susan A. Cohen, *Bush Administration Isolates U.S. at International Meeting to Promote Cairo Agenda*, GUTTMACHER REP. ON PUB. POL’Y, Mar. 2003, at 3, available at <http://www.guttmacher.org/pubs/tgr/06/1/gr060103.pdf>.

¹⁶² We have adopted Andrew Byrnes’ use of the word “myopia” for this Article. *Women, Feminism and International Human Rights Law—Methodological Myopia, Fun-*

the human rights treaty system: the system's tendency to compartmentalize certain issues into the women, race, or economic/social categories. This cabining continues to have effects, despite a clear recognition of the "interdependency" of all rights and the "intersectional" nature of discrimination.¹⁶³ The second myopia is intrinsic to CEDAW's mandate: its focus on adverse discrimination between women and men prevents it from addressing the fundamental question of whether the state has the *right* to regulate sex, as opposed to just assessing how it regulates sex in ways that disadvantage women. While recent scholars have begun to question its core approach in demarcating "woman" as the subject of the treaty rather than "gender," here we are interested in how and why CEDAW has been constrained in its understanding of sexuality. Why has it been so slow to develop a response to the diversity among women, or to engage with sexuality as a topic worthy of inclusion as an affirmative "right to," not solely as a thing to be protected from?¹⁶⁴

While the evolving jurisprudence through general recommendations has rectified many historic gaps in CEDAW, such as the lack of textual reference to violence, it has been slow to recognize diverse sexualities for women, as well as the role of policing sexuality in discrimination against women.¹⁶⁵ While the historic silence has been explored, the contemporary lacuna requires new analysis. For example, CEDAW's text includes marital status as a

damental Flaws or Meaningful Marginalisation? Some Current Issues, 12 AUSTL. YBIL 205, 216–18 (1988–1989).

¹⁶³ For a recent iteration of the importance of the interconnectedness of rights protections and for an intersectional approach to sex and gender discrimination, see Comm. on the Elimination of Discrimination against Women ("CEDAW"), General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, ¶¶ 3, 18, U.N. Doc. CEDAW/C/2010/47/GC.2 (Oct. 19, 2010) [hereinafter CEDAW General Recommendation No. 28 on Core Obligations].

¹⁶⁴ Darren Rosenblum, *Unsex CEDAW: What's Wrong with Women's Rights*, 20 COLUM. J. GENDER & L. (forthcoming 2011) (discussing the gendered constraints placed on women's rights under CEDAW). Large portions of this subpart have been drawn from an unpublished paper, Alice Miller, *Abortion and international human rights law—a critical reflection* (May 14–15, 2010) (unpublished manuscript) (on file with author Miller).

¹⁶⁵ While potentially rich in some regards, CEDAW's anti-discrimination focus and its work to ensure substantive equality for women through state fulfillment of their treaty obligations is also (so far) impoverished in its conception of how a woman is a full social, political, cultural, and economic human, with an interior as well as a physical life. Absent from CEDAW's conception of "woman" is that she is not someone who will get into trouble with the law (there are no enumerated security of person rights), nor is she someone who, famously, faces violence. It is important to recall that the states drafting CEDAW in the mid-1970s focused on the problems they understood for women in contexts of, *inter alia*, the development discourses of the time, a waning ideology of state (welfarist) roles circumscribed by Cold War struggles, the state of women's rights claiming at the national level, and de-colonization. See Rebecca J. Cook & Verónica Undurraga, *Article 12 (health)*, in *THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY* (Rebecca J. Cook & Verónica Undurraga eds.) (forthcoming 2012) (offering a historical and legal analysis relating to CEDAW's antidiscrimination focus).

prohibited ground of discrimination:¹⁶⁶ CEDAW, as a treaty explicitly oriented to end gender stereotypes that inhibit women's equality, could directly address the double standard imposed on women by laws penalizing extramarital sex. It is remarkable, though, that until now, CEDAW has not done so in any extensive way. Its focus on fornication and adultery laws has been concentrated on the *differential treatment* between women and men (usually in regard to evidence and punishment), yet CEDAW has not delved into the underlying role of sexual activity in stigmatizing women. Whether such an equality-focused lens could also address the role of the law in stigmatizing sexual activity itself is an open question.¹⁶⁷

In two early General Recommendations that have a direct purchase on sexuality—General Recommendation 19 on violence against women and General Recommendation 24 on health—the Committee focused on violations to sexual violence and barriers to information on sexual and reproductive health. These soft law standards are ground-breaking in some respects: outlining a clear nondiscrimination standard for sexual health services for girls and women, regardless of marital status; demanding conditions, including the enforcement of marital rape provisions, under which women could refuse sex if not carried out with precautions for “safe and responsible sex practices”;¹⁶⁸ and elaborating the gender-specific application of a new “due diligence” standard in international law under which governmental action can be evaluated for state accountability for non-state actor abuse.¹⁶⁹ Nonetheless, we would argue that these standards fall shy of asserting an affirmative interest in sexual expression for girls and women. There are no references to same-sex behaviors among women, explicit or implicit, and there is barely any development, if at all, of an understanding that women may be gendered and gender themselves differently.¹⁷⁰

¹⁶⁶ CEDAW defines “discrimination” in Article 1:

For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

CEDAW art. 1, *supra* note 121.

¹⁶⁷ For a review of the discrimination-based focus of CEDAW, see, for example, CTR. FOR REPROD. RIGHTS, *supra* note 158; DR. FAREDA BANDA, OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS—WOMEN’S RIGHTS AND GEND. UNIT, PROJECT ON A MECHANISM TO ADDRESS LAWS THAT DISCRIMINATE AGAINST WOMEN 1, 42, 44–46 (Mar. 6, 2008), available at http://www.ohchr.org/Documents/Publications/laws_that_discriminate_against_women.pdf (failing to mention that CEDAW addresses the underlying role of sexual activity).

¹⁶⁸ CEDAW General Recommendation 24: Women and health, *supra* note 146, ¶ 18; CEDAW General Recommendation 19: Violence against women, *supra* note 146, ¶ 24.

¹⁶⁹ See Sullivan, *supra* note 91, at 129–32.

¹⁷⁰ For a critique of these absences at the time, see generally Rachel Rosenbloom, *Introduction to UNSPOKEN RULES: SEXUAL ORIENTATION AND WOMEN’S HUMAN RIGHTS* ix (Rachel Rosenbloom ed., 1996) [hereinafter UNSPOKEN RULES]; see also CYNTHIA

However understandable these silences may have been in the 1990s, they were deafening by the new millennium. In 2010, CEDAW issued two General Recommendations: General Recommendation No. 27 on older women and protection of their human rights and General Recommendation No. 28 on the core obligations of states parties under Article 2.¹⁷¹ In these two Recommendations, the committee bit (one of) the bullets in sexual rights and spoke of “sexual orientation and gender identity.”¹⁷² The two General Recommendations are a fascinating pastiche: in these two Recommendations, CEDAW for the first time explicitly recognizes homosexuality among women and gender expression variation.¹⁷³ By its use of the words “sexual orientation and gender identity” (“SOGI”), CEDAW reflects the Yogyakarta Principles in both statements.¹⁷⁴ We focus here on General Recommendation 28, because CEDAW’s article 2 sets out the core commitments that States undertake in ratifying its treaty.¹⁷⁵ General Recommendation 28 occupies a critical space for the doctrinal development of the treaty, but its inclusion of sexual diversity bears further scrutiny: SOGI appears in the section that addresses “intersectionality” as a basic concept for understanding how the dis-

ROTHSCHILD, WRITTEN OUT: HOW SEXUALITY IS USED TO ATTACK WOMEN’S ORGANIZING 38, 85, 91, 109 (Scott Long & Susan T. Fried eds., 2005), available at <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/16-1.pdf> (for a discussion of how the UN and CEDAW fear direct protection of women’s sexuality).

¹⁷¹ Comm. on the Elimination of Discrimination against Women (“CEDAW”), General Recommendation No. 27 on older women and protection of their human rights, U.N. Doc. CEDAW/C/2010/47/GC (Oct. 19, 2010) [hereinafter CEDAW General Recommendation No. 27 on older women]; CEDAW General Recommendation No. 28 on Core Obligations, *supra* note 163.

¹⁷² CEDAW General Recommendation No. 27 on older women, *supra* note 171, ¶ 13; CEDAW General Recommendation No. 28 on Core Obligations, *supra* note 163, ¶ 18. Notably, just a year prior, advocates had spoken of the Committee as deeply divided on the relevance of sexual orientation or gender expression/identity to its work. Most classically, experts on the Committee had complained almost a decade ago to lesbian and transsexual rights advocates that the treaty addressed discrimination against women rather than men, and that sexual orientation fell within the “women” category in the summer 2009 session. In fact, some experts on the Committee reportedly threatened to block all discussion on the draft General Recommendation if sexual orientation was included. See generally UNSPOKEN RULES, *supra* note 170 (profiling early reviews and critiques of CEDAW’s exclusion of lesbian women); Grace Poore, *30 Years of CEDAW: Achievements & Continuing Challenges Towards The Realization of Women’s Human Rights*, INT’L GAY & LESBIAN HUMAN RIGHTS COMM’N, <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/partners/872.html> (last visited Mar. 10, 2011) (discussing the “struggle within CEDAW to recognize that sexual orientation, gender identity and gender expression are grounds for human rights abuses”).

¹⁷³ CEDAW General Recommendation No. 27 on older women, *supra* note 171, ¶ 13; CEDAW General Recommendation No. 28 on Core Obligations, *supra* note 163, ¶¶ 18, 31.

¹⁷⁴ The discrimination experienced by older women is often multidimensional, with age discrimination compounding other forms of discrimination based on sex, gender, ethnic origin, disability, levels of poverty, sexual orientation and gender identity, migrant status, marital and family status, literacy, and other grounds. “Older women who are members of minority, ethnic or indigenous groups, or who are internally displaced or stateless often experience a disproportionate degree of discrimination.” CEDAW General Recommendation No. 27 on older women, *supra* note 171, ¶ 13.

¹⁷⁵ CEDAW art. 2, *supra* note 121.

crimination of women based on sex and gender is inextricably linked with other factors that affect women. However, by including SOGI in the laundry list of characteristics of women, such as “race, ethnicity, religion or belief, health, status, age, class, caste, and *sexual orientation and gender identity*,”¹⁷⁶ the inclusion has the strange effect of treating sexual and gender identity differences as otherwise unconnected to sex and gender. One can applaud this as radically escaping the (false) imprisonment of all sexuality under gender. However, the more likely explanation for the rather wooden inclusion is the lack of total agreement or in-depth discussion within the Committee on the nuances and implications of inclusion of the terms “sexual orientation” and “gender identity.”¹⁷⁷

We would argue that CEDAW’s constricted doctrinal growth can partly be laid at the door of the special scrutiny and special protection CEDAW receives in the contemporary sex/culture contests of geopolitics.¹⁷⁸ CEDAW has also been hindered by governmental tendencies to treat women’s situation as a matter of status, culture, or social development, rather than one of rights that should be addressed by “hard” law.¹⁷⁹ Furthermore, CEDAW suffers from the historic under-funding of women’s rights in the UN and, in our opinion, the related inconsistent professionalization of CEDAW experts and staff support.¹⁸⁰ Its reorganization (out from under the New York-based Division for the Advancement of Women Secretariat three years ago to the Geneva-based UN Office of the High Commissioner for Human Rights) has hardly improved its integration into the treaty body system and isolation of CEDAW experts.¹⁸¹ Finally, CEDAW—as the treaty covering women’s rights—is more heavily and publicly scrutinized by anti-abortion and sexual rights NGOs than any other treaty.¹⁸² But, we would argue that CEDAW has

¹⁷⁶ See CEDAW General Recommendation No. 28 on Core Obligations, *supra* note 163, ¶ 18.

¹⁷⁷ Email from anonymous NGO advocate, to author Alice Miller (July 23, 2008) (on file with author) (detailing internal discussion at CEDAW).

¹⁷⁸ For a twenty-year-old critique of CEDAW and the UN’s work on women that still is worthy of review, even in this era of a new gender equality reform, see generally Byrnes, *supra* note 162.

¹⁷⁹ See Rebecca J. Cook, *State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women*, in HUMAN RIGHTS OF WOMEN, *supra* note 165, at 251–52.

¹⁸⁰ See, e.g., Byrnes, *supra* note 162, at 208, 213.

¹⁸¹ See Helen Hintjens, *UNIFEM, CEDAW and the Human Rights-based Approach*, 39 DEV. & CHANGE 1181, 1184 (2008):

Perhaps the recent move of the CEDAW Committee from New York to Geneva, where the Committee falls directly under the Office of the High Commissioner for Human Rights, will facilitate UNIFEM’s new coordinating and articulating role. However UNIFEM headquarters remain in New York, and there remains considerable fragmentation among UN agencies promoting gender equality, including DAW (Division for the Advancement of Women), UNIFEM itself and OSAGI (Office of the Special Advisor on Gender Issues and Advancement of Women).

¹⁸² For a particularly lively example of monitoring, see generally CATHOLIC FAMILY & HUMAN RIGHTS INST. (“C-FAM”), http://www.c-fam.org/inside_the_un/ (last visited

also historically been hobbled by “treaty-self love,” or a lack of constructive criticism that we associate with the fear of women’s rights advocates to criticize their only “dedicated to women” treaty.¹⁸³

The tension posed by CEDAW’s symbolic hold on nondiscrimination on the basis of sex is ironically avoidable, as nondiscrimination on the basis of sex is a core principle of all the major human rights treaties.¹⁸⁴ One might argue that the “woman-specific” nature of CEDAW endlessly threatens to make it a vehicle of partial citizenship: even as CEDAW is touted as an essential platform for understanding gender-specific discrimination¹⁸⁵ (even in the authors’ previous works), it may be that it functions best as a laboratory for work that is then fully realized in the treaties without “female trou-

Mar. 10, 2011). For specific attacks on CEDAW’s work, see, e.g., Amy De Rosa, *CEDAW Committee Targets East Timor on Abortion*, C-FAM (May 21, 2009), available at http://www.c-fam.org/publications/id.1172/pub_detail.asp; Terrence McKeegan, *UN Committee Attacks Motherhood, Demands New “Rights” for Women*, C-FAM (July 29, 2010), http://www.c-fam.org/publications/id.1673/pub_detail.asp. Similarly, the HRC of the ICCPR had not initially been the target of right-wing reviews, although recently it has caught the attention of these groups due to its increased attention to sexual and reproductive rights. For C-FAM’s recent submission to CESCR, see CATHOLIC FAMILY & HUMAN RIGHTS INST., DAY OF GENERAL DISCUSSION ON THE FORMULATION OF A GENERAL COMMENT ON “THE RIGHT TO SEXUAL AND REPRODUCTIVE HEALTH” (Nov. 15, 2010), available at http://www.c-fam.org/docLib/20101021_subCESCR_SRHOct18.pdf (arguing that the CESCR has no authority under ICESCR to issue a general comment on sexual and reproductive health, and even if it did, such a right would not encompass the right to abortion). The Heritage Foundation has also been active in following and producing law-oriented publications critical of CEDAW, in preparation for resisting U.S. ratification of CEDAW. See, e.g., Grace Melton, *CEDAW: How U.N. Interference Threatens the Rights of American Women*, THE HERITAGE FOUND. (Jan. 9, 2009), <http://www.heritage.org/research/reports/2009/01/cedaw-how-un-interference-threatens-the-rights-of-american-women> (arguing that the CEDAW Committee uses its mandate to advance “the homosexual-lobby agenda”).

¹⁸³ See Rosenblum, *supra* note 164 (one of the few strong critiques from the left of CEDAW in the recent era). Prior critiques of CEDAW were concerned about its developmental or formalist discourse. See, e.g., Radhika Coomaraswamy, *To Bellow Like a Cow: Women, Ethnicity, and the Discourse of Rights*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 39, 40–41, 47 (Rebecca J. Cook ed., 1994).

¹⁸⁴ See, e.g., The International Covenant on Economic, Social and Cultural Rights art. 2, *supra* note 148; International Covenant on Civil and Political Rights art. 4, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); Convention on the Rights of the Child art. 2, *supra* note 121; see also Rep. of the Comm. on the Elimination of Racial Discrimination, 56th Sess., 152–53, U.N. Doc. A/55/18; GAOR, 55th Sess., Supp No. 18 (2000); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, *opened for signature* Feb. 4, 1985, 1465 U.N.T.S. 86 (entered into force June 26, 1987) (prohibiting torture for discriminatory purposes); Convention on the Rights of Persons with Disabilities arts. 3, 5, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess. Supp. No. 49 (Vol. I), U.N. Doc. A/61/49 (Vol. 1), at 65 (Dec. 13, 2006).

¹⁸⁵ Harold Hongju Koh, *Why America Should Ratify the Women’s Rights Treaty (CEDAW)*, 34 CASE W. RES. J. INT’L L. 263, 266–68 (2002). For a description of CEDAW as the key treaty for women, see, e.g., UNITED NATIONS DEVELOPMENT FUND FOR WOMEN (“UNIFEM”), BRINGING EQUALITY HOME: IMPLEMENTING THE CONVENTION ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN 8 (1998), available at http://www.unifem.org/attachments/products/BringingEqualityHome_eng.pdf; *What is CEDAW?*, INT’L WOMEN’S RIGHTS ACTION WATCH ASIA PAC., <http://www.iwraw-ap.org/convention.htm> (last visited Mar. 11, 2011).

bles,” such as the ICCPR, ICESCR, CERD, and the UN Convention Against Torture (“CAT”).¹⁸⁶

We have intentionally emphasized single, although prominent, dimensions of the forthcoming CESC and CEDAW approaches to sexual rights—“health” and “nondiscrimination/SOGL,” respectively—for reasons of emphasis. However, our small distortions (since all of these General Comments invoke a broader base and range of rights) do not alter what ultimately is most essential about the nature of the expressed norms. These treaty body-developed norms are strategic interventions, relatively autonomous from the political contexts out of which they emerge,¹⁸⁷ but nonetheless colored by them. By political contexts, we mean the entire sum of the individual committee members’ understanding of their independence from member states, as well as their allegiance to the project of constructing international law. We mean the influence and command that NGOs, transnational and domestic, advocates and scholars, on all sides of the issues, have on the Committees; we include member and observer states, their domestic politics surrounding sexual rights, as well as the dynamic interactions among them.

Even in these highly formalized, ostensibly independent, quasi-legal settings, the fact that politics (or the concern for state support and deference to geopolitical struggles) still inflect the production of human rights norms should not be surprising. Politics are a central feature of international human rights—thus it is out of the state approval requirements of all human rights that sexual rights norms are fashioned, enabled, and constrained. The UN expert bodies constantly strive for the approval of the states they monitor, with standards drafted by states. Certain governments and nations may be ahead of others in their recognition of sexual rights and, as such, provide an entry point for their articulation in the relatively “depoliticized” arena of treaty-based lawmaking (relative to national settings in states that are highly resistant to such rights). According to “world polity,” or “acculturation theory”—the most current theoretical approach to why and how states behave

¹⁸⁶ The Convention on the Rights of Persons with Disabilities (“CRPD”) has a particularly strong claim to autonomy rights, as its articles begin to re-imagine decision-making. See Convention on the Rights of Persons with Disabilities art. 3, *supra* note 184:

The principles of the present Convention shall be: (a) Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons; (b) Non-discrimination; (c) Full and effective participation and inclusion in society; (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; (e) Equality of opportunity; (f) Accessibility; (g) Equality between men and women; (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

¹⁸⁷ For an early exposition of the concept of “relative autonomy,” see generally Isaac D. Balbus, *Commodity Form and Legal Form: An Essay on the “Relative Autonomy” of the Law*, 11 *LAW & SOC’Y REV.* 571 (1977) (exploring the apparent independence of law or “legal superstructure” from underlying economic relationships and social actors).

under international law—recalcitrant states will “emulate” or “mimic” the behavior of their peer states, and adopt the more universalizing, human rights promotive norms.¹⁸⁸ When viewed in this manner, whether “health” or “nondiscrimination” is more constructive as a legal frame often matters little to the advocates pushing development, as long as the norms are established and adopted. How these norms—with their different doctrinal underpinnings—“cash out,” however, may matter in unexpected ways on the ground, ways that are highly context-specific.¹⁸⁹ As our discussion of health in Part II flagged, for example, some national constitutions are unable to recognize rights grounded in health, and sexually dissident actors may not want to be limited to organizing under health. Why should lesbians, for example, have to track the HIV arguments that have made MSMs so visible? And as for nondiscrimination-based principles on sexuality, they fail to confront a key issue—is the bottom line in the human rights approach to sexuality equal criminalization of sex outside of marriage, or no criminalization of consensual sex?

V. INTERGOVERNMENTAL ORGANIZATIONS: THE UN POLITICAL BODIES AND SEXUAL RIGHTS

Many advocates, some scholars, and a considerable number of journalists treat the politics in the political bodies of the UN as if they were Captain Renault in *Casablanca*:¹⁹⁰ they are shocked and appalled to find that geopolitics and self-interest motivate many of the decisions of the UN political bod-

¹⁸⁸ For approaches to acculturation or world polity theory, see Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004) (arguing that international law might change state behavior through acculturation, a process whereby state actors eventually adopt the behaviors and beliefs of the surrounding international culture out of pressures to assimilate and other socialization processes). It presumably could run the other way, however, towards illiberalism.

¹⁸⁹ For example, health-based principles on sexuality often can move more safely into conservative settings, as noted in the discussion above. See Narrain, *supra* note 81, at 152–54 (describing the successes and limits of an HIV-based outreach strategy to MSM in Lucknow, India). However, in a state whose constitution or national legal framework does not recognize health as the basis of justiciable claims, this move has distinct ramifications. See ANDREW BYRNES, RENUKA THILAGARATNAM, HILARY CHARLESWORTH & KATHERINE G. YOUNG, UNIV. OF NEW SOUTH WALES, AUSTRALIAN CAPITAL TERRITORY ECONOMIC, SOCIAL AND CULTURAL RIGHTS RESEARCH REPORT 78–79 (Sept. 2010), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1266&context=unswpps>.

¹⁹⁰ The film *Casablanca*, directed by Michael Curtiz, starred Claude Rains, playing the corrupt but tender-hearted Vichy regime Captain Renault who announces (just before he pockets his winnings): “I’m shocked—SHOCKED—to discover there’s gambling going on in this establishment!” *CASABLANCA* (Warner Bros. Pictures 1942). To view the clip, see *Casablanca gambling? I’m shocked!*, http://www.youtube.com/watch?v=SjbPi00k_ME (last visited Mar.5, 2011).

ies that address human rights.¹⁹¹ Yet, this is the intended structure and process of the UN, perhaps counterbalanced by the increasing professionalism of its agencies and the independent rights bodies. Either way, to the extent that standards on sexuality are to move into “hard law” by the general process of international lawmaking, which requires the participation and consent of states, the process must include politics: rights language that claims to be above politics is actually intended to be a product of politics—that is one of its most vexed and compelling (and legitimizing) components.

On the global stage of the UN Human Rights Commission (now Council), the Holy See, operating in a mode we can call “political Catholicism,” simultaneously attacks the West for its licentiousness,¹⁹² and though allied with some Islamic nations,¹⁹³ distinguishes itself from them by condemning polygyny and capital punishment for homosexuality.¹⁹⁴ The Organization of

¹⁹¹ See, e.g., Philip Alston, *Richard Lillich Memorial Lecture: Promoting the Accountability of Members of the New Human Rights Council*, 15 J. TRANSNAT'L L. & POL'Y 49 (2005–2006) (analyzing the role of NGOs and journalists in the transition from Commission to Council and efforts made to ensure accountability on the new Council); Jeroen Gutter, *Special Procedures and the Human Rights Council: Achievements and Challenges Ahead*, 7 HUM. RTS. L. REV. 93, 93–98, 104 (2007) (providing an overview history of the change from the Human Rights Commission to the Human Rights Council, which was intended to re-legitimize the work of the Charter-based human rights bodies). The election of Libya as Chair of the UN Human Rights Commission was the central act that triggered calls for its reform. See *Libyan takes chair of UN human rights commission*, THE GUARDIAN, Jan. 21, 2003, <http://www.guardian.co.uk/world/2003/jan/21/3>. Human Rights Watch in particular deployed attention to the unseemly politics of Libya as Chair to push for reform of the Commission. See, e.g., *U.N. Rights Body In Serious Decline*, HUMAN RIGHTS WATCH (Apr. 25, 2003), <http://www.hrw.org/en/news/2003/04/25/un-rights-body-serious-decline>; Rory Munoven, *Better a White Night Than a Trojan Horse*, HUMAN RIGHTS WATCH (Jan. 27, 2003), www.hrw.org/en/news/2003/01/26/better-white-night-trojan-horse:

Last week's controversy over Libya's election as chair of the UN Commission on Human Rights put a spotlight on the crisis facing the world's leading human rights body. The commission plays a critical role in developing human rights treaties, investigating human rights abuses and naming and shaming some of the worst offenders. But over the past few years repressive governments have flocked to join the commission, intent on blocking criticism of each other and white-anting the international human rights system.

¹⁹² See generally Girard, *supra* note 23 (arguing that in the UN negotiations on sexuality, the Holy See articulates sex as an original sin and denounces same-sex families); JANE W. MUTHUMBI, PARTICIPATION, REPRESENTATION, AND GLOBAL CIVIL SOCIETY: CHRISTIAN AND ISLAMIC FUNDAMENTALIST ANTI-ABORTION NETWORKS AND UNITED NATIONS CONFERENCES (2010) (examining the participation at UN conferences of religious fundamentalist Christian and Islamist NGOs, who oppose reproductive freedom and family planning rights for women). Thank you to Reva Siegel for alerting the authors to Jane Muthumbi's work. For a careful analysis of the role of dignity in transnational conversations on sexuality and rights, see Reva Siegel, *Dignity's Sex: Claims on Dignity in Abortion and Same-Sex Marriage Debates* (Nov. 14, 2010) (unpublished manuscript) (on file with authors).

¹⁹³ Prohibiting legal recognition and protection of same-sex sexuality, sexuality education for children and adolescents, and abortion are the more common points of agreement. MUTHUMBI, *supra* note 192, at 13.

¹⁹⁴ In other words, the Catholic Church maintains that marriage is only between one man and one woman, thereby denouncing polygyny; in keeping with its opposition to the

the Islamic Conference (“OIC”), operating in the mode of “political Islam,” expresses its anxiety about claims for sexual rights and gender equality by labeling the movement neocolonial, exported and imposed on Africa, Asia, and the Arab world by the decadent west.¹⁹⁵ The United States, for its part, has also consistently exported its sexual and social anxieties through its foreign policy, placing sex-normative conditions on receipt of U.S. government assistance.¹⁹⁶

This geopolitical struggle with culture as its motif is also, however, a struggle over lawmaking and sovereignty more generally. It is with attention to this duality, on the cultural struggles serving as the engine to drive standard-setting struggles, that we turn for our last sites of analysis: the UN Human Rights Council, previously known as the Human Rights Commission, and the UN General Assembly.

A. *The UN Human Rights Council*

The Human Rights Council is currently a central site for disputes over sexual rights norms. While many international and national NGOs—such as Amnesty International and Human Rights Watch—focus on the Human Rights Council, much of the sexuality work is advanced through the efforts of the NGO coalition, the Sexual Rights Initiative.¹⁹⁷ The SRI works with

death penalty, the Church also condemns executions for same-sex practices, labeling them sins, not crimes. See *Vatican calls for homosexuality to be decriminalized*, NAT'L CATHOLIC REPORTER (Dec. 31, 2008), <http://ncronline.org/news/vatican/vatican-calls-homosexuality-be-decriminalized>.

¹⁹⁵ See Press Release, The United Nations Office at Geneva, Human Rights Council Holds Interactive Debate with Mandate Holders on Right to Health, Extreme Poverty, and Violence Against Women (June 4, 2010), [http://www.unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/B145BF83D31B832CC12577380050DBB8?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/B145BF83D31B832CC12577380050DBB8?OpenDocument) [hereinafter, UN Press Release on Right to Health] (Pakistan, on behalf of the OIC, argued that efforts at the UN to decriminalize same-sex relations showed a [Western] bias). See also INT'L GAY & LESBIAN HUMAN RIGHTS COMM'N, RESOLUTION ON SEXUAL ORIENTATION AND HUMAN RIGHTS, at Annex I (2003), <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/213-1.pdf> (detailing the OIC's response to the proposed Brazilian resolution prohibiting discrimination based on sexual orientation; on behalf of OIC, Pakistan argued that the resolution was a “direct insult to all 1.2 billion Muslims in the world”). For more on the Brazilian resolution, see *infra* note 202.

¹⁹⁶ See Françoise Girard, *Global Implications of U.S. Domestic and International Policies on Sexuality* 23 (Sexuality Policy Watch, Working Paper No. 1, 2004), available at www.sxpolitics.org/wp-content/uploads/2009/03/workingpaper1.pdf (describing the gender concerns related to women, through the U.S. Mexico City Policy, which prohibited abortion rights advocacy by entities receiving U.S. aid); see also Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437 (2005–2006) (criticizing U.S. anti-human trafficking legislation as a unilateral sanctions regime that allows the U.S. to police the world and impose its own anti-trafficking paradigm on other states).

¹⁹⁷ The Sexual Rights Initiative (“SRI”) is an association of international NGOs. For more on the SRI, see *Reframing Sexual Rights at the Human Rights Council*, *supra* note 87. SRI advocates at the Human Rights Council in order to influence the development and implementation of international law and standards. SRI, for example, submits sup-

states to develop norms on sexual rights by means of resolutions, the Universal Periodic Review of States, and the “Special Procedures” mechanism.¹⁹⁸

The Council/Commission has been receptive to some aspects of sexual rights, insofar as issuing resolutions against discrimination in the contexts of HIV/AIDS,¹⁹⁹ sexual violence (in the context of violence against women), and executions based on sexual transgression. However, it has balked at articulating a full range of sexual rights in the context of reproduction. One might posit that the abortion struggle functions to preempt this discussion; notably, women’s groups have, for the most part, not made a public issue of this preemptive silencing.²⁰⁰ Another obstacle has been the NGO’s own “gender territorialization” to which we alluded earlier in this Article: the way in which women’s groups and LGBT organizations have deployed their respective conceptualizations of gender in disconnected channels of advocacy.²⁰¹ Out of this complex of issues and interests, NGOs and governments have recently focused on sexual orientation. In 2003, Brazil, first surprised, and then brought on board, its NGO supporters and twenty allied nations when it presented a resolution on human rights and sexual orientation. This resolution, which ultimately ended in defeat,²⁰² was caught up in delays associated with the reform of the Human Rights Commission, though an attempt was once again made in 2006. It failed to reach a vote, so supporting states simply issued a *statement* against discrimination on the basis of sexual orientation and gender identity.²⁰³ A similar declarative statement, initially conceived of as a resolution (though there were not enough supporting member states to get it passed) was read before the UN General Assembly to commemorate the sixtieth anniversary of the Universal Declaration of Human Rights.²⁰⁴ While sixty-eight member states endorsed it, an alternative state-

plemental information on a variety of sexual rights issues in countries undergoing the Universal Periodic Review (which frequently provokes debate at the Council).

¹⁹⁸ See SANDEEP PRASAD & KATHERINE McDONALD, ACTION CAN. FOR POPULATION & DEV., BUILDING THE UN HUMAN RIGHTS COUNCIL AND ITS SPECIAL PROCEDURES: NOTES FOR SEXUAL RIGHTS AND REPRODUCTIVE RIGHTS ADVOCATES 21–23 (2006), available at http://files.creaworld.org/files/HRC_Report_Sept2006.pdf (providing background on the Universal Periodic Review and sexual rights advocacy at the Council).

¹⁹⁹ E.C.S. Res. 2001/51, U.N. Doc. E/CN.4/2001/L.69 (Apr. 19, 2001); E.C.S. Res. 1996/43, U.N. Doc. E/CN.4/1996/L.53, at 3 (Apr. 15, 1996) (both urging States to ensure that their laws and policies prohibit HIV/AIDS related discrimination).

²⁰⁰ For a complete analysis of this process, see Girard, *supra* note 23, at 322, 333.

²⁰¹ *Id.* at 351, 354–56.

²⁰² In 2003, Brazil proposed a resolution entitled “Human Rights and Sexual Orientation,” to the Human Rights Commission. The defeat was due to opposition by the Organization of the Islamic Conference, the Holy See, and the U.S., as well as divisions between LGBT and feminist groups. *Id.* at 341–51.

²⁰³ This statement has no legal weight in Human Rights Council proceedings, but it served as a political rallying flag. *See id.* at 351.

²⁰⁴ Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, in letter dated Dec. 18, 2008 from the Permanent Reps. of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands, and Norway to the United Nations addressed to the President of the General Assembly, U.N. Doc. A/63/635 (Dec. 22, 2008)

ment was read on behalf of fifty-seven states that opposed “sexual rights”²⁰⁵ and the overstepping of the advocacy efforts of allied states and NGOs. These events illustrate the contentious parameters of sexual rights norms development at the Council and underline our concern about the possibilities of full sexual rights being articulated at that site.

United Nations Special Rapporteurs—-independent experts appointed by the Human Rights Council under an agenda item called “special procedures”—released a number of reports in 2010 related to a range of sexual rights concerns.²⁰⁶ Two of these reports, one on education and one on health, stand out for their content and reception.²⁰⁷ They elicited a huge outcry from certain member states, many of whom claimed that these Special Rapporteurs exceeded their mandates and flouted the rules of the Human Rights Council.²⁰⁸ These states therefore rejected the reports’ content.

The tenor of the “interactive dialogues” with the States parties reveals the extent of the political/legal intransigence and posturing surrounding sexual rights. Anand Grover, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, presented his report in June 2010, focusing on the ways criminalization of same-sex sexual practices, sex work, and HIV/AIDS transmission has erected obstacles to the realization of the right to health.²⁰⁹ A number of states, for example, the Netherlands, Colombia, and Brazil, agreed with the report and the reporter for taking a stand on the relationship of poor sexual

[hereinafter Letter by Argentina et al. to the UN] (affirming commitment to the protection of human rights based on sexual orientation and gender identity).

²⁰⁵ Response to SOGI Human Rights Statement, read by Syria to the UN General Assembly (Dec. 18, 2008) [Response by Syria et al. on SOGI], available at www.ishr.ch/index.php?option=com_docman&task=doc_download&Itemid=&gid=307 (expressing concern at the attempt to introduce protections on SOGI grounds, which “have no legal foundations in any international human rights instrument”).

²⁰⁶ The UN Special Rapporteur on Violence against Women has also issued a report on states’ obligations for reparations to survivors of gender-based violence. Special Rapporteur on violence against women, *Rep. of the Special Rapporteur on violence against women, its causes and consequences*, Human Rights Council, U.N. Doc. A/HRC/14/22 (Apr. 23, 2010) (by Rashida Manjoo).

²⁰⁷ Special Rapporteur on the right to education, *Rep. of the United Nations Special Rapporteur on the right to education*, Human Rights Council, U.N. Doc. A/65/162 (July 23, 2010) (by Vernor Muñoz) [hereinafter Special Rapporteur on the right to education]; Special Rapporteur on the Right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Rep. on the Right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Human Rights Council, U.N. Doc. A/HRC/14/20 (Apr. 27, 2010) (by Anand Grover) [hereinafter Special Rapporteur on the right to health (by Anand Grover)]; see also Special Rapporteur on the right to health (by Paul Hunt), *supra* note 10.

²⁰⁸ UN Press Release on Right to Health, *supra* note 195. For the continued objections of States parties at the UNGA, see *Majority of GA Third Committee unable to accept report on the human right to sexual education*, INT’L SERV. FOR HUMAN RIGHTS, <http://www.ishr.ch/archive-general-assembly/933-majority-of-ga-third-committee-unable-to-accept-report-on-the-human-right-to-sexual-education> (last updated Nov. 1, 2010).

²⁰⁹ Special Rapporteur on the right to health (by Anand Grover), *supra* note 207, ¶¶ 42, 332, 343, 345, 347.

health and criminalization.²¹⁰ Yet most member states that made public remarks took public offense at the report's analysis and recommendation.²¹¹ Egypt, for example, stated the following:

Not only had [the Special Rapporteur] stepped over his mandate, but he had gone as far as prescribing to sovereign Member States how to devise and enact their national laws and legislation. This was also done on issues that did not fall within the scope of internationally agreed human rights norms and principles.²¹²

There was also criticism from Bangladesh that the issue under examination "was not universally recognized as a human rights issue," and that the groups identified as vulnerable (e.g., lesbian, gay, bisexual, transgender, and intersex) "did not fall in the category of vulnerable groups."²¹³ Pakistan, on behalf of the OIC, was the most threatening, stating that the Special Rapporteur had "transgressed beyond his mandate and should avoid highly controversial issues in the future." Furthermore, "[t]he Organization of the Islamic Conference would therefore continue to closely monitor the Special Rapporteur's future work."²¹⁴ Grover, in a reply to the States, acknowledged the controversy but said these issues should not be "swept under the carpet," and pleaded for a more dispassionate, less culturally constrained examination of the issues.²¹⁵

The 2010 report from the outgoing Special Rapporteur on education, Vernor Muñoz, drew even more fire.²¹⁶ This report recognized a "human right to comprehensive sexual education," grounded in the work of the UN treaty bodies.²¹⁷ As the report's summary states:

The Special Rapporteur introduces the topic of the right to sexual education, placing it in the context of patriarchy and control of sexuality. He explains the interdependence of sexuality, health and education and the relationship of this right to other rights from a gender and diversity perspective. The Special Rapporteur also introduces the right to sexual education in the context of international human rights law and analyses international and regional standards. . . . The Special Rapporteur concludes his report by . . .

²¹⁰ UN Press Release on Right to Health, *supra* note 195.

²¹¹ *Id.* Some of these countries include Egypt, Bangladesh, Nigeria on behalf of the African Group, Pakistan on behalf of the OIC, and the African Union.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*; see also *Council debates decriminalisation of consensual sexual conduct*, INT'L SERV. FOR HUMAN RIGHTS, <http://www.ishr.ch/archive-council/833-council-debates-decriminalisation-of-consensual-sexual-conduct> (last updated Aug. 24, 2010).

²¹⁶ See *Majority of GA Third Committee unable to accept report on the human right to sexual education*, *supra* note 208.

²¹⁷ Special Rapporteur on the right to education, *supra* note 207, ¶ 2.

presenting specific recommendations for States and the international community.²¹⁸

Muñoz argued that barriers to gender and other dimensions of equality were perpetrated by patriarchal attitudes which states were obliged to address through a sexual education curriculum.²¹⁹ We might speculate on how unsettled the States parties may have been by this call to examine the relationship of patriarchy to state control of sexuality. However, states were silent on this point. While engaging in hyperbolic refutation of the perspective of the reports, the states focused their attacks on the formal doctrinal bases and procedural boundaries of the special procedures.²²⁰ The Africa Group, represented by Malawi, captures the gist of the dissent. Rejecting the report on the right to education, Malawi argued that it “not only reflected an attempt to introduce controversial notions, but also indicated that [Muñoz] had flouted the Code of Conduct for Special Procedures Mandate-Holders.”²²¹ The African Group strongly rejected the report’s attempt to “impose concepts or notions pertaining to social matters, including private individual conduct, which fell outside the internationally agreed human rights legal framework.”²²²

Many states—Trinidad and Tobago (for the Caribbean Community, “CARICOM”), Mauritania (for the Africa Group,) Morocco (for the OIC), and Russia—were incensed.²²³ They accused Muñoz of inventing new human rights, introducing concepts not recognized in international law, using unverified sources, selectively quoting, endangering the welfare of children and the family, and threatening to destroy the special procedures mechanism.²²⁴ Because the 2010 education report had few, if any champions—Canada, the European Union, and Costa Rica, among a few others, defended the importance of both sexual education and the independence of

²¹⁸ *Id.* at 2.

²¹⁹ *Id.* at ¶¶ 7–8, 22, 27–28, 63.

²²⁰ Muñoz’s mandate had expired by the time the report was introduced. The newly appointed Special Rapporteur, Kishore Singh, distanced himself from the report, which left its status, after the drubbing it took from member states, in limbo. There was no agreement that there was a human right to sexual education, though the European Union (“EU”), for example, thought comprehensive sexual education was a means to enable the enjoyment of other human rights, particularly of women and girls. UN Press Release on Right to Health, *supra* note 195 (providing a résumé of proceedings before the Human Rights Council).

²²¹ Press Release, General Assembly, Human Rights Council Texts Declaring Water, Sanitation Human Right; Also Holds Lengthy Exchange on Report on Sex Education; Hears UN Experts on Torture, Human Trafficking, Extreme Poverty, Physical and Mental Health, U.N. Press Release GA/SHC/3987 (Oct. 25, 2010), available at <http://www.un.org/News/Press/docs/2010/gashc3987.doc.htm>.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

mandates of the special procedures—it was not submitted to the General Assembly, as is the regular practice, for consideration.²²⁵

What is to be learned from the controversy surrounding these two reports? That the Human Rights Council is another venue for the stock theatre troupe of international sexual rights advocates, experts, and their discontents? That a gadfly always attracts a swift swat, but nonetheless provokes, and perhaps moves the agenda along?²²⁶ Clearly, such reports become occasions for attention, garnering campaign claims and intensifying calls for advocacy at the Human Rights Council, as well as outside of it. The texts of these reports get cited as support for the existence of a norm, on the one hand, and rejected as “not well settled,” on the other.²²⁷ Ultimately, when these efforts result in resolutions adopting and extending the analysis of the reports, they provide empirical evidence that can be marshaled to answer the question of soft law formation; over time, the “weight” of these reports’ impact on the development of new norms will be made manifest. However, the perils of attaching lawmaking to modes of provocation is that it leaves us with an open question whether sexual rights advocates can legitimately claim such a report in their “cascade” of authoritative statements when it has faced this level of criticism.

²²⁵ *Id.*

²²⁶ See PLATO, *The Apology*, in EUTHYPHRO. APOLOGY. CRITO. PHAEDO. PHAEDRUS 61, 113 (Harold North Fowler trans., 1953):

For if you put me to death, you will not easily find another, who, to use a rather absurd figure, attaches himself to the city as a gadfly to a horse, which, though large and well bred, is sluggish on account of his size and needs to be aroused by stinging. I think the god fastened me upon the city in some such capacity, and I go about arousing, and urging and reproaching each one of you, constantly alighting upon you everywhere the whole day long. Such another is not likely to come to you, gentlemen; but if you take my advice, you will spare me. But you, perhaps, might be angry, like people awakened from a nap, and might slap me, as Anytus advises, and easily kill me; then you would pass the rest of your lives in slumber, unless God, in his care for you, should send someone else to sting you.

²²⁷ For academic and NGO assessment of the results of the Human Rights Council’s work on sexual rights, specifically sexual orientation protections, see generally Girard, *supra* note 23 (offering a political analysis that supports the growing status of sexual rights in the Human Rights Council and in past UN world conferences); INT’L COMM’N OF JURISTS, SEXUAL ORIENTATION, GENDER IDENTITY AND INTERNATIONAL HUMAN RIGHTS LAW: PRACTITIONERS GUIDE No. 4 (2009), available at <http://www.icj.org/dwn/database/PractitionersGuideonSOGI.pdf> (engaging with the reports as evidence of valid human rights claims); MILLER, ICHRP DISCUSSION PAPER, *supra* note 26 (for a policy-oriented paper that engages with the gaps in global advocacy around sexual rights, from the perspective of stimulating next steps in doctrinal research); O’Flaherty & Fisher, *supra* note 38 (providing a comprehensive compilation of and reflection on the benefits of the “soft law” standards from UN special procedures and treaty bodies in service of codifying sexual orientation). But see Holning Lau, *Sexual Orientation: Testing the Universality of International Human Rights Law*, 71 U. Chi. L. Rev. 1689, 1703–08 (2004) (exploring the role of the U.S. in opposing sexual orientation protections at the UN, including at the Human Rights Council); Samantha Singson, *Countries Slam Attempts to Create New “Right” to Sexual Education at UN*, C-FAM (Oct. 28, 2010), http://www.c-fam.org/publications/id.1726/pub_detail.asp (explicating an activist attack on the Council’s special procedures, viewed as over-stepping the principles of human rights).

B. UNGA, Security Council, SOGI and Violence

In the last decade, the UN General Assembly and the Security Council have, rather unexpectedly, become a venue in which sexual rights issues are being advocated. Here, we briefly address two sexual rights-related issues that have recently been placed on the agenda of these two UN bodies: violence against women (with special attention to sexual violence) and sexual orientation.

In general, the UNGA has not been understood as a welcoming venue either for NGO advocacy on issues of first instance, or for the “softer” thematic issues like women’s rights, because of the extent to which superpower/geopolitical alliances and interests firmly govern the proceedings.²²⁸ A few thematic issues with resonance for sexual rights have been regularly addressed in the UNGA, such as trafficking, which has historical/postcolonial political roots and dedicated sponsors.²²⁹ From silence or occasional concern, since the 1992 adoption by the UNGA of the Declaration on Violence against Women (soft law), the UNGA has officially entertained plenary debate on violence, especially sexual violence.²³⁰ Research, in service of standard-setting (rather than robust action), is the states’ preferred approach: a

²²⁸ Cf. PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* (2d ed. 2003) (explicating an optimistic history of human rights as institutionalized in the United Nations and contextualizing the distinct structures for human rights within the UN). Of course, the 3rd and 6th committees of the UNGA, addressing social and legal issues, respectively, have been the points of entry for advocates, but the modalities of working of the committees and the UNGA, as a whole, tended to keep all but the most New York-centered and power-politic NGOs away. See Interview with Samantha Cook, Project Dir. of PeaceWomen, Women’s Int’l League for Peace and Freedom, in Warrenton, VA (Feb. 2008). Additionally, a review of textbooks on human rights reveals that the UNGA does not appear in their table of contents as a site of human rights advocacy. See, e.g., INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE (Hurst Hannum, S. James Anaya & Dinah Shelton eds., 4th ed. 2006) (similarly not including the UNGA in its extensive table of contents); STEINER, ALSTON & GOODMAN, *supra* note 114 (omitting the UNGA from foundational sources of international human rights, but including the ICCPR, ICESCR, and CEDAW).

²²⁹ The Philippines continually sponsored the anti-trafficking resolutions through the 1990s, in part because the issue had been orphaned in the 1970s and 1980s alongside the 1951 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. See generally Laura Reanda, *Prostitution as a Human Rights Question: Problems and Prospects for United Nations Actions*, 13 HUM. RTS. Q. 202 (1991) (providing a comprehensive history of the actions of various UN bodies, including the UNGA, on anti-trafficking); see also Press Release, Mission News, RP Echoes Need for Synergy in Efforts vs Human Trafficking (May 19, 2009), <http://www.un.int/philippines/news/20090519.htm> (detailing a statement of the Philippines’ commitment to anti-trafficking initiatives).

²³⁰ The issue of violence against women was brought to the attention of the UNGA by a coalition of states whose work on the issue resulted in a resolution authorizing a Secretary General’s study. See U.N. Secretary-General, *In-depth study on all forms of violence against women*, U.N. Doc. A/61/122/Add.1 (July 6, 2006). See generally WORLD HEALTH ORG., *VIOLENCE AGAINST WOMEN AND HIV/AIDS: SETTING THE RESEARCH AGENDA* (2000), available at www.who.int/gender/violence/VAWhiv.pdf (bringing attention to the prevalence of sexual violence against women and its relation to HIV/AIDS).

resolution of 2003 authorized the creation of a Secretary General Global Report on Violence against Women, which dedicated a substantial component of its work to sexual violence.²³¹ Responses to these now-regular reports include, in our opinion, a study in platitudes on the horrors of sexual assault for women and girls, resolutions creating new positions, further study, and state attention to existing norms. In general, however, with all the debate, no new normative advances on sexual violence have been made in the UNGA since the mid-1990s.

However, the Security Council, also historically not a site conducive for either rights or sex talk, has given extraordinary attention to standards clarification around sexual violence, especially as an element of the merging of international humanitarian and human rights legal doctrines.²³² It is an open question as to how productive its recent rhetoric in resolutions on sexual violence will be in realizing women's rights.²³³ Yet the Security Council has undeniable influence on the evolution of international law addressing sexual violence, along with other international institutions, such as the ad hoc international criminal tribunals and the Rome Statute of the International Criminal Court.²³⁴ Notably, the Security Council appears to be unable to

²³¹ See U.N. Secretary-General, *supra* note 230, ¶¶ 128–31, 226–28. The General Assembly also adopted resolution 61/143 on December 19, 2006 on the intensification of efforts to eliminate all forms of violence against women. G.A. Res. 61/143, U.N. Doc. A/RES/61/143 (Jan. 30, 2007).

²³² See generally Halley, *supra* note 33 (detailing the specific application of international humanitarian law to sexual violence); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000) (providing a general introduction to the merging of the two branches of law).

²³³ See Natalie Florea Hudson, *Securitizing Women's Rights and Gender Equality*, 8 J. HUM. RTS. 53, 60–61 (2009) (assessing the recent scope and structure of debates and the resulting resolutions on women in the UN Security Council).

²³⁴ See, e.g., Rome Statute, *supra* note 35; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, in *Rep. of the Secretary-General Pursuant to Paragraph 2 of Security Resolution 808 (1993)*, at 36, U.N. Doc. S/25704 (May 3, 1993). The Statute of the International Tribunal was adopted by the Security Council in 1993. See S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993). For commentary favorably inclined toward the new norms, see, for example, Kelly Askin, *A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003*, 11 HUM. RTS. BRIEF 16, 17 (2004) (lauding the ICTY and the ICTR for establishing norms around rape as a war crime); Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN'S L.J. 243, 253–54 n.46 (1994); Patricia Viseur Sellers, *The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law*, in 1 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS 263, 316, 332 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000). For the importance of the new address of sexual violence, see Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 428 (1993). See generally Dorothy Thomas & Regan Ralph, *Rape in War: Challenging the Tradition of Impunity*, 14 SAIS REV. INT'L AFF. 81 (1994) (for an early call to action in addressing sexual violence). *But see* Halley, *supra* note 33, at 3–8, 63–67 (critiquing the various modalities of “governance feminism,” as well as the scope of attention to rape in the Rome Statute of the ICC); *see also* Karen Engle, “*Calling in the Troops*”: *The Uneasy Relationship Among Women's Rights, Human Rights, and*

resist the model adopted by the Bush Administration, which cast itself in the “White Knight” role of saving women from sexual harm.²³⁵ This can be seen as the Security Council has moved away from its Resolution 1325 (calling for more involvement of women in post-conflict peace-building, *inter alia*) toward almost exclusive attention to sexual violence in Resolution 1960 and its follow-ups.²³⁶ These resolutions exemplify a paradox which we stressed earlier: in this contemporary moment, there is no need to break silence about rape in conflict, but rather to cease the din and usefully respond to the harms and the material conditions that give rise to the harm. The paradox is rendered all the more bitter to sexual rights advocates in that the Security Council is in fact only restating existing laws, not making concrete advances in the area.

Humanitarian Intervention, 20 HARV. HUM. RTS. J. 189, 217–26 (2007) (providing a review and critique of the role of women as victims in the validation of a U.S. interventionist paradigm); *see generally* Engle, *supra* note 33 (analyzing the shifting role of consent in sexual assault as a crime under international humanitarian law, in the context of reviewing women’s rights advocacy in the ad hoc tribunal for the Former Yugoslavia). Cf. Doris Buss, *Rethinking ‘Rape as a Weapon of War,’* 17 FEMINIST LEGAL STUD. 145 (2009) (for a critique of the narrowing effects that the “rape as a weapon of war” paradigm has on understanding sexual violence in the context of the Rwandan Genocide).

²³⁵ See U.N. GAOR, 58th Sess., 7th plen. mtg. at 8, U.N. Doc. A/58/PV.7 (Sept. 23, 2003) (President George W. Bush pledging to liberate Iraq and Afghanistan and provide aid to groups that rescue women and children from exploitation); *see also* UNSC adopts Resolution on Sexual Violence, EUROPEAN WOMEN’S LOBBY (Dec. 20, 2010), <http://www.womenlobby.org/spip.php?article926> (discussing the new UN Security Council Resolution on Sexual Violence in Conflict, which was sponsored by the U.S. and co-sponsored by about thirty countries). For other discussions of the U.S. leading rescue missions from sexual harm, see Chuang, *supra* note 196, at 469 (referring to the Bush Administration as a “Global Sheriff” due to its international deployment of U.S. policies and sanctions in response to other nations’ actions to counter human trafficking); Miller, *supra* note 31, at 31.

²³⁶ See UNSCR 1960 and the need for focus on full implementation of UNSCR 1325: *Open Letter to Member States of the Security Council Re: Res 1960*, THE GLOBAL NETWORK OF WOMEN PEACEBUILDERS (Jan. 7, 2011), <http://www.gnwp.org/uns-cr-1960-and-the-need-for-focus-on-full-implementation-of-uns-cr-1325>. The letter reads in part:

The process of the recent adoption of UNSCR 1960 sponsored by governments without consultation with women on the ground is a case in point. It speaks only of women as victims of sexual abuse during violent conflict and does not mention that if women were recognized as participants in decision making they would be less vulnerable to attack. If governments would involve more women and worked harder to prevent wars there would be less sexual abuse. If small arms were regulated and reduced by involving women in the decision making there would be less sexual violence. If the UN leadership and its member states involved women more systematically in conflict prevention and resolution—the real focus of 1325—there would be a marked improvement in peace and security for everyone. These issues of women’s participation, of prevention of violence and reduction of weapons cannot be left out of any resolution on women and peace and security. Reference to the full implementation of UNSCR 1325 must be substantively integral to any subsequent resolutions of the Security Council on women, not just a passing reference in preambular paragraphs to this foundational and fundamental document. We cannot pluck rape out of war for our attention and let the war go on.

The UNGA trajectory, from resistance to platitudes, in the realm of sexual violence has not been the direction it has taken in the realm of sexual orientation. The UNGA has been loathe to address sexual orientation, as the politics of sex dictate that putting an item on the plenary agenda would in itself legitimize (homo)sexual orientation as the object of new international norms.²³⁷ In response to the Human Rights Council's failure to act on resolutions calling for an end to discrimination against persons on the grounds of sexual orientation, the UNGA (really, Argentina on behalf of several states) read a statement affirming the application of nondiscrimination on the basis of sexual orientation and gender identity (SOGI).²³⁸ But that was as far as it went. This statement has the virtue of a UN document number but has no official status in international law, though it does mark the emergence of political support for an inchoate nondiscrimination norm. However, the mere flag-raising of sympathy generated a counter-statement: Syria, on behalf of fifty-seven states, resisted this call to "new rights" using the language of Article 29 of the Universal Declaration of Human Rights.²³⁹ These states stressed the right of Member States to enact laws that meet "just requirements of morality, public order, and the general welfare in a democratic society," and in light of the need to "devote special attention and resources to protect the family," to "refrain from attempting to give priority to the rights of certain individuals, which could result in a positive discrimination on the expense of others' rights"²⁴⁰ This intervention showcases how the provocation of sexual rights can work: that Syria and its allies are responding to a new rights claim with a defense of human rights is notable, as is their call to proper principles and processes of lawmaking in the global order.

²³⁷ In gay rights literature, the UNGA Special Session on HIV/AIDS in 2001 is notorious for the plenary refusal to accept language in the final document acknowledging MSM and sex workers as populations especially at risk of HIV transmission. The compromise language was "vulnerable groups." Declaration of Commitment on HIV/AIDS, G.A. Res. S-26/2, *supra* note 76, ¶¶ 19, 27, 32, 37, 46. *See also* Sofia Gruskin, *The UN General Assembly Special Session on HIV/AIDS: Were Some Lessons of the Last 20 Years Ignored?*, 92 AM. J. PUB. HEALTH 337, 337 (2003). For an example of the legitimating function of speaking sexual orientation at the UNGA, see *UN: General Assembly to Address Sexual Orientation and Gender Identity*, HUMAN RIGHTS WATCH (Dec. 11, 2008), <http://www.hrw.org/en/news/2008/12/11/un-general-assembly-address-sexual-orientation-and-gender-identity>.

²³⁸ Letter by Argentina et al. to the UN, *supra* note 204.

²³⁹ Response by Syria et al. on SOGI, *supra* note 205. Another incident occurred in December 2010: the UNGA resolution condemning arbitrary killings passed out of the 3d Committee stripped of the phrase that highlighted the special attention required for protecting persons of diverse sexual orientation (sexual orientation was removed from a long list of characteristics of persons); intense mobilization by advocates in South Africa pressured the state to change its acquiescence toward this stripping and the phrase was returned. *See* Press Release, ARC Int'l, Victory at the UN!: Discriminatory Decision Reversed as UN General Assembly Overwhelmingly Condemns Killings based on Sexual Orientation (Dec. 21, 2010), *available at* www.arc-international.net/press-releases/eje-pressrelease-dec2010.pdf.

²⁴⁰ *See* Response by Syria et al. on SOGI, *supra* note 205.

The experience of sexual rights advocacy before the UN political bodies, and more recently the General Assembly and Security Council, highlights the flashpoints in the political environment surrounding norm recognition/generation. A consistent group of states—those identified with a conservative interpretation of Islam (or Catholicism) and more authoritarian governing practices—become very hostile to recognizing any “rights” related to sexuality and reproduction, which could disturb gender and sex hierarchical assumptions.²⁴¹ This is reflected even in resistance to what should be noncontroversial—a 2009 Human Rights Council resolution on maternal mortality and human rights.²⁴² Often when countries do endorse “sexual rights,” they do so to bolster existing gendered orders—thus they argue that sex education, for example, is important for women’s and girl’s rights, but ignore completely its potential effects on boys, or how it might transform binary assumptions about gender all together.²⁴³ These states are concerned with sexual violence, but in terms that signal a return to concern for women’s chastity rather than their autonomy.²⁴⁴

The articulation of sexual rights claims, certainly in hyper-politicized spaces, always comes at a cost to a coherent approach to rights, one that does not divide the acceptable to conquer the deviance, as it were. The frustrations and sense of dissipation among advocates, and governments, is of material consequence in the sexual norms battles at the General Assembly and the Human Rights Council. And it explains in part, the turn to, and desire for, the relative “apolitical” spaces of the UN treaty bodies in which to stake the claim for sexual rights. Despite this desire for apolitical spaces, if standards on sexuality are to move into “hard law” through international lawmaking, the presence of politics is inevitable.

VI. SO WHAT? OR, WHAT IS TO BE DONE?

In this Article, we have mapped a range of recent initiatives in sexual rights, from the current efforts of the CESCR to draft a new general comment on sexual and reproductive rights, to CEDAW’s slow steps toward recognizing sexuality.²⁴⁵ We briefly touched on other treaty and UN political bodies’ engagement with sexuality, particularly in light of the efforts of NGOs to seed the field with initiatives elaborating sexual rights.²⁴⁶ We considered the extent to which certain sites of rights-claiming (e.g., health) have been generative and constraining homes for sexual rights, while other sites

²⁴¹ See, e.g., discussion *supra* Part V.A. (detailing the Special Rapporteur reports on education and health).

²⁴² Human Rights Council Res. 11/8, U.N. Doc. A/HRC/11/L.16 (June 12, 2009).

²⁴³ See Miller & Vance, *supra* note 82, at 7–8.

²⁴⁴ Miller, *supra* note 31, at 19, 31.

²⁴⁵ See *supra* Part IV.

²⁴⁶ See *supra* Part V.

(e.g., gender discrimination) have been territorialized and exclusionary in regard to sexual rights.²⁴⁷

This outline threads between the hard law and soft law developments, distinguishing the power of the claims not only by substantive focus (e.g., is this liberatory?) but also by doctrinal weight (e.g., to whom and how does this claim matter?) and context (whose rules govern the adoption of the norm?). We also highlight the culture-inflected atmospherics, which contribute to generating and shaping “sexual rights talk.” What we intended to render visible through our mapping is the emergence into the UN’s human rights debates the topic of sexuality itself, no longer hidden in reproduction, marriage, or global debates over forced prostitution. It also makes visible the “push down, pop up” or “Whack-a-mole” phenomenon in contemporary human rights standard-setting: advocates and interested actors, including states, strategize across very diverse venues in the process of standards development. There are vast differences not only between issues that are the sites for specific sexual rights claims, but also the processes and dynamics of norm development. Advocates for and opponents of sexual rights each engage in tactical flag-raising, trying out topics, advancing coalitions, and borrowing advances and examples across procedures.²⁴⁸ And, there is a mutually generative aspect to the heated claims and counter claims on sexual rights, especially in the deployment of national culture and morality claims to affect the procedures of norms-making.

As the high-decibel opposition to the Special Rapporteurs on the right to health and education makes clear,²⁴⁹ players in the political bodies seek to suppress these reports not because they have more legal weight *vis-a-vis* standards development but because of their communicative value. Notably, the experts taking risks on sexual rights claims, their supporters, and the opposition in political bodies like the Human Rights Council, all understand themselves to be in a game of legitimizing and signaling, with media coverage of geopolitical fights amplifying their cultural postures as politics.²⁵⁰

Conversely, the putatively more expert UN treaty bodies show themselves to be highly fragmented and, at times, remarkably simplistic in their understanding of sexuality and rights. The diverse frames of the treaties inevitably make for distinct approaches to sexual rights questions.²⁵¹ What

²⁴⁷ See *supra* Part II.

²⁴⁸ Kay Warren has pointed out that the extent to which the UN negotiations rely on settled language from previous texts alters the way issues can develop over time. Kay Warren, *The 2000 UN Human Trafficking Protocol: rights, enforcement, vulnerabilities*, in *THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL* 242, 251 (Mark Goodale & Sally Engle Merry eds., 2007).

²⁴⁹ See discussion *supra* Part V.A.

²⁵⁰ See Girard, *supra* note 23, at 341–53 (describing in great detail the political maneuvering of sexual rights advocates and NGOs, on the one hand, and States on the other hand, at the UN Commission on Human Rights [predecessor to Human Rights Council]).

²⁵¹ These frames include economic and social rights/health, discrimination against women, torture, disability, children, and race discrimination.

our narrative concerning the forthcoming CESCR General Comment on the “Right to Sexual and Reproductive Health” demonstrates is not merely fragmentation via doctrinal base, but the inherent risks in piecemeal approaches to sexual rights.²⁵² The “ad hoc” nature of such rights articulation necessarily stems from all of the processes we have already described: it is predicated on seizing opportunities as they arise, in whatever forum contributes to a piecemeal doctrine. The concern that spaces may be open for some aspects of sexual rights because others are shut down is one that advocates are loath to address. The resulting norms neither necessarily contribute to protecting the full range of potential sexual rights nor encompass the idea of the fully human person envisioned by human rights.²⁵³

The ideal functional response to the ad hoc aspect of the treaty body jurisprudence could be a joint general comment across the treaty bodies on sexual rights. This would have the virtue of avoiding the fragmentation and “cherry picking” of rights, and perhaps force a more robust vision of sexual rights. Yet, if the now regularly-arising but stymied conversation of a “global” treaty body is any indication, the states prefer the fragmented system.²⁵⁴ This fractured process is duplicative and exhausting to some bureaucrats and the NGOs that work across treaties. This arrangement, in which there are multiple, repetitive monitoring processes established to oversee each of the covenants and each specialized treaty, reinforces sectarianism. It militates against NGO coalitional work that draws attention to the common repressive powers functioning through rules that criminalize sex outside of marriage for different and same-sex persons, and rules that seek to penalize abortion and homosexuality as expressions of gendered revolt.

²⁵² See discussion *supra* Part IV.

²⁵³ For a discussion of human rights’ paradoxical creation and denial of humanity, see JOSEPH R. SLAUGHTER, *HUMAN RIGHTS, INC.: THE WORLD NOVEL, NARRATIVE FORM, AND INTERNATIONAL LAW* 1–3, 11–24 (2007). For a transformative view of rights for sexual minorities, see PEOPLES’ UNION FOR CIVIL LIBERTIES, KARNATAKA, *HUMAN RIGHTS VIOLATIONS AGAINST THE TRANSGENDER COMMUNITY IN INDIA: A STUDY OF KOTHI AND HIJRA SEX WORKERS IN BANGALORE, INDIA* 5–7 (Sept. 2003), available at <http://ai.eecs.umich.edu/people/conway/TS/PUCL/PUCL%20Report.pdf>.

²⁵⁴ Despite State Party grumbling about too much duplication and fragmentation in treaty reporting, there is not sufficient will to reform the human rights treaty body system and retain present levels of rights obligations. The effort to create a “super treaty body,” synthesizing all of the treaties, instead resolved into the creation of a “common core document,” which States Parties can file as an initial common explanation of their legal framework with all the treaty bodies to which they report. See OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, THE UNITED NATIONS HUMAN RIGHTS TREATY SYSTEM: AN INTRODUCTION TO THE CORE HUMAN RIGHTS TREATIES AND THE TREATY BODIES: FACT SHEET NO. 30, available at <http://www2.ohchr.org/english/bodies/docs/OHCHR-FactSheet30.pdf>. For an advocacy group’s introduction to the failed attempts at treaty body reform, see *Context and Background of the Treaty Body Reform Discussion*, INT’L WOMEN’S RIGHTS ACTION WATCH-ASIA PAC. (July 15, 2010), <http://treatybodyreform.wordpress.com/2010/07/15/context-and-background-of-the-treaty-body-reform-discussion/>. For a scholarly response and recommendation for a way forward to unify human rights standards, see Manfred Nowak, *The Need for a World Court of Human Rights*, 7 *HUM. RTS. L. REV.* 251 (2007).

This recognition—that, in international human rights standard-setting, what the experts can do is not only limited by their assumptions about gender and sex but also uncomfortably perched in a larger geo-politic of international lawmaking—is both the source of human rights’ legal power and one of its constraints. Despite the push by many notable human rights jurists, relying on the notion that human rights treaties are different because they are not meant to be agreements to benefit states, but to benefit persons, the formal world of international law remains state-centered.²⁵⁵ If this is true, are the expert human rights bodies, either the treaty bodies or the political bodies, capable of being sites of reimagining sexual rights for a diversity of people around the world? Or are these institutions more like dangerous “Procrustean beds”²⁵⁶—so bounded by patriarchal development, obscure rules of gravity in public international law,²⁵⁷ or geopolitical “culture wars” among national governments, as to be without use?

Given the highly contested sites in which rights claims take place and the UN intergovernmental structures today,²⁵⁸ what does “making universal consensus” today mean for laws around sexuality? Moreover, if we take seriously the social constructionist insights around gender and sexuality (that one cannot generalize or assume meaning around common sexual or gendered practices, in part),²⁵⁹ how does harnessing sexuality to the international law of human rights benefit gender or sexuality? Indeed, we might ask, considering the political controversies generated by and through the deployment of sexuality as an axis of judgment and struggle, within and among states, how does this yoking of sex and rights law benefit human rights?

The interests of sovereign states return us to the bigger political world in which human rights law incubates and operates. By moving sexual rights to international lawmaking, partisans in this process seek to generate norms that challenge the existing gender, family, class, race, and other inclusion/

²⁵⁵ For a strong statement on the “difference” of human rights treaties, and their need to evolve, see *Selmouni v. France*, 5 Eur. Ct. H.R. 149, 183 (1999) (addressing the future-looking and historically inflected nature of human rights treaties as the definition of torture necessarily evolves in light of present-day conditions).

²⁵⁶ Procrustes was an innkeeper and thief in Attica, whom Theseus encountered on his adventures, and who was in the habit of forcing his guests to spend the night in a bed which was too short—he would lop off the limbs that protruded to make his guest “fit.” The “Procrustean bed” has assumed the character of arbitrary rules to which one is forced to fit. See *Procrustes*, ENCYCLOPEDIA OF GREEK MYTHOLOGY, <http://www.mythweb.com/encyc/entries/procrustes.html> (last visited Mar. 13, 2011).

²⁵⁷ See INT’L COUNCIL ON HUMAN RIGHTS POLICY, CATCHING THE WIND—HUMAN RIGHTS 38–50 (2007), available at http://www.ichrp.org/files/reports/4/133_report_en.pdf (referencing new configurations of power within and among nations through the 1990s and first years of 2000, challenging lawmaking and sovereignty, shifting allegiances to rights in the context of the so called “war on terror”).

²⁵⁸ See *Mutua*, *supra* note 13, at 565–87 (for an analysis to the obstacles in new standard-setting ventures).

²⁵⁹ For an introduction to social constructionist theories, see, e.g., Mary McIntosh, *The Homosexual Role*, 16 SOC. PROBS. 182 (1968), reprinted in QUEER THEORY/SOCIOLOGY 33, 34–36 (Steven Seidman ed., 1996); see also Vance, *supra* note 28, at 878.

exclusion hierarchical arrangements upon which many regimes depend. When states challenge the powers of treaty bodies or independent experts over their positions on sexual rights, they are challenging not just the sexual rights norm but also the arrogation of governance powers by these bodies. The critics of the “constitutionalization” of international law—a fashionable term—suggest that this search for a central set of principles with a superior body vested with the power of ultimate judicial review flies in the face of either the reality of fragmentation or the thorny problem of sovereignty.²⁶⁰

We close by calling attention to the inherent tensions in this process of international human rights norms solidification: it is always historically contingent—that is to say, it is a product of the complex interaction of social, economic, political, and other factors occurring at particular locations and times. However, it is this very contingency and specificity that the discourse of rights claims (e.g., “all persons are,” “universal”) masks. In this Article, we have tried to address “the process and exercise of the creation of *expectations* and *obligations* in human rights,”²⁶¹ with sexual rights as our site of analysis. Sexuality poses some problems that are unique to sexuality. But it also faces obstacles that all contemporary human rights norm development must confront. Through an analysis of human rights’ engagement with a new topic (sexuality), we sought to explore the way that the intersection of the universal and the particular, the self-evident and the unrealized, actually functions in the creation of human rights law, in part through the proliferation of institutional debates.²⁶² In particular, we also sought to capture the promise and the peril of sexual rights claims in the practice of international lawmaking—always vexed and contested, but with specific vexations today. Sexual rights as a topic in contemporary human rights standard-setting reveals international rights as a discomfiting kind of law: fluctuating in development in light of local politics and use, and possibly varying in impact on the ground, yet couched in a global language of universal entitlements and inalienable rights and forged in settings with international law rules. For sexual rights, as for all human rights, their global salience is a central component of their purpose, and the indeterminacy of their promises ensures that the political struggle to give legal content to their local claim-making power will be fiercely fought.

²⁶⁰ Cf. JEFFREY L. DUNOFF & JOEL P. TRACHTMAN, *A Functional Approach to International Constitutionalization*, in *RULING THE WORLD?*, *supra* note 89, at 5, 9–10 (exploring the functional and conceptual usefulness of framing international law through the lens of constitutionalism, in terms of international law’s processes and its norms).

²⁶¹ Mutua, *supra* note 13, at 558.

²⁶² See SLAUGHTER, *supra* note 253, at 14 (describing the tension of human rights, which are presumably self-evident rights yet must always be declared).

