SEXUALITY AND HUMAN RIGHTS

DISCUSSION PAPER

INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY

International Council on Human Rights Policy

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Sexuality and Human Rights

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Sexuality and Human Rights

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ICHRP
48 chemin du Grand-Montfleury
1290 Versoix
Geneva, Switzerland
Phone: +41 (0) 22 775 33 00
Fax: +41 (0) 22 775 33 03
ichrp@ichrp.org
www.ichrp.org

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ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACtHPR	African Court on Human and Peoples' Rights
AU	African Union
CAT	Convention against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CLADEM	The Latin American and Caribbean Committee for the Defense of Women's Rights
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DRC	Democratic Republic of the Congo
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights)
ECtHR	European Court of Human Rights
GBV	Gender-based violence
HIV/AIDS	Human Immunodeficiency Virus / Acquired Immune Deficiency Syndrome
HRC	Human Rights Committee
HRW	Human Rights Watch
IACHR	Inter-American Commission on Human Rights
I/A Court H.R.	Inter-American Court on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHRP	International Council on Human Rights Policy
ICJ	International Commission of Jurists

ICPD	International Council on Population and Development
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IPPF	International Planned Parenthood Federation
IRRRAG	International Reproductive Rights Research Action Group
LGBT	Lesbian, Gay, Bisexual and Transsexual
MSM	Men having sex with men
NACO	National AIDS Control Organization
NGO	Non-governmental organisation
OAS	Organization of American States
OHCHR	Office of the United Nations High Commissioner for Human Rights
RBA	Rights-based approach
SOGI	Sexual orientation and gender identity
SRHR	Sexual and reproductive health rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
WHO	World Health Organization

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INTRODUCTION

As an institution dedicated to international, multidisciplinary and consultative human rights policy research, the International Council on Human Rights Policy is committed to facilitating dialogue and discussion. In keeping with this commitment the Council is pleased to publish this Discussion Paper on sexuality and human rights.

In early 2008, the Council decided to begin work on the subject of sexuality and human rights. The 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.

On the basis of preliminary research, it became clear that a number of conceptual challenges need to be addressed. The Council therefore commissioned a paper from Alice M. Miller, a leading academic in the field. The Council asked her to examine the content of sexual rights, the evolution of their discussion, and problematic issues that need further consideration, in order to assist the Council to identify the focus of its project on sexuality.

The paper sets out many of the questions, conflicts and dilemmas that mark this subject and impede discussions of sexuality and sexual rights. It frames the issue in ways that we feel will be useful and fresh for activists, policy-makers and human rights practitioners. We hope its publication will help those working in the field of sexuality to measure the potential relevance of human rights, and help human rights advocates to look more inclusively and more deeply into the subject of sexuality.

We describe this as a "Discussion Paper", because it departs from the models of consultative research that have characterised the International Council's work. It is the first in a series that we will publish from time to time.

Robert Archer, Executive Director, ICHRP.

SCOPE OF THE REPORT

This paper considers current human rights claims in relation to sexual rights, in formal human rights structures and processes. It shows that troublesome but predictable disjunctures continue to constrain the evolution of coherent and progressive policy positions in this area. Given that there is powerful opposition to sexual rights and sexual rights work globally, more coherence is keenly needed. As an independent organisation, the International Council on Human Rights Policy's (ICHRP) aim is to help generate clearer thinking about sexual rights, and in particular to promote discussion and debate that will be helpful both to non-governmental organisation (NGO) advocacy, and to research and policy in this area.

This analysis appears at an interesting time, when some concepts in the field of sexuality and human rights are far advanced and others are just in their initial stages. Excitement, need, confusion, disapproval, discomfort and vastly different stages of development characterise both formal and informal work on rights and sexuality. In particular, there is no well-conceptualised agreement about the following issues:

- The rationale for, and scope of, state regulation of sexuality in public and private life.
- The nature of rights to sexual speech and regulation of material with sexual content.
- The content of the state's obligation to create conditions that protect and provide for the diversity of human sexual conduct.
- The scope of privacy with respect to information about a person's sexual identity and sexual history, including information on sexual offences, HIV status, etc. This issue is linked to the increasing (and troubling) deployment of the concept of 'informed consent' in the context of sexual conduct.

The report considers some of the reasons why coherent policy is lacking, specifically in these areas and more generally in historical and modern human rights advocacy about sexuality. It then examines some specific current problems at international level.

In doing so, it focuses largely on formal human rights work in the United Nations (UN) and other international fora which draw on international human rights standards and mechanisms. Nevertheless, regional, national and local claims drive much of the international work that is done on sexuality. The report therefore addresses some local claims, not in their context or complexity but as they are deployed and integrated in (or diverge from) international human rights standards.[1] The goal is to draw principles, theory, legal standards, lived experience and political possibility together, towards a new vision of sexuality and human rights.

It should be emphasised that the report highlights (but does not resolve) the implications of recognising that sexuality and therefore sexual rights arise at the point where public and private domains – the private body and the body politic – meet.[2] The fact that sexuality spans both dimensions makes it necessary to re-conceptualise human rights that are relevant to sexuality, in order to cover more fully the public as well as private worlds. More deliberate work on the incorporation of concepts of participation and human dignity as human rights could be particularly useful for sexual rights. Because sexually stigmatised persons are often denied standing as public actors, it is important to focus on participation as a key human rights value.[3] The notion of human dignity is similarly essential, although it can have a complicated and gendered (often restrictive) bias, particularly when applied to women.[4]

The report considers the tensions and voids within human rights thinking and principles with regard to sexuality, and considers some of the structural and political reasons for under-development in this area. Lack of clarity, aggravated by various ideological differences, undermines sexual rights as a coherent set of claims within human rights. Lack of critical thinking also makes it more likely that sexual rights can be hijacked for purposes that restrict human diversity and global justice.[5] As Gayle Rubin wrote almost 25 years ago, "it is difficult to make such decisions [about what policies on sexuality should be supported or opposed] in the absence of a coherent and intelligent body" of thought about sex.[6]

Bringing sexuality to human rights, with an emphasis on affirming common humanity, requires a deliberate commitment to become more self-aware about the 'ideological formations' (Rubin's term) that govern our assumptions about sexual behaviours and expression; and willingness to explore the assumptions that underlie different political, religious and cultural arguments about sexuality.[7] Drawing from Rubin's diagnoses of sexual politics in the United States, one can argue that two pervasive beliefs have undermined inquiry into a global, rights-driven standard of legitimacy for sexuality, and these beliefs are often held by both advocates and opponents of sexual rights. One explains all of sexuality (its desires, practices and organisation) as a natural, 'just so' emanation of the body. The other distrusts sex, particularly sex that is not subject to dominant gender rules. Put another way, both historically and today, almost all sexual behaviour has to be justified: traditionally, by reference to marriage, reproduction; today, by love.[8] In addition, 'health' (and the discursively related but different standard 'healthy outcomes') has become a new term of judgement regarding sexual behaviour.[9]

Historical analysis and self-reflection are starting points for our analysis, though not the main content of this paper, because they establish the pre-conditions for any constructive project on sexual rights. As in other fields of human rights where intra- and cross-cultural evolutions must occur, through reflection we may hope to reach a workable consensus about how rights can contribute to broader social acceptance of diverse sexual interests and practices, even if we lack total agreement on every aspect of sexual behaviour or expression.[10]

Political and strategic questions about human rights practice, to the extent that they relate to sexuality, are also highlighted without being analysed deeply in this inquiry.

The report references history and practice in order to focus on a set of unanswered questions regarding human rights principles governing sexuality. It argues that examination of human rights practices – advocacy, research and documentation, jurisprudence – reveals rhetorical agreement on some issues and principles, but also exposes silences and tensions at the core of current sexual rights work.

The report's central question is: according to which principles, and in agreement with which standards and jurisprudence, should human rights work on sexuality develop?

In human rights work, advocacy, documentation and legal frameworks are mutually constitutive. Human rights organisations document facts which they believe have legal relevance to the rights claim at issue; advocacy campaigns arise from and organise around demands to end abusive practice, bolstered by reference to violations 'proved' by documentation. Both activities are structured in light of the binding obligations contained in human rights treaties.[11] A tight connection therefore exists between documentation practices and legal frameworks governing sexuality; and, where we seek new legal frameworks, we will need to review human rights reporting practices. At the same time, as human rights NGOs generate new legal claims linked to the documentation of abuses, they become better able to evaluate the degree to which they document abuses sufficiently. Is the range of sexual rights concerns covered? Is the legal framework adequate to address these concerns?

In this examination, gaps and silences and contradictions emerge, as Chapters II and III argue. Taking a step back to search for principles that might resolve certain claims reveals that common principles are lacking that would enable legal frameworks to conceptualise obligations regarding sexuality more effectively. At a basic level, this lack impedes the development of constructive recommendations, by NGOs and advocates, to guide and monitor state interventions.

Further, agreements forged on the basis of unexamined beliefs about sexuality can become tools of repressive or inadvertently harmful NGO and state actions.[12] Awareness of what governs our thinking about sexuality makes it possible to productively analyse the current practices, claims and ideologies of sexual rights advocates, and understand how these are reflected in human rights standards.

The report

Chapter I surveys current work on the interplay between human rights and sexuality in its new and dominant form: rights-based advocacy and calls for standards on 'sexual rights'. Deeper inquiry, however, reveals incomplete and uneven content in this new field.

The report goes on to present some political, conceptual and practical reasons for this thinness. Streams of work linked to women's rights and reproductive health, understood as one aspect of social regulation of gender, now appear to have been divorced from work on gender expression and gay identity, despite initial political and analytic links. These projects persist not merely as distinct streams in national, regional and international venues, but sometimes seem to be non-complementary, despite sharing in common the phrase 'sexual rights'. Moreover, whilst sexual rights advocates often employ a common rhetoric, these different advocacy and policy communities at times have different priorities and power. Divisions are exacerbated by confusion over what sexuality entails, and whether rights should or do address conduct, identities, relationships, sexual expression, individuals or groups; or when a problem is about sexuality or gender and how these aspects interact. Discussion or agreement regarding key principles of sexual rights will remain fraught in the absence of clarity on these questions.

In the second part of this chapter, the report therefore suggests how careful analysis, using social construction theory, can help make visible the different ways that sexual behaviours, identities, and relationships are organised and prioritised in different parts of the world. This body of theory moves us from thinking of sexuality as circumscribed by bodies, towards thinking about power and the power of ideas as constitutive of sexuality and therefore a key target of sexual rights work. This shift makes it possible to develop a politics of justice around sexuality. At present, sexual rights work tends to focus on three aspects of sexuality: sexual conduct, sexual identity, and relational status or orientation.[13] Developing a politics of justice with respect to sexuality enables us to add *participatory citizenship* to the three aspects of sexuality that must be supported by human rights.

Chapter II considers state regulation of sexuality and the role of human rights. It reflects briefly on the reasons why international human rights law and practice historically accommodated restrictive and discriminatory state regulation of sexuality. It then turns to the emerging consensus around principles that would support the exercise of sexual rights, affirming: "the equal right of all [adult] persons to consensual sexual activity in private, free of discrimination, coercion, violence and threats to health, and the right to determine if such conduct results in reproduction." Later in the chapter, we look more critically at this formulation, and in particular test the concepts of consent and (adult) capacity. The chapter concludes that, where there is agreement, it is around a subset of sexual rights which represent but do not in fact embrace the full range of sexual rights.

Chapter III examines some of the tensions between rights advocates which contribute to inconsistencies of sexual rights analysis and obstruct advocates' ability to claim rights in relation to sexuality in robust and forward-looking ways. The chapter looks at different stages of synthesis and agreement on specific issues.

Chapter IV concludes the report. It draws attention to current weaknesses of analysis and policy that make it difficult to address hard cases; and identifies two sets of critical issues that must be explored if sexual rights are to be integrated operationally in human rights work. In short:

- What is the rationale and scope of the state's role in regulating sexuality in public and private life? And
- What conditions are required for the exercise of protected sexual conduct, including the making of valid consent? Answering this question requires identification and definition of what constitutes unacceptable *coercion* (which would trigger valid state intervention), distinct from *constraint* (where concerns would attract state action through rights promotion, education and other non criminal policies). A constrained person does not yet enjoy all her or his rights, but is not a crime victim.

The chapter ends by flagging some caveats and considerations that need to be addressed if work on sexual rights is not to fail because it over-regulates sexuality or promises too much. The chapter outlines some principles and ways forward that may assist and deepen the work of building effective claims in the area of sexual rights.

I. 'SEXUAL RIGHTS' – A FRAMEWORK FOR BRINGING HUMAN RIGHTS TO SEXUALITY?

Tremendous changes in the engagement of human rights with sexuality have been made over the last twenty years. The issue today is no longer whether human rights will engage with sexuality, but rather involves very particular practical questions: on what terms, for whom, for what purposes, about which aspects of sexuality, and with what limits.[14]

In 2000, advocates and scholars (of whom the author was one) asked how coherent claims to sexual rights could emerge from distinct, often disjointed conversations about sexuality and rights that were taking place among people working on sexual violence against women, on sexual and reproductive health, on HIV/AIDS, on child abuse, and in Lesbian, Gay, Bisexual and Transsexual (LGBT) advocacy, to name a few of the relevant areas.[15] By 2008, the unifying phrase 'sexual rights' was being used regularly in international and national fora; but the frequency of its use, particularly in academic and policy literature, is not yet always matched by clarity of legal content.[16] Moreover, concerns about sexuality have evolved rapidly in the last decade in light of the HIV/AIDS epidemic, as well as in response to recent migration and community displacement which has exacerbated anxiety about national borders. Notably, the recent globalisation of information systems, driven by the Internet and other new communication technologies (cell phones with video capacity, etc.) is driving new regulations on online content. With increasing frequency, attention to material with a sexual content is often coupled with claims around national security.[17] Extremely powerful counter-attacks on sexual rights, reflecting the latter's impact, are linked to the emergence of an amalgam of political interests that draw together justifications based on religion, culture and nation to undermine human rights at the United Nations.[18] In the context of these subversive, indeed repressive, elements, the silences between sexual rights movements, and the policy gaps that exist, are particularly troubling.

Defining sexual rights

Early efforts to bring human rights and sexuality together suffered from an initial focus on protecting people from harm: from sexual harm in the case of girls and women, and from extreme abuse and killing in the case of persons then identified as gay or transgendered. While initially justified as necessary, the abuse focus contributed to a lack of coherent rights-based claims that affirmed diverse sexualities.[19] It has only been in the last few years that scholars, NGO advocates and some UN experts have reached agreement that the term 'sexual rights' helps them to work together and move past the ad hoc, often scattered development of activity on violence against women, sexual and reproductive health, HIV/AIDS, children's rights, and LGBT rights. Ignacio Saiz suggests the concept of sexual rights has appeal because it:

> …enables us to address the intersections between sexual orientation, discrimination and other sexuality issues – such as restrictions on all sexual expression outside marriage or abuses against sex workers – and to identify root causes of different forms of oppression. It also offers strategic possibilities for building coalitions or bridges between diverse movements so as to confront common obstacles more effectively (such as religious fundamentalism) and explore how different discourses of subordination work together.
>
> Sexual rights make a strong claim to universality, since they relate to an element of the self which is common to all humans: their sexuality. The concept therefore avoids the complex task of identifying a fixed sub-category of humanity to whom these rights apply. By proposing an affirmative vision of sexuality as a fundamental aspect of being human, as central to the full development of the human personality as freedom of conscience or physical integrity, sexual rights offers enormous transformational potential not just for society's "sexual minorities", but for its "sexual majorities" too.[20]

The phrase 'sexual rights' has recently gained substantial acceptance in the human rights community. Paul Hunt, then the UN Special Rapporteur on the right to health, wrote in 2004 that he had

> …no doubt that the correct understanding of fundamental human rights principles, as well as existing human rights norms, leads ineluctably to the recognition of sexual rights as human rights. Sexual rights include the right of all persons to express their sexual orientation, with due regard for the well-being and rights of others, without fear of persecution, denial of liberty or social interference…. The contents of sexual rights, the right to sexual health and the right to reproductive health need further attention, as do the relationships between them.[21]

Hunt's statement legitimised the work of NGO advocates who argued that the content of sexual rights should be clarified in human rights law. Indeed, though it did not attempt to articulate sexual rights fully, his report spelled out some specific aspects and characteristics of sexual rights – liberty from abuse or discrimination on the basis of practice or identity, for example, and entitlement to contraception services and information about safer sex.[22]

Today, the language of sexual rights is employed by NGOs, advocates, and policy-makers as well as scholars.[23] A dynamic working group of NGOs, called the Sexual Rights Initiative, now operates at the UN Human Rights Council. The Initiative appears to be one of few groups that consistently seeks to give examples of sexual rights issues across sectors, addressing adultery, rape of females and males, discrimination against people in sex work, violations of the rights of gay and lesbian identified people, inter-sex as well as transgendered persons.[24] Human Rights Watch (HRW), whose legal counsel used to reject the phrase sexual rights,[25] now regularly uses the term.[26] In May 2008, the International Planned Parenthood Federation (IPPF), a global service and advocacy coalition on sexual and reproductive rights, adopted "Sexual Rights: An IPPF Declaration" to succeed its innovative and influential Charter on Sexual

and Reproductive Rights.[27] A newer group called the Coalition for Sexual and Bodily Rights in Muslim Societies carries out training and advocacy using a sexual rights frame.[28] A Latin American regional project has highlighted sexual rights as the key focus of its campaign for a Convention on Sexual and Reproductive Rights.[29] The University of Sussex Institute of Development Studies BRIDGE Project, which has produced sophisticated and comprehensive policy and programmatic materials on sexual rights, argues that sexual rights provide a "framework with clout".[30]

But what does the term mean? The most commonly cited definition of sexual rights is one found on the website of the World Health Organization (WHO). Though it illustrates the somewhat anaemic nature of the current conceptual framework, many groups use it because it appears to bestow the imprimatur of an authoritative intergovernmental body.[31] The definition, which originated in 2002, reads:

> Sexual rights embrace human rights that are already recognized in national laws, international human rights documents and other consensus statements. They include the right of all persons, free of coercion, discrimination and violence, to: (1) the highest attainable standard of sexual health, including access to sexual and reproductive health care services; (2) seek, receive and impart information related to sexuality; (3) sexuality education; (4) respect for bodily integrity; (5) choose their partner; (6) decide to be sexually active or not; (7) consensual sexual relations; (8) consensual marriage; (9) decide whether or not, and when, to have children; and (10) pursue a satisfying, safe and pleasurable sexual life. The responsible exercise of human rights requires that all persons respect the rights of others.[32]

As an indication of the subject's volatility, the WHO (ironically without success) puts some distance between itself and this definition. Its website states: "These definitions do not represent an official WHO position, and should not be used or quoted as WHO definitions...."[33] Officials note that the definition was intended to be an initial working draft, developed so that work could proceed consensually on some aspects of sexuality, pending a more final definition.[34]

This set of enumerations represents a strategic step forward, especially for health policy-makers and governments, but it is yet incomplete. The rights it elaborates are indeed relevant, and the definition places sexuality clearly within the frame of human rights by identifying the key role of *decision-making* by the individual. However, because it focuses on individual human bodies, it does not engage fully with sexuality as a political and public construct through which sexual behaviours are given meaning and judged. Nor does the enumerated list of rights refer to public and participatory rights – rights to advocate, assemble, organise and call for change. And, because the WHO has a health mandate, it focuses only on '*sexual health* information', thereby failing to address the important role which other kinds of information plays in more general concepts of sexuality and identity. The right to access sexuality-related information in literature, cinema and other forms of expression, which is also an element of sexual rights, cannot easily be derived from a right that confines itself to

information on sexual health. Finally, the WHO definition makes no reference to access to resources, at individual or national level, that enable the exercise of sexual and all other rights – a striking omission in view of the fact that a major debate about resources occurred in the International Council on Population and Development (ICPD) in 1994.

Politics without a common conceptual framework: fractures and coalitions

The power of 'sexual rights' as a consensus claim is further weakened by political and practical fractures beneath the surface of coalitions working for sexual rights. Unresolved tensions about power and access to resources are found between and among women's groups, gay male and transdominated groups as well as across national and geo-political inequalities. Some advocates working on women's sexual rights are critical of new work in health, development and rights that addresses sexuality through the lens of HIV and often engages with struggles from a male perspective, apprehending that doing so may divert resources and attention from women's issues.[35] They fear that, while sexual violence and violations of women's sexual rights continue unabated, current versions of the advocacy to undo oppressive gender identity systems in public and private life will not benefit girls and women. While most (but not all) women's rights advocates support the articulation of rights to address gender identity, the absence of practical connections – in funding, in timing, in audiences and targets – between transgender advocacy and women's rights advocacy (around gender-based violence, for example) impedes effective coalition. At the same time, feminist advocates are concerned that 'gender mainstreaming', even in its most common understanding, is as yet incomplete.[36] Recent work has critiqued the continued invisibility of lesbians, who sit at the intersection of women's rights and gay identity rights but are often barely addressed in advocacy reports, a casualty of unaddressed analytic barriers that result in advocates treating 'women' and 'gay' as exclusive categories.[37] Moreover, human rights advocates still disagree about the nature of sexual harm and the implications of sexual freedom, as debates about prostitution and sex work, and pornography and sexual speech (discussed below in Chapter III), make clear.

Ironically, some exciting new global initiatives demonstrate the centrifugal forces at work. One is a feminist-inflected, health and rights-oriented declaration of sexual rights by the International Planned Parenthood Federation.[38] Another stand-alone initiative, the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, elaborates principles applicable to sexual orientation and gender identity, an important subset of sexual rights.[39] Both the IPPF Declaration and the Yogyakarta Principles are likely to have significant local and global political impact, and both emerge from and are used in a lively advocacy scene. Nevertheless, they betray continued compartmentalisation, and reveal the limits of formal human rights doctrine in this area.[40] A third initiative, the Latin American-based Campaign for a Convention on Sexual and Reproductive

Rights (The Latin American and Caribbean Committee for the Defense of Women's Rights, CLADEM), is regional and has created its own public self-examination process. Many of the responses received by the Campaign echo the concerns about sexual rights that are canvassed in this report.[41] The campaign seeks to harness feminist ethics to political action with the goal of creating new legal standards capable of contributing to social transformation on sexual and reproductive rights. The campaign also speaks openly of its internal disagreements concerning some sexual rights issues, such as sex work and prostitution, and questions of sexual speech. Each of these campaigns takes very different approaches to the centrality of identity as a fixed and findable thing, and each has a different take on gender. The Yogyakarta Principles relies primarily on a specific concept of sexual orientation and gender identity; the CLADEM campaign adopts a feminist analysis of patriarchy; and the IPPF declaration adopts a health focus. Each, therefore, speaks to different, albeit sometimes overlapping constituencies.

The uneven mosaic of formal jurisprudence supporting sexual rights

There is a paucity of international legal authority affirming the existence of 'sexual rights' as a category of rights. Judgements concerning sexuality and rights have addressed only a limited range of issues, and have been geographically concentrated in certain jurisdictions (particularly in Europe and selected national states such as South Africa, Canada and the United States). Accordingly, it is difficult to claim at present the existence of a comprehensive set of sexual rights standards that are accepted as universal, politically or substantively. Judicial authority matters because it elaborates legal reasoning and establishes the reach of principles to a greater degree than much of the country report-based treaty work that is undertaken in dialogue with states. European courts that have human rights mandates (the European Court of Human Rights (ECtHR) in particular, but also the European Court of Justice) have issued more than two dozen judgements relating to non-discrimination and privacy for same sex sexual activity, sexual and gender orientation, sexuality information, and (hetero)sex assault.[42] The Organization of American States (OAS) has addressed a few cases of sexual rights ([heterosex] rape,[43] same sex conjugal visits,[44] a lesbian custody case[45]), which are pending or have been resolved at the level of the Commission but not at the Court. The African Union's (AU) newly reconstituted Court and Commission have issued no judgements that directly address sexual rights issues, though in 2003 the Commission considered (and partly avoided judging) the applicability of a religious (Sharia-derived) justification for corporal punishment, administered to young women and men socialising together, for behaviour deemed to be immoral or offensive to public feeling.[46] Both the AU and the OAS have adopted treaties that address sexual rights of women, including freedom from sexual violence, and the AU has supported affirmative rights to sexual health services and information, among other related rights. In June 2008, the OAS unanimously adopted a resolution condemning human rights violations based

on sexual orientation and gender identity.[47] To date, however, interpretations of these decisions have primarily been offered by NGOs.[48]

The ECtHR's jurisprudence has articulated an evolved doctrine on rights violations and state obligations associated with sexual assault. Its decisions have enlarged the state's obligation by setting a due diligence standard (which so far addresses only heterosex cases),[49] and defining some forms of sexual assault as torture[50] and marital rape as a crime.[51] The Inter-American Commission on Human Rights (IACHR) is developing a due diligence standard for gender-based violence against women.[52] The International Criminal Tribunal for the Former Yugoslavia (ICTY) has prosecuted more than two dozen cases that involve sexual assault (as forms of slavery, torture, crimes against humanity, as well as rape), in respect of both male and female victims, and its judgements (convictions and acquittals) have developed a comprehensive (if not always coherent) jurisprudence.[53] The International Criminal Tribunal for Rwanda (ICTR) has taken one major decision (rape as genocide)[54] and made at least one other conviction (appeals pending).[55] The International Criminal Court (ICC) is beginning a prosecution of sexual assault in the Central African Republic,[56] and groups continue to pressure for ICC prosecutions of sexual assault in the Democratic Republic of the Congo (DRC).[57] Advocates such as Women's Initiatives for Gender Justice[58] hope that the ICC's gender neutral rape standard (which defines the harm of sexual assault in terms of force and the denial of autonomy of the person assaulted, rather than in terms of the chastity or honour of women victims) can be used to improve national rape laws, even before it is applied in an international prosecution.

International criminal law is attractive to rights advocates because it seems to produce sharp-edged clarity on state obligations. A small cottage industry tracks sexual assault prosecutions (primarily ones involving women victims) at the ad hoc war crimes tribunals and in the ICC.[59] This work, and other work like it which involves careful reading of legal standards and decisions, has revealed that many apparently clear criminal rules (including parts of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the UN Trafficking Protocol), and the standard for consent used in the ad hoc tribunals) are not in fact clear at all, and this in turn has generated disputes among rights activists and feminists about the goals and content of international criminal law.[60]

These debates over the specificity of international sexual assault law contrast with other legal thinking about sexual rights which has emerged, in particular from the treaty and political bodies of the UN. When they interpret and apply international texts, human rights and sexual rights advocates gloss over the uneven coverage of international standards by referencing a mosaic of norms that have variable weight. They attempt to convey the force of their claims, and emerging formal support for them, by assembling a dense body of citations. The International Commission of Jurists (ICJ), and Human Rights Watch, for example, have each begun to assemble the jurisprudence on sexual orientation and gender identity.[61] The Center for Reproductive Rights, working with the

University of Toronto, has compiled treaty jurisprudence relating to sexual and reproductive health rights.[62]

Unfortunately, the many reports and judgements produced by UN treaty and political bodies on sexual harm, entitlements and freedoms, are not matched by equally authoritative and clear legal arguments on the standards being applied to sexual rights questions. The NGO compilations, for example, rely heavily on reports that are issued by the special procedures of the former UN Commission on Human Rights and its successor the UN Human Rights Council.[63]

Independent expert statements (by special procedures experts and expert Committees of human rights treaty bodies) are important because they confirm that the abuses documented *are* violations of rights. But they are not equally rigorous in their language and content. Many texts reference undefined 'sexual minorities'; others confuse trans, inter sex and gay identities. They are not always clear about the specific scope of abuses, and do not always specify the basis of principle on which they reach their judgements. In some instances, the failure to clarify terms could (unintentionally or intentionally) exclude consideration of certain claims or practices. Trans people in particular tend to disappear from the concluding comments made by treaty bodies on country reports; and women who fall outside gender norms and who are attacked or face discrimination (but do not identify themselves as gay or transsexual) disappear entirely in the work of the UN.[64] Unfortunately, a careful analysis of these suggestive (and sometimes opaque) comments has not yet been undertaken: it would strengthen our reading of them, and could improve UN practice.

In addition, the UN human rights treaty bodies examine sexual identities, practices and gender categories from certain perspectives. They tend to focus on: sexual orientation (but limit their concern to homosexual orientation); sexual violence against women; and links between sexuality and reproductive policy. This bias is reinforced by the practical reality that most of the documentation they receive focuses on these issues. Indeed it is striking how unevenly the various treaty bodies have developed doctrine on human rights protection in the context of sexuality. The Committees that monitor the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture, CAT) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) until quite recently gave little or no attention to sexual (or interestingly gendered) harms. The Committee that monitors the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has been remarkably reluctant to address sexual rights issues that are not associated with sexual violence and health; in late 2008 it was still discussing how sexual differences among women could be addressed.[65]

The UN Human Rights Committee (HRC), and the Committees that monitor the UN International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC) have most actively asserted positions on legal standards in support of non-discrimination and equal protection for diverse sexual identities and non-traditional sexualities

(though they have all shied away from applying these to marriage). These expert committees have also clarified the right to freedom from violence, when violence is attributable to the state directly or indirectly, as when the state fails to protect. In reaching judgement, in many cases these committees have also adopted an inter-sectional understanding (the recognition that discrimination or abuses based on gender, sexuality or race are mutually reinforcing and cumulative).[66]

UN treaty bodies have adopted a number of general comments and recommendations that are relevant to sexual rights (comments which are understood to have authority regarding the meaning of the treaties).[67] About five of these name sexual orientation explicitly, while another four are concerned with sexual health or sexual violence. However, most of the treaty body jurisprudence that advocates draw on to support their sexual rights claims is found in the concluding comments to state parties' reports. As O'Flaherty and Fisher note, "these Concluding Observations have a flexible and non-binding nature. As such they are not always a useful indicator of what a Committee may consider to be a matter of obligation under the Covenant".[68] Moreover, they often take dangerously erratic directions even within a single treaty body's jurisprudence. In the last decade, CEDAW experts have taken up the problems of violence and discrimination against women in sex work, but a review of their questions and comments suggests that at least three different proposals for solutions are in play: to increase services and outreach to women in sex work but leave the law intact; to decriminalise the selling of sex but increase criminalisation of the buying of sex (as a matter of equality between women and men); and to consider decriminalisation of prostitution.[69] In general, looking across the record of the treaty bodies, one can see that they are concerned with discrimination and violence that are understood to be attached to homosexual orientation (a positive stance), but have not fully embraced the range of discriminations that constrain heterosexual women who refuse to accept normative rules that confine their sexuality. They understand that some forms of violence are connected to the legal regulations of sex, and have begun usefully to focus on penal regulation of same sex behaviour, but have not extended their inquiries to sexual behaviour generally.

NGOs have concentrated on the *validity* of various rights claims around sexuality by demonstrating the accumulation of UN expert commentary about the general problem of abuse based on sexual difference, and this work is an essential opening step. Taken together, the documentation that has been assembled is impressive. It suggests the emergence of a coherent position; nevertheless, critical gaps remain in areas that are essential for setting policy and reforming law. For example, some commentaries can be understood to yield clear general guidance to states: decriminalise same sex behaviour; set up processes to respond effectively to rape; provide comprehensive sexuality education to adolescents.[70] Guidance in other instances is vague: it is recommended that states protect sexual minorities from abuse, but the term "sexual minorities" is undefined, and no distinction is made between, for example, the legal and policy changes that are required to protect trans

people and those that will ensure adolescents can get accurate information on same sex sexual behaviour. Moreover, the status of sexual behaviour outside of marriage for heterosexuals is unclear.

Even some of the clearer recommendations falter because of the lack of articulated underlying principles. As we discuss further below, treaty body experts have raised concerns about the criminalisation of same sex behaviour, but have not clearly indicated the standard for heterosexual behaviour outside marriage. Is the fundamental human rights concern equality of criminalisation and penalties, or resistance to criminalisation of consensual sex entirely?[71] (See Chapter III). However, advocates have begun to marshal NGO statements against criminalisation of heterosexual behaviour outside of marriage.[72] For contemporary advocacy, this call for decriminalisation of 'consensual' sexual behaviour (between the same or different sexes) begs the question of which conditions justify limits or restrictions on sexual behaviour, especially through criminal law. The unacceptability of forced or coerced sexual activity (as articulated in international and some national sexual assault laws) will clearly be one test; but even here, a full legal elaboration of the various categories or examples of unacceptable force is still evolving. For example, does sex in detention *per se* signal unacceptable force, such as the custodial rape law in India suggests for women? What range of 'abuse of authority', as set out in the UN Trafficking Protocol, vitiates consent? Other issues will need to be considered in light of the acceptance by international law of regulation in the name of public order. Further questions arise on the continuums between sexual, erotic or intimate expression. What makes conduct private? How can human rights standards protect affectional conduct which is not sexual but contradicts traditional norms because it suggests possible private erotic behaviour? What are the rights and interests of others, by reference to which sexual activity can be limited? To date, the priority of activists has been to get issues 'on the agenda' as valid human rights claims. While understandable as a first phase, at some point it will be necessary to clarify content. Can this be done at a time when sexual rights are subject to sharp counter-attack?[73]

After ten years of sexual rights work, it may be fair to ask if we can now raise concerns that too much rights works is about 'getting a rape law passed' rather than 'getting a good rape law passed'. The next frontier may be drafting rape laws that are good for women, for men and for transpersons, and which respect the rights of defendants. In many contexts, women's groups are concerned that calls for protection of defendants' rights in sexual assault cases merely reveal the privileges of already powerful men in patriarchal societies. The challenge to protect rights of victims while respecting the rights of the accused is particularly troubling in the field of anti-trafficking laws. Currently, many states receive praise for enacting new laws against trafficking, even though such laws may be little more than re-named anti-prostitution laws which enhance prosecution or penalties for prostitution or immigrant smuggling. Moreover, increased penalisation is often paired with creating barriers to safe movement of irregular workers. Such laws fail to help trafficked persons and instead constrain the movement and association of un-trafficked but irregular migrants.[74]

Universal rights talk meets locally-defined sexual meanings: how to proceed[75]

One of the more stubborn obstacles for the UN, courts and monitoring bodies is the persistent confusion amongst advocates and UN bodies about what personal actions or aspects sexual rights need to address, and what explanatory system of sexuality should be applied. The discussion below highlights that many different belief systems operate simultaneously in current international discussions. Struggles to identify and name the component parts of sexuality generate two separate problems for rights. First, what is being protected: a status, an identity, behaviour, a private role or a public presentation (masculine, feminine, displaying sexual interest or gender role playfulness)? Do law and policy need to address a relationship, an act, an ideology, beliefs, an act of imagination or a desire? To give one example, when NGO advocates affirm the principle of non-discrimination when speaking of sexual orientation, they rely on a notion of sexual orientation that has been developed in the last hundred years. This assumes that the gender of the sexual partner is the crucial choice in sexuality, and that individuals link their (different or same) sex practice in a consistent way to their affections and their public identity. Yet many women and men do not organise their lives in this manner, yet engage in same and different sex partner behaviour. As will be discussed below, to argue that sexual orientation is not always the most useful way to characterise hetero or homosexual behaviour is not to deny either the existence of diverse behaviour, or that individuals should be able to assert their orientation, if that is their intention. It is to assert that human rights advocates must recognise ways to protect sexual acts as well as identities. The scholarship on sexuality in different historical and cultural contexts highlights the understanding that rigid, universal categorisation of groups of persons, while important, can conflict with the struggle to protect diverse practices.

Second, disputes over sexual terms, which involve issues of accuracy as well as resistance to recognition and compartmentalisation, can also be linked to struggles for geographic, linguistic, political and cultural control over the content of human rights work more generally. At present, some states use negotiations over draft texts as the forum in which to reject efforts at an international level to recognise the existence of certain social groups and practices: they refuse to allow terms like 'sex workers' or 'men who have sex with men' (let alone terms such as 'gay', 'sexual orientation', or 'sexual rights for women') to be included in UN documents, notably those addressing HIV/AIDS.[76] Naming makes non-conforming people visible and more difficult to marginalise. At the same time, while censoring of terms is often about refusal to recognise non-approved sexual practices and identities (and therefore to accord rights to the people named), the refusal to name may also coincide with the perspectives of advocates who do not wish to attach (some would say, impose) new cultural values and systems of meaning to individuals and behaviours in very diverse societies. The repressive impulse of the state coincides in paradoxical ways with anti-colonial discourse, as recent disputes in scholarly and advocacy

pages about executions and torture claims arising from sexual conduct in Iran, Egypt and Iraq demonstrate.[77]

Contemporary geopolitical struggles over sexual rights take place alongside the development of a rapidly expanding field of cross-cultural and inter-disciplinary scholarship, which makes use of theories of 'social construction'. Social construction draws on historical, anthropological, political and post-colonial studies to understand how sexual practices in time and place are invested with meanings, in conjunction with attributes such as race, gender, age, etc.[78] Social construction frameworks can be used to inquire into many different social, inter- and intra-personal forces that give meaning and shape to beliefs and behaviour: the formation and practice of law, science, religion, government, literature, language, the media and markets, as well as psycho-social processes. The methodology assumes nothing about the meaning of sexual practices *a priori*. Social-constructionist approaches do not deny a connection between sexuality and body, but reject the notion that desires are fully explained as emanations of the body and nature. Biology is not unimportant, but is examined alongside cultural questions.

Social construction research draws extensively on gender as a tool of analysis. Its advocates consider that the fact that female sexuality has been invested with many different 'essences' at different times and places (innately lustful and out of control, virginal and essentially passive, etc.) reveals the extent to which the norms and meanings of heterosexuality (and sexuality) are deeply malleable over time and place.[79]

Many governments assert that certain behaviours (sex outside marriage, same sex activity) never arise in their country (a space often conflated with "national culture"). Others, seeking to resist the imposition of Western mores, celebrate the diversity of their sexual and gender practices but refuse to share terms with groups from the West, even when local organisations adopt terms like LGBT themselves. Because so much of heterosexuality is treated as 'beyond examination', many varieties of practices and changes of practice in heterosexual contexts, of girls and women and boys and men, are ignored; or women are picked out as sexually promiscuous betrayers of culture.[80] As noted, arguments over 'what exists here' take place in complicated ways around the world, yet very often the outcome is denial of rights (see Chapter IV).

Political, NGO and scholarly debate is further complicated by the fact that the vocabularies they use in discussions of sex and gender have their origins in different cultural models, characterised as modern, Western, pre-modern, Eastern, Southern, traditional, medical, moral, etc. Each historical period and place tends to have specific, often local ways of identifying the rules that apply to gender and sexuality, and of distinguishing sexually conforming from non-conforming persons. Same sex as well as different sex behaviour arises everywhere; but the practical and social organisation of a person's public identity and life (what some modern naming systems call sexual orientation)

around either hetero or homosexual behaviour is a specific development of the last century.[81] It happens that, after centuries of diverse understandings of what constitutes the sexual being, in the West it is now the gender of the sexual partner that defines sexual identity.[82] Interestingly, Matthew Waites has claimed that 'sexual orientation' was first used in a national law in Canada/Quebec in 1977.[83] The more recent term MSM (men having sex with men) arose initially in a public health context, where it was necessary to devise sexual health messages that did not assume the individuals addressed had a homosexual orientation or one specific sexual identity.[84] In addition, questions arise regarding women who live outside conventional gender and sexual roles. These have scarcely been addressed in human rights discourse, though women are attacked, even killed, because they are alleged to be 'whores', 'butch', 'disgraceful wives', or play other social roles.[85] It is important to remember that when feminists developed gender as a tool for political (not just linguistic) analysis, to investigate the power relationships between women and men, the analytic frameworks that emerged did not always give attention to sexuality.[86] Indeed, feminist analyses of international law acted as if sexuality were absent, rather than noticing that heteronormative assumptions underpin the basis of all law.

Indeed, the idea that 'sexual orientation' is a characteristic that defines a person may make no sense to people who have different cultural systems of naming sexual practices and different ways of linking up sexual acts, reproduction, status and identity. In many cultures, high status men can sexually penetrate both women and lower status men (younger or of a different social group) and be considered masculine.[87] Women in many societies can engage in erotic intimacy with other women under the cover of all-women spaces in traditional societies. Ideas of marriage are similarly historically and culturally specific. Historically, in most societies marriage was converted into a legal status (from a purely social or religious status) at a time when women were not legal persons and their legal consent was subsumed within the husband's status and legal personhood. The notion of marriage as a sacred union between a man and a woman (often dedicated to reproduction) leaves little room for the more modern legal idea of consent to sex, let alone the right to non-procreative sex. Resistance to the introduction of marital rape in law is tied, for this reason, to notions of marriage that consider spouses are fused together in one legal and spiritual entity.

At the same time, much legal work and advocacy on sexuality draws on older, perhaps more comfortable thinking that assumes most people across the world "naturally" have settled identities. The modern, apparently progressive version of this naturalised story is that some people are just 'born gay', as some are just 'born straight', and that women's sexuality is fused with their reproductive capacity. "Natural" models of this sort tend to assume that all human bodies simply produce sex and gender expression; that same sex behaviour automatically equates with a gay identity; that same sex and heterosexual identities and behaviours are clearly distinct (or even that these terms are equally intelligible or meaningful in different local frameworks);[88] and that male and female bodies are organised in a rigid binary system as a matter of biology.[89]

Locally as well a globally, human rights and sexual rights advocates – with their focus on violations of rights, power and agency, consent and identity – are a forceful influence on the formation of contemporary ideas of sexuality. Their approach, especially a rights approach that begins with the principles of non-discrimination, tends to apply this principle to identities and practices that are assumed to be settled and fixed.[90] Thus, NGO advocacy around the Yogyakarta Principles highlights almost exclusively homosexual orientation (a fixed public status) and gender identity.[91] Some advocates are concerned that men are primarily highlighted in this approach. This paper contends that, if advocates were to adopt approaches based on social construction research, they would be more likely to develop forms of advocacy on human rights and sexual rights that take account of the assumptions made when particular social categories are created, adopted or disseminated. Girls and women would become more visible (and would not become visible only as rape victims).

Turning to the second concern around 'naming' and recognition, sexual rights advocates and UN experts often slide between different systems of cultural naming and naturalist approaches. They often use the terms 'gay', 'sexual orientation', 'sexual minority', 'transgender' and 'transsexual' interchangeably to denote members of sexual minorities, despite the fact that each of these terms captures a different experience and engagement with law, and often different forms of abuse.[92] The UN and many NGO advocates leave 'heterosexuality' untouched, as if it were a single set of practices and beliefs, although there is of course a sense that the (binary reinforcing) categories of women and men enjoy different power in 'heterosexuality'. Rape is now recognised to be a gender neutral crime in international law, regarding the harm and abuse it causes to women and men, but most documentation focuses on rape of women, followed by abuse of gender non-conforming men (transgender men and women raped in police detention, for example).[93] By contrast, the rape of heterosexually-identified and gender-normative men in armed conflict, and coerced or negotiated sex by men in prison, remains remarkably under-theorised and unaddressed in most current documentation.[94]

As local claims 'go global', advocates must struggle with how culturally-local practices (for example, men assuming women's roles and identities in specific cultures, as Mak Nyahs do in Malaysia[95] and hijras do in South Asia[96]) are to be described. Do terms like 'gay' or 'transgender' apply? Transgendered persons are often referred to as 'gay' in advocacy reports, even when transgender indicates a gender presentation, not a direction of sexual attraction. Many advocacy groups have faced this problem of analytic confusion. We are still waiting on an authorised translation of a recent advisory opinion from the Nepali Supreme Court to understand its substantive reach: press and NGO advocacy reports have variously asserted that the ruling protects LGBT people, people who are members of something called a 'third sex', people of homosexual orientation and transgendered persons.[97]

In other contexts, advocates have struggled to describe abuses against masculine-acting women. Are the women to be described as lesbian, or gay,

or transgendered? Are abuses to be understood as generated by sexuality or gender when the violence is directed at women trying to live outside marriage and families?[98] Such confusions, and the extraction and separation of identities from their local contexts, raises another difficult question: who is being empowered to claim protection under the various discourses in play? How can advocates of rights – whose capacity to document is limited in the best of circumstances – ensure that they do not contribute to new hierarchies of identity as they interact with complex local struggles for resources, legitimacy and rights?[99]

Globally, advocates wage a difficult and uneven struggle at a global level to win attention and validity for sexual rights claims, alongside emerging identities and dissident social roles (single women's movements, LGBT groups, and so on). Some advocates may not see that integrating the many different strands of sexual rights in a single coherent analysis should be among their highest priorities, in the face of daily emergencies and abuse. Yet the proliferation of acronyms – GBV (gender based violence), SOGI (sexual orientation and gender identity), SRHR (sexual and reproductive health rights) – has begun to obscure the common roots of oppression for each of the named groups. One could argue that the proliferation reveals the degree to which integration is becoming necessary. This paper would argue that advocates need to be able to use relevant terms with precision, which implies careful discussion of the scope of rights engaged by each term. While it may seem trivial or academic to quibble over terms in the face of emergencies, in the interests of effective documentation and sound policies, we need to clarify our terms if we are to address human and sexual rights claims meaningfully. This work could help us focus at the same time on a central component of rights work that is in danger of getting lost entirely: the development of common principles that should guide the state in matters of sexuality. We turn to this issue in the next chapter.

II. SEXUAL RIGHTS IN HUMAN RIGHTS LAW

Historical standards of 'legitimate sex' (reproduction, marriage and claims to morality) in the modern rights age

International human rights law facilitates the state's repressive role in regulating sexual activity and expression. Despite the often-stated concern of human rights advocates with state power, and egregious evidence of abusive, extensive state (and colonial state) regulation of sexual behaviour through criminal law, marriage regulation systems and health codes, international human rights law says very little about the national regulation of sexuality. Very little scholarly work has deconstructed the global historical forces determining the effects of beliefs guided by sexual norms, or the effects of those norms on treaty provisions. Feminist analysts have begun by analysing the impact of the gendered state in international law, but this work does not examine assumptions about sexuality.[100]

Direct state regulation of sexuality (applying law often drawn from religious authority)[101] arises primarily in family and personal status law, health administration, and criminal law. More indirect regulation also operates through citizenship and immigration, housing and inheritance laws. Much colonial legislation was dedicated to sexual (and gender) regulation, especially through marriage and prostitution regulations, which served to stratify and segregate societies racially and in terms of gender.[102] Because de-colonisation struggles frequently confronted or deployed sexual scandals and imagery in their campaigns (issues of sexuality often glossed as control of lust, or promotion of morality or national hygiene), these issues were prominent and notorious in the period when the foundation documents of human rights were drafted.[103] It is not plausible to argue that the drafters had no awareness of sexual issues or sexual laws: laws regulating sex (between 'natives' and colonisers, within groups, as well as same sex behaviour and paid sex) were publicly debated at all levels.[104] However, because international law, including human rights law, is grounded in state-based systems, its evolution has affirmed state or national sovereignty.[105] George Mosse has notably argued that national self-image, respectability and regulation of public morality are closely linked. Informed by this perception, one can understand how international relations attributed to nation states the responsibility of determining how sexuality would be organised.[106] Most but not all sex law was insulated from the reach and criticism of human rights. Exceptions include the condemnation of servile marriages (termed as slavery) and prostitution (often tied to colonial-era laws), which was re-characterised to take account of concerns about transnational trafficking.

When many of the key international human rights instruments were drafted, in most modernising states marriage and reproduction provided the legal and social context for acceptable sexual conduct.[107] At international level, human rights treaties did address some aspects of marriage. Two kinds of human rights standards related to sexuality emerged. One addressed the conditions

of entry into marriage: "marriage must be entered into with the free consent of the intending spouses" (ICESCR, Article 10); or with "the free and full" consent of the intending spouses (ICCPR, Article 23). The other addressed equality within marriage (summarised variously in the 1960s and 1970s as equal rights over children, fertility control and dissolution).[108] The importance of *consent* in human rights and sexual relations (and its restricted scope) was set out early, though it was subsumed within the practice of consenting to marriage. (Consent as a sexual rights question within marriage is still an issue today. See Chapter III, below.)

Non-marital, non-reproductive or non-normative sexuality was not invisible at national level. It was highly visible in criminal law, particularly in laws against prostitution, debauchery, fornication and "crimes against the order of nature" (sometimes conflated with sodomy). Often in response to pressure from colonial authorities or from abroad, colonial and national laws increasingly also addressed servile marriage, child marriage and adultery. At international level, however, sexual activity outside marriage's shadow was not considered as a rights problem in the 1970s and 1980s (i.e. after decolonisation), with the exception of prostitution, which was addressed in standards that dealt with trafficking and prostitution.[109] The CRC, by its terms, seemed to address only child sexual abuse, not affirmative rights for persons under 18 to engage in sexual activity, but recent interpretations have expanded the reach of the CRC.[110] However, those involved in drafting recent human rights standards have faced sharp and explicit resistance to sexual rights. The result has been that sexual rights in the recently signed Convention on the Rights of Persons with Disabilities (CRPD) have been textually subsumed under health and reproduction.[111]

Contemporary sexual rights advocates therefore have available a body of international human rights law that is ill-equipped to deal with issues of sexual diversity, women's claims to sexual rights free of discrimination or stereotype, and the rights of minors in sexuality, except in terms of health or public morals. Until recently, international human rights did not concern itself with under or over-invasive state action with regard to sexual behaviour.

The legacy of the 'public/private divide' also continues to play a troubling role. For many years, legal experts took the view that (with certain exceptions) private life was off-limits to state regulation, and therefore to human rights law. Human rights law was drafted accordingly, and this impeded the ability of many women to protect or claim their rights.[112] Ironically, sexuality outside marriage – sex transacted for money, between trans persons or persons of the same sex, or heterosexual sex outside of marriage – was (and often still is) deemed public. For individuals who engaged in such sex, privacy was no protection; the state had full powers to penalise them.[113]

This inconsistent attitude to privacy, and the narrow morality that informed state regulation of sexuality, contributes to the present lack of coherent thinking about the rules that should govern state interference in sexual conduct.

Consent, gender equality and non-discrimination: new standards of legitimacy for sexual activity?

In the last 40 years, seismic changes have occurred in social understandings of what is acceptable sexuality. In many settings, social acceptance of sexual behaviour has moved from a 'standard of legitimacy' tied to reproduction and marriage,[114] towards a standard that is governed by individual preference and decision. In terms of sexual rights, the standard of legitimacy has also arguably moved in favour of affirming principles of autonomy, consent and non-discrimination. As a normative code that privileges human conscience and liberty, human rights have played an important part in this transformation.[115] More recently, human rights work that focuses on the material and political conditions that enable realisation of rights has also made a crucial contribution to sexual rights by focusing on conditions that enable autonomous decision-making to occur on sexual matters. Nevertheless, this evolution has not been adequately conceptualised: more work needs to be done on the diversity of enabling conditions that differently situated individuals require, as well as the variety of purposes that sexual decision-making needs to address, and more generally the role of the state.[116]

Responding to need, advocacy in support of sexual rights races ahead. Indeed, in the last ten to fifteen years, several elements of a definition of the right to engage in sexual activity have been brought together by NGOs, advocates and scholars, and echoed in some official policy documents.[117] These elements, as reflected in contemporary advocacy, can be synthesised as affirming:

> The equal right of all [adult] persons to consensual sexual activity in private, free of discrimination, coercion, violence and threats to health, and the right to determine what relation such conduct has to reproduction.

A further element is emerging: the right to determine how and if sexual conduct is linked to any relationship or intimacy, including publicly declared relationships.

This synthesised formulation makes explicit an aspect of human rights work which has often had to be inferred from earlier documents: it affirms that each person has the right *to the means* to exercise sexual rights, implying the provision of material conditions and an enabling social and legal framework.[118] This presumes the creation of international policy and funding frameworks (often informed by Article 28 of the Universal Declaration of Human Rights (UDHR)), as well as a local and global social order in which these rights are made possible.

The formulation has several roots. They include 25 year-old judgements by the European Court of Human Rights that condemned criminalisation of same sex sexual behaviour as a violation of protections of private life; Amnesty International's ground-breaking 1991 assertion that individuals should never be criminally detained solely because they had committed homosexual acts

in private with consenting adults;[119] the affirmation of the principle of non-discrimination; and the feminisation of the claim and its emphasis on coercion, which gathered strength at the Beijing Fourth World Conference on Women.[120] Finally, it draws on efforts to link sexual rights with work on global justice and create conditions in which it would become possible for rights to be enjoyed more equitably.[121]

Several core principles and rights are assumed. Among these are: consent; privacy; bodily integrity; equality; (quasi-adult) competency; and enabling conditions. Each of these concepts is densely packed with ideological assumptions, and generates numerous analytical and factual problems. What is consent? To what rights is consent attached? How is consent made, given or received? Should adulthood be the criterion that determines the possession of rights to sexual activity? Are younger people to be considered incomplete rights-holders, and is their erotic activity to be tolerated (and if so, on what conditions)? What does 'in private' imply? What does equality look like with regard to diverse sexual activities, identities and relationships? Although the formulation engages with three of four key areas of sexuality – conduct, identity, relationships – it too avoids tackling the fourth: participatory rights, the right to assert sexual rights publicly and not only 'in private'.

The formulation that appears to be operating today assumes (without elaborating) that certain material and political conditions must be met before consent can be meaningful, and before other aspects of what might be called 'sexual citizenship' can flourish. The idea of 'sexual citizenship' serves to capture the ways in which sexual difference or conformity influences the ability of individuals to participate in political society, or excludes them. It is meant also to suggest that multiple rights need to be fulfilled in order for a person to participate as a full member of his or her local or national polity.[122] It leaves open the question of what positive obligations the state has to create conditions in which sexual diversity and wanted sexual activity can occur. All these matters are still the subject of disputes among human and sexual rights advocates (see Chapter III below).

The term 'sexual citizenship' usefully reminds us that public life is an important domain of rights, including sexual rights. This is not an assertion of a right to take part in public sexual activity; it is an understanding that members of society need to contribute to the meanings their society gives to sexual activity. It is through participation in making meaning, including through rights of expression, association, and assembly, that "citizens", including marginalised people and members of minorities, can influence and enrich law and policy.[123]

Stressing the ability and right of all persons, regardless of sexuality, to participate in creating the legal, political and cultural context that determines the meaning of their sexual activity would assist in developing a conceptual framework that could re-formulate the state's interest in keeping sexuality private. International human rights law famously allows restrictions of expression, association and assembly in certain circumstances, including on grounds of public morality,

to protect the rights of others. A similar set of justifications permit states to limit privacy rights, taking account of necessity, proportionality and effective protection of the rights of others, as well as public morality. Accordingly, an expanded notion of sexual citizenship might help us to re-calibrate the 'rules of civility', as Robert Post terms them, which mediate the boundaries between public and private, and which locally, on grounds of morality, have been so stubborn an obstruction to the diversity of sexual expression.

III. STRUGGLES WITHIN RIGHTS

This chapter examines several disputes regarding advocacy and policy that will affect future efforts to develop sexual rights principles and legal rules. Even if the resistance of some states were to become less fierce, or different communities did not have different priorities, rights advocates would still face major hurdles because they have ideological disagreements. These disagreements contribute to the significant challenges we face in clarifying the meaning of consent in relation to sexual activity, and the notion of capacity to take decisions with regard to sexual conduct and identity, concepts which are closely tied to the justifications for modern state regulation of sexual behaviour and expression. We look at three areas of policy tensions, and at the issue of rights-based approaches (RBA). These four are ideal types more than distinct categories; in practice, there are interactions between them, and assignment to one or another is not straightforward or exclusive.

Some historians and advocates of human rights present the evolution of international standards and jurisprudence as unidirectional and progressive, toward ever more complete rights promotion, in a context of general consent among rights organisations. Others focus on the way that rights and norms have emerged from historically specific needs and interests, and have often been contested.[124] The arguments that follow belong to the second school and view human rights norm creation as a necessarily messy business.

Category A: advocate agreement, formal consensus, political resistance by some states

In the first area, we find issues about which international rights advocates mostly agree and about which they have been able to develop policy positions, but which are contested by a number of states both in speech and in action. This is a classic problem of an emerging human rights norm: at a certain phase, advocates and international experts are very often in advance of international law.

LGBT groups' efforts to register and participate in public life might be described as in this phase of "norm consensus with substantial political resistance". Although there is clear ECtHR case law on the right of LGBT groups to participate in public rallies and marches, a recent court decision in Turkey decided in favour of closing down the Istanbul office of Lambda (a gay/lesbian/bisexual/transgender NGO that works to reduce homophobia, inequality, hate crimes and discrimination) on the grounds of public morality.[125] Other examples might include the claims: that no one should be executed for homo or heterosexual conduct outside marriage; that girls and women should determine when (hetero)sexual activity is associated with reproduction, and should have access to contraception; and that access to emergency contraception and abortion should be available, reflecting principles of sexual freedom and reproductive rights.[126]

At the same time, advocates may also disagree about the application of a broadly agreed norm. The principle of freedom of assembly has been recognised wholeheartedly by advocates of lesbians and gay men, but it is distrusted as a principle for women involved in sex work. (For now, let us leave aside the reality that many people who identify as transgendered or gay are also in sex work.) A case associated with the right of sexually marginalised people to assemble and associate in public illustrates this. In December 2004, women's rights advocates in South Korea publicly split over support for a sex worker demonstration. Even though the women were raising claims of abuse by police and others (a straightforward human rights concern), some advocates argued that the demonstration was fraudulent because it was instigated entirely by brothel owners, not women in prostitution.[127] The dispute had the effect of undermining the right to public assembly of people engaged in sex work.

Category B: incompletely theorised agreements/not fully agreed-on theories[128]

This broad category concerns issues upon which advocates have reached only partial agreement and have developed incompletely reasoned claims. Three examples serve to illustrate: marital rape; the notion of informed consent; and adultery. Significantly, marriage figures in all three. The claim that same sex as well as heterosex couples should be entitled to marry could also fall within this category of cases, since advocates simultaneously seek to equalise and liberalise the ability of individuals to enter into and to leave marriage.[129] The issue of age in the context of sexuality could also be said to fall in the category.

Marital rape and marriage

As Mary John recently remarked, in many modernising contexts, feminist analyses of marriage as an instrument of class, racial, ethnic and religious privilege, as well as a tool of gender power, have been overtaken by the contemporary (market driven) image of the new modern ideal of the "sexy marriage".[130] John's insight is critical to understanding the contemporary global discussions of marriage as a core social institution that both organises sexuality and encodes power relationships. Same sex marriage is progressing as a rights issue[131] as feminists in many different legal and cultural settings are working through their feminist position on marriage in general. Linked to these conversations are questions about the nature of marriage. Does it have a role at the core of sexual activity, or is it irrelevant? If relevant, the modern human rights approach to marital sex will force us to ask what conditions are required for sexual activity.

Most rights advocates agree that national law should not distinguish marital rape from other forms of rape (for example, by defining it as [some form of] coercive sex of a woman by a man not her husband).[132] States (including the Vatican) have at times resisted this demand on the grounds that marriage is a unity

and is defined by the pledge of sexual access (and that under a reproductive standard of sexual activity, penile/vaginal sex that can result in procreation is not a violation of marriage).[133] Human rights advocates condemn this position.

Nevertheless, some aspects of abusive sex in the context of marriage have been incompletely conceptualised. This is evident from some of the reports, policy papers and press statements published by NGOs, which focus on the varieties of circumstance in which sex between married people occurs, but often fail to clarify the legal standard to be applied to problematic sex. Should all sex in marriage that is not mutually-initiated be termed 'rape'? An International Reproductive Rights Research Action Group (IRRRAG) study of married women in seven countries revealed that women engage in complex agreements through sexual activity with their husbands in circumstances where sexual 'service' allows them access to specific privileges or freedoms that their unequal marital status would otherwise not permit.[134] It is unclear how to distinguish these cases from situations where women engage in sex to avoid abuse.

Clearly 'sex-for-privilege' is evidence of inequality and inequity, but should it be prosecuted as a sexual assault crime, as some advocates believe? If not (and in many situations deference to male privilege in marriage makes this criminal response unlikely, albeit for patriarchal as opposed to equality- and liberty-based reasons), how is the occurrence of undesired sex within marriage (and within any long-term relationship) to be addressed in rights terms, especially when relationships are structurally unequal? Sexual health advocates have identified a variety of conditions that correlate with unsafe and unprotected sex; some also argue that forms of sex within marriage which are not mutually initiated should *not* be considered crimes *per se*. It is still not clear what duties states have, either to act in cases of undesired sex, or respond to proposals to criminalise it.

Advocates also struggle to articulate the key components or tests of consent to sexual activity. What criteria should be applied to justify interventions of different kinds, from prosecution to education or other promotional state action? In the regulation of sexual conduct, most legal regimes draw sharp distinctions between different categories of person (those over and under a certain age, those married and unmarried, those who are and are not closely related) and different kinds of behaviour (sex between people of the same or different gender, sex for money or not, sex involving reproduction or not). If advocates argue instead for a standard of legitimacy that privileges decision-making, what borders should be retained and why? Some feminists argue that gender difference itself is a marker that must be patrolled presumptively by criminal law: they believe that sex between women and men outside traditional marriage or without love, is always suspect. Can gender inequality be presumed or must it be proven? Much recent thinking on consent and rape has arisen in the context of war. Do wars create a 'special case' in which lack of consent akin to a crime of assault can be presumed when sexual activity occurs between women and men of opposing sides?[135] What specific evidence should be proffered for proof

of subjective coercion? Should rape be gender-neutral (in the sense that both men and women can be victims and perpetrators of rape)? Some feminists resist such a step too, on the grounds that gender neutrality would mask the use of rape as a tool to subordinate women.[136]

HIV/AIDS adds a further layer. Public health research demonstrates that increased condom use can be achieved by education programmes or programmes that reduce discrimination against people in same sex relationships or in sex work.[137] More than twenty years of health-rights advocacy on HIV suggests that positive incentives and education, rather than prosecution, are most effective in reducing the occurrence of HIV in 'marginalised communities'.[138] Yet, in the context of heterosexual relations, in which one sex, men, are presumed dominant, some advocates believe that gender power differences mean that state penal intervention is required to protect women in sero-discordant couples; and much traditional marriage clearly fails to promote equal or mutual sexual decision-making.[139] Research has demonstrated that a high proportion of women have unprotected sex in circumstances where they are subject to (intimate, family or community) violence; and that in many contexts women cannot choose their marital or sexual partners, or the manner of their sexual activity, in relationships including marriage.[140]

Informed consent

Given these realities, some advocates have begun pressing for what they call a right to '*informed consent*' to sex and marriage.[141] The notion of informed consent is drawn from modern medical practice (the patient/provider relationship) and it is not clear how appropriately it can be applied to sexual behaviour or marriage. Potentially dangerously, it opens the way to state review, and incorrectly suggests that the provision of information alone can correct power imbalances between potential sex partners or spouses. Others advocate for criminalisation of sex without a condom, or invoke informed consent as a standard for safe and protected sex. These approaches are compatible with the position taken by an increasing numbers of states which seek to criminalise the transmission of HIV itself through sex, alternately penalising women and claiming to protect them from non-traditional sex, or sex outside of marriage.[142]

Adultery

Human rights debates about adultery raise different issues, and expose a gap in basic principles justifying state regulation of sexual behaviour. In 2002, the Human Rights Committee's review of Egypt under the ICCPR adopted contradictory positions on the laws regulating adult sexual conduct. With regard to same sex behaviour between men, the HRC promoted *liberty* and called on Egypt to "refrain from penalizing private sexual relations between consenting adults". In the case of men or women having sex outside marriage in Egypt, the Committee focused on *equality* and called for the equal application of criminal penalties.[143]

Following the same line of argument, Pakistan objected (during the May 2008 Universal Periodic Review) to expert recommendations in support of decriminalising adultery and a moratorium or repeal of the death penalty for sexual offences. It argued that these recommendations had no basis in "universally recognized human rights" and were inconsistent with Pakistani beliefs and norms. When it found that the human rights treaties focused only on discrimination (disproportionate punishment of women for adultery compared to men),[144] the Swedish delegation expressed concern at the absence of internationally agreed legal grounds for decriminalising adultery.[145]

At the same time, some women's rights advocates are also in favour of criminalising adultery, as a use of state power to diminish male privilege.[146] Decriminalisation engages more than privacy rights, moreover, because marriage is an institution of the state as well as a contract between private individuals.[147] What interests and rights are implicated as a result? In what circumstances is use of criminal law justified to prosecute adultery: where is the public interest?

Age and sexual activity

Fear of being attacked for promoting sexual conduct among children, or between adults and children, permeates policy and advocacy work on sexuality.[148]

Ironically, international advocates have to contend with the fact that many conservative religious leaders and some states (often seeking to placate religious leaders) resist calls to condemn child sexual activity within marriage, on grounds of tradition. Often the same actors oppose comprehensive education on health or sexuality, which is recommended by the Convention on the Rights of the Child, as well as the notion that a child has rights to sexual activity as opposed to sexual duties in marriage. Conversely, some child rights advocates – in their zeal to end child marriage – promote a reductionist view of 'the child', as though children were equally incapable of sexual engagement at all ages below 18, a posture that may obstruct adolescents in their rights to obtain sexual health and contraceptive services or to engage in sexual activity with one another.[149]

The 2007 Yogyakarta Principles (Article 6) innovate (or equivocate) in this context, by affirming that not only adults but 'all persons over the age of consent' are entitled to exercise sexual activity.[150] However, the Principles decline to set an age standard. The IPPF declaration also recognises the entitlement of adolescents to sexual activity, but sets boundaries on the right to have sex by affirming that 'due regard' must be given to evolving capacities and that there is a special duty to ensure that individuals younger than 18 are not sexually abused.[151] Discussion of minors' sexual activity is often carefully circumscribed by obvious requirements to protect from sexual abuse. The Committee on the Rights of the Child and the ECtHR have accepted that the age at which individuals can give sexual consent is *not* the age at which they

attain adulthood (age 18). The CRC clearly distinguishes age of sexual consent for young persons from the age at which they can legally marry, which the CRC sets at 18. The CRC also states clearly that the age at which individuals can consent to homo and heterosexual activity should not be different.[152]

Sexual abuse of minors tends to be discussed in simple terms – of the abused child – as if there were no differences in capacity between minors at age 5, 9, 15 and 17 years. When they address this complex and sensitive issue, advocacy in relation to policies that restrict harmful adult access to children needs to avoid blocking sexual activity between young people on the verge of adulthood – those just under and just over 18, for example.[153]

Category C: areas of disagreement

On a number of issues, rights activists differ in their views: the disputes between them defy attempts to formulate simple standards or conditions for legitimate sexual activity. Many arise within women's rights advocacy, though one prominent issue – the dispute over prostitution (or sex work) – aligns some feminists with governments who also condemn it.[154]

The standard caricature of this dispute simplistically depicts a clean split between feminists who focus on 'women's perpetual subordination to men', a subordination made manifest in sex, and feminists who adhere to a single-minded belief in 'choice'. In practice, feminist positions are very diverse and cannot be characterised easily. The caricature ignores the complexity of feminist efforts to develop an analysis that will capture the shifting structures of privilege and power that women and men face globally.[155] Its reliance on a metaphor of two extremes also perpetuates the notion of a 'moderate middle' that must split the difference between two extreme views. The absurdity of this characterisation becomes evident if it is applied to other human rights debates: as if pro- or anti-torture arguments would be resolved by 'a little bit of torture'. This paper argues, following Vance and others, that disputes over sex work and prostitution should be separated from arguments about sexual speech and imagery. They are often wrongly conflated[156] and are also often framed simplistically in terms of 'choice and consent versus coercion and abuse'.[157] Such a characterisation is unjust to the many attempts feminists have made to address serious abuses associated with prostitution but to avoid narrowing the options of sex workers, which are already constrained, by suppressing sex work advocacy on ideological grounds. Careful research that has been done on the lives of people in sex work has demonstrated the inadequacy of a simple "consent/abuse" approach.[158]

Prostitution and sex work surfaced as a modern rights question when the crime of trafficking was redefined in the 1990s.[159] As NGOs and states pressed different positions on prostitution, drafters struck a compromise. According to the terms of the final UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, individuals who cross an international border

and are forced or coerced into prostitution (or other forms of labour), by fraud or other abuse, are victims of an international trafficking crime; but ratifying states could choose whether or not to criminalise non-coerced prostitution in their national law.[160]

By exporting its anti-prostitution position, using conditions attached to aid and anti-trafficking grants, the United States government has deepened this dispute. Vague rules, combined with competition for diminishing resources, have undermined cooperation between feminist, health and sex worker groups.[161]

In most countries sex workers have only recently started to organise to denounce abuses, or use human rights language and tactics; and their interventions are often not welcomed by other groups.[162] UN treaty bodies do not have a common position on sex workers' demands for freedom from abuse, safe conditions of work and the right to participate in decisions that concern them. Simultaneously, human rights organisations are increasingly, if tentatively, starting to discuss what a human rights approach to sex work might look like.[163] Many rights groups fear they will face renewed criticism from anti-prostitution NGOs and some governments if they make such discussions public.

Category D: do single sector-focused, rights-based reports undermine sexual rights?

Most human rights reports are tactical. As components of campaigns that seek to influence specific laws or policies, they are researched, drafted and released for specific purposes,[164] and in most cases have a country or regional focus and give attention to specific claimants: women raped in war, gay men facing abuse, women trafficked for forced prostitution, sex workers harassed by police, adolescents denied access to health information, etc. The targeting of such reports, however, reinforces the classification of people and issues as discrete and separate: it is sometimes hard to remember that some sex workers are men or transgendered, that some women are gay, that sometimes heterosexually identified men are raped in war.

Interestingly, the categorisation of claimants may also obscure issues of sexual rights. For example, freedom from sexual assault is a well articulated claim that is also highly gendered, and the resulting absence of analysis has led advocates to treat male-on-male rape in armed conflicts as if it is 'equal to' male-on-female rape. This equation does not assist advocates to formulate a strategy of prevention, because they cannot rely on the argument that before the armed conflict men were 'equal to' women.[165] It tends also to be presumed that homosexual orientation is the only sexual orientation needing a rights analysis. Though this reflects a response to the past failure of human rights organisations to engage with sexual diversity, it is nonetheless problematic. Focusing on the marginal category as the one needing explanation and protection creates two kinds of problem. First, heterosexuality is treated as if it were historically and socially homogeneous. This has the effect of making rights to sexuality

claims less universal and narrows the political space within which they are discussed. Second, advocacy in favour of sexual rights for women and girls has not been undertaken in order to enlarge heterosexual privilege. It is unlikely that achievement of women's rights alone will be sufficient to cause reform of heteronormative institutions such as marriage. Heterosexual men will need to become involved, and to have invested in 'the right' to change and contest heteronormative standards.

Neatly compartmentalising sexual rights issues impedes discussion of how rights can contribute to the dynamic interaction between ideas, identities and practices which generate the diversity of sexual orientation. Such reporting highlights 'special rights claims' but precludes politically coherent analysis of the many social, material and legal conditions in which meaningful sexual decisions and life choices are made. In the absence of such analysis, human rights advocacy can easily be reduced to victim advocacy, and from the perspective of this report (which seeks to develop a broader analysis for understanding human rights claims in relation to sexual freedom, orientation and identity) the effect is constrictive. The focus on specific claimants may be contributing to the strange dissociation of 'gender identity claims' from 'gender-based violence' and sex discrimination claims in advocacy work, which is mentioned above.

Rights-based approaches and health

Rights-based programming on sexuality has become a cornerstone of sexual rights work, because it provides tools for analysing the material or structural and political conditions under which rights can be met effectively.[166] However, health-based approaches are not immune to bias regarding "normal" sexual behaviour and "proper" gender roles. The rights-based components of programmes are often conditioned by their health focus, marginalised in government budgets or distorted by the attachment of inappropriate moral judgements.

As the Special Rapporteur on the right to health has recognised, while health is critical to sexual rights, not all sexual rights fall within health rights.[167] Many activists nevertheless adopt a health focus because it provides a neutral and effective way to mobilise state resources and garner support for sexual rights. Agencies that work on sexual and reproductive health generally treat sexuality and sexual health as 'natural' matters, in relation to which every person deserves protection from violence, coercion, inequality, risk of disease, etc. This approach, while sanitising and removing salaciousness from discussion of sex, simplifies sex too: its diversity, its association with pleasure and its complex relation with power.[168] Moreover, some advocates are concerned that funders push the health approach to sexuality, and support service provision to the exclusion of sexual rights advocacy, out of fear of the contentiousness of such advocacy.

Materials that describe sex work and same sex 'safe sex' have tended to escape this trap of "respectability"; but because they have realistic sexual content, they

are subject to attack by censors of right and left for whom all sexual explicitness is degrading or threatening. In a notorious case in Lucknow, India, police made arrests in a park and then raided an HIV education programme for men who have sex with men. The media reported that the police had raided an NGO office with pornography in its files, and traditional rights groups hesitated to react, fearing they would be condemned for supporting pornography. As Arvind Narrain pointed out, health claims failed to shield health service providers from state persecution for association with 'sexual deviance', yet health advocates, because of their neutral health stance, had not adopted positions that allowed them to challenge the authorities' behaviour in rights terms.[169]

Experiences with school-based sexuality education suggest that it is important to pay attention to the more general ideological orientation of governments when they implement policies in sexuality education. India again provides an illustration: the education materials published by India's National AIDS Control Organization (NACO) show clear gender bias, in suggesting that girls must control the sexual excesses of boys, since girls are naturally chaste and boys are naturally lustful.[170] Elsewhere, United States government-funded education curricula focus on abstinence, condemn same sex behaviour and heterosexual sex outside marriage, and often dispense medically incorrect information.[171] While health-based approaches seem to have a particular capacity to promote *and* repress sexual rights at the same time, all rights-based approaches, including those that call on states to fulfil their responsibility to promote appropriate rights, should be scrutinised to make sure that they dissolve rather than reify sexual hierarchies.

But upon what principles should scrutiny rely?

IV. TOWARDS SOME CONCLUSIONS

This paper has identified some of the policy differences that must still be resolved in the field of sexuality and rights. It suggests that more research and discussion will be needed to move the conversation forward. Chapters I and II discussed the contribution of UN human rights experts, and the overlapping interests of sexual rights and human rights advocates. Nevertheless, both continue to lack experience and language for thinking in a comprehensive and informed way about sex (in terms that are not moralised, naturalised or based on 'folk knowledge'[172]).

There are good reasons to think that 'continuing to form policy as usual' will not easily lead to the adoption by states of adequate and inclusive standards. Where to from here?

THE NEED FOR KEY PRINCIPLES AND LEGAL RULES

Past international treaty body and regional court decisions reveal a mixture of rationales for extending or withholding rights protection with regard to sexual concerns. They are shot through with distrust of sex or assumptions about sexual practices and identities.

Principles of privacy, which are "more elastic than [most other human rights tools]"[173] have been used to address both over-invasive and neglectful behaviour by governments.[174] However, if values that support privacy claims are not made explicit, sexuality can be divorced from social context and its application can be confined narrowly to individuals' physically intimate behaviour.[175] Moreover, the texts of human rights treaties vary quite widely in what they say about privacy rights. A study that compared regional treaties – the African Charter on Human and Peoples' Rights (which includes no guarantee of privacy, although there are some references to privacy in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and the African Charter on the Rights and Welfare of the Child), the American Convention on Human Rights (Article 11), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (which develops more expansive jurisprudence [Article 8]) – with global treaties (the ICCPR, [Article 17], the ICESCR and the CRC, CAT, CEDAW, CERD and CRPD) would be immensely useful.[176]

Rights to expression, and to assembly and association, are not applied often enough to sexuality questions, and their use might advance some contemporary sexual rights issues, especially if an effort were made to expand the notion of protection of private life, personal meaning and decision-making. A problem here is that the public space for discussion of sexual speech, dress and sexual comportment (and the separate but sometimes related question of gender for both women and men) is compromised by the influence of Victorian morality and the values it exported to former colonies. These values find expression

in human rights rulings and have been reinvigorated by some contemporary political groups, who attach them to religious, cultural and nationalist claims.[177]

The various regimes of gender control have similarly repressive effects, and girls and women have different experiences to men and boys. Additionally, specific forms of control regulate inter-sex and transgender expression. So far, however, most analysis and advocacy on gender expression has been transgender linked. It has been separate from work on gender-based violence and discrimination, which has mainly focused on women (as traditionally categorised), in the context of CEDAW and the UN Human Rights Council. There has been little or no combined advocacy or jurisprudence. Yet, any search for coherent policy must address the great differences that exist between gender regimes and their expression in public life. It has been suggested, for example, that francophone countries will need to deal with the specific concepts of *mœurs* and *pudeur* in order to address legal restrictions on sexual expression – in other words, with forms of speech that address *ideas* of sexual difference as well as actions.[178]

Many states, buttressed (or threatened) by emboldened religious authorities in public life, are using morality claims to narrow sexual rights. In this struggle, such newly moralizing discourses reaffirm, for example, that reproduction is the natural and deserved result of (hetero) sexual activity for women, even in the case of rape.[179]

State claims to protect 'religious belief' in public life underpin recent moves to condemn 'defamation of religion'[180] in rights terms, and are visible in attacks on LGBT, sex worker and access-to-abortion groups as 'offensive to public morality'.[181] These developments suggest that the relatively blithe and opaque formulation of the Human Rights Committee in its 1994 views on Toonen v. Australia, which asserted a rights basis for the protection of non-dominant sexualities, might be unlikely to hold in the absence of a more robust justification. The Toonen case famously found that states were not entitled to restrict sexual behaviour 'in private' merely on the grounds that the restriction was necessary to protect public morals.[182] However, Toonen might also be read simply to say that the Committee felt that defence of morality is not a sufficient ground when no other part of the state felt the need to impose such a restriction in order to defend morality; this is a much weaker position. It is also notable that in the Toonen case the Human Rights Committee was not faced with strong state opposition mounted in the name of religion.

Moreover, a 1982 decision of the UN Human Rights Committee (criticised by scholars but never revisited) found that Finland had not committed a violation when it censured homosexual advocacy on television; the Committee accepted the state's concern about harmful effects on minors.[183] While it is unlikely that the Committee would regulate speech in such a sweeping and restrictive way in the future, the arguments it drew on when it considered the protection of morals of young persons (arguments echoed in the European Court of Human Rights 1976 judgement of Handyside) need a modern articulation. This ought to link the rights of young people to health, personal sovereignty and sexual autonomy

as currently understood, with parental rights to guide their children, and should also take account of and affirm the (contested) rights of minorities, including sexual minorities, to participation and expression.[184]

The crucial human rights principle of non-discrimination has had a surprisingly tentative influence on issues of sexual identity and relationship in both international and regional cases and policy.[185]

In reviewing the range of laws governing sex around the world, it appears that there is a general vision of sexuality that assumes that sex must be legitimised by higher goals (marriage, love, procreation).[186] Its influence is clearly revealed when one moves from areas where protection has been granted to areas where it has been denied. The criminalisation of private sado-masochistic sex on grounds of public health (the Spanner case),[187] and the status of sex work (in public or in private) provide two examples.[188] In a 1994 decision that is still cited, the ECtHR upheld restrictions on public life based on *blasphemy* law.[189] Such cases show the relatively fearful understandings of sexuality, disrupted gender roles, and 'public morals' that underpin the rulings and decisions issued by many of the experts and judges operating in the UN and the regional systems.

The European Court's jurisprudence has also revealed an uneasy attitude to sexual information. Two 1976 cases illustrate this. One deferred to state arguments in favour of mandatory sexuality education (judging that it does not violate parents' private life),[190] while the other accepted that comprehensive sexual information might be censored if it went too far.[191] However, some recent ECtHR cases have clarified the issue of public assembly and sexual advocacy in the European system, notably regarding LGBT marches in Poland.[192]

The emergence of new technologies that enable sexual information to be transmitted and commodified across the globe has created further challenges. Feminist analyses, in general, support revisioning the protection of private life, though, as already noted, a number of feminists support some forms of state control over sexual activity.[193] In broad terms, however, the emancipatory dimension of rights has been under-considered in discussions of state regulation of public sexual behaviour. This has partly been due to a bias in favour of focusing on the 'body in private' when considering sexual rights. The strong human rights emphasis on non-discrimination in relation to identities partly accounts for the high degree of attention that is currently given to sexual orientation and gender identity, since these are aspects of sexuality that are claimed to be 'fixed' components of a person, regarding which no difference in legal treatment should be made.[194]

The availability of funding and donor strategies is another factor. As the short discussion in Chapter I notes, differences in rights claims have arisen at times out of advocacy focused on heterosexuals (primarily on behalf of girls and women, and often organised around rape) and advocacy focused on gay identity (often organised around HIV/AIDS): these increasingly seem to prevent close co-operation and may bring the two advocacy streams into tension.

The need for principles of state obligation

Sexual rights work would benefit from a theoretically sound, experience-based examination of principles, which should take account of the following issues.

1. **The rationale for and scope of state regulation of sexuality in public and private life, including the nature of the right of association, and the rights to sexual speech and to publish material with sexual content.**

Past case law, and the current politics of sexuality, would form the basis for identifying standards of legitimacy according to which the state might regulate the expression of sexuality in public. Put another way, by what principles do we limit the expression in sexual matters of the freedom of belief, the right to advocate and the right to information, association and assembly, in ways that take account of gender, sexual difference, race and class positions, and age?

States are permitted to limit the above rights, but only on certain grounds which are generally phrased in the following terms: in conformity with the law; necessary in a democratic society; in the interests of national security or public safety, public order (*ordre public*); the protection of public health or morals; or the protection of the rights and freedoms, and reputations of others (ICCPR, variously Articles 18, 19, 21 and 22). What do these justifications imply for sexual rights, and where should their values or content be challenged?[195]

The use of law and policy to patrol and expel from public life evidence of sexual diversity (ideas, practices and people) has a long tradition.[196] Notably, shifts in advocacy on sexuality, especially concerning women's sexual rights and self-identified LGBT rights, coupled with new mediums for sexual expression (cell phone photography, YouTube, etc.), seem to have generated new practices in a number of states. These repress transgendered bodies and confine expressions of female sexuality that breach modesty norms, and develop new regulations of obscenity and other offences against public taste or morals.[197] Several Special Rapporteurs have called attention to the vagueness of the terms used in national or municipal laws or statutes, such as causing 'offence to the public', public scandal', or 'immoral' activity.

As yet, no comprehensive review exists that assesses the work of treaty bodies in this area. An evaluation of the current norms and principles, against which regulations of sexual expression and conduct can be carried out without penalty, would have great value. It should give serious consideration to national jurisprudence and take account of sex work, sexuality education, sexual and reproductive health related speech, organising, same sex expression and association, and public dress[198] and comportment rules. Such a review could refresh historically limited ideas of public health, order and morality.

The political as well as legal need for a progressive advocacy concerning the grounds on which states can regulate diverse sexuality was made clear in the statement read to the UN General Assembly (UNGA) by Syria on behalf of 57

states in response to the statement on Human Rights and Sexual Orientation and Gender Identity read by Argentina to the UNGA in December 2008, which read "We also reaffirm Article 29 of the Universal Declaration of Human Rights and the right of Member States to enact laws that meet 'just requirements of morality, public order, and the general welfare in a democratic society'".[199] The statement went on to juxtapose the states' 'rights' to enact laws in light of both the need to "devote special attention and resources to protect the family as "the natural and fundamental group unit of society in accordance with Article 16 of the [UDHR]" with the need to ensure that states "…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…".[200]

Public health as a field has changed radically in its embrace of rights and justice concerns, as well as its engagement with sexuality. The justifications for limiting rights on health grounds should be reviewed in light of these advances.[201] Justifications based on public order and public morals need to be reanalysed and given more solid content, not least in relation to issues of sexuality. To the extent that the test for valid limitations includes not only that the restrictions in question are necessary and effective to the stated purpose, but that the goal is valid under the relevant treaty, it will be necessary to return to the basic question: for what purposes is sexuality, including sexual speech and sexual conduct, valid? Moreover, because even non-sexual conduct which threatens gender or sexual norms (hand holding, joining sex worker associations) is often repressed as if it were sexual, the arguments must address non-sexual as well as sexual forms of expression. Whereas few question the importance of traditional freedoms of (political) speech, the earlier sections of this paper suggest that the 'validity' of sexual expression is always suspect.[202] The state needs to be able to show when grounds of limitation can be applied under human rights principles to sexual conduct, speech and behaviour, as well as to non-sexual but sexually dissident expression. It should not be assumed in these arguments that sexual content is *per se* dangerous in the absence of harm.

Determining what the state *must* regulate in private life is an equally vexed question. Demanding that the state intervene to prevent harm to the rights of others has been helpful in a range of cases, especially around rape and sexual assault, but much remains to be done to understand other kinds of harm experienced by diverse people, and ensure that harm is defined by reference to rights (decision-making, equality, participation, and well-being or health) rather than morality, traditional gender norms, or security and safety. In this context, the recent UN Security Council Resolution on Sexual Violence has been welcomed because it signals that the great powers have taken up the issue of sexual harm (against women).[203] Much more work needs to be done, nevertheless, both practically by states to protect the persons most affected,[204] and to formulate an effective policy framework that includes sanctions when these can be useful. Such a policy framework must also draw on other state and civic tools in addition to criminal law, which is often both under-responsive and over-draconian, provides incomplete remedies, and has often proved inequitable, especially across race and class.

The nature of rights to sexual speech/material with sexual content

It would be helpful too to clarify when sexual speech, or material with a sexual content, is 'harmful'. Why is the arousal of sexual interests harmful? In what way is it discriminatory to women? Clearly much pornography is sexist, but how does it compare to other forms of sexism in daily life?[205] Some feminists are convinced that sexualised sexism is worse than other images of gender subordination, but others dispute this claim. In particular, a contemporary analysis would want to examine the extent to which existing national regulation of material with sexual content draws on conservative, historical notions of gender roles, chastity and morality. If sex is not intrinsically harmful but abuse of power is, a rights-based analysis would carefully articulate a notion of harm that would not rely upon or revive gendered or chastity-based criteria for protection.

2. The content of state obligation to facilitate affirmative conditions for exercising diverse sexual conduct, and the details of those conditions; and informational privacy with respect to sexual identity, sexual history, sexual offender laws, HIV status, etc.

A standards-focused way to frame this issue might be: what constitutes the valid operation of consent? By what markers will we know? However, decades of critical race and post-colonial research on the limits of liberal and property-based notions of consent show that it will be necessary to investigate the very distinct conditions that produce meaningful consent.[206] So far this report has only addressed people who are technically free, although very differently situated in regard to state power. However, many women, transpersons and men in custodial situations (prisons, mental health facilities, other places of detention) would find the entire consent discussion irrelevant. In many countries, sexual behaviour in custodial settings, even intimacy on any grounds, is formally an infraction, or a separate crime. At the same time, coercive sexuality, amounting to conditions of slavery, is tolerated by authorities, and legal frameworks often make it next to impossible to assert that violations have occurred.[207] As noted in Chapter IV, it appears that a new standard of 'informed consent'[208] will not deal with the experience of, or the conditions faced by, persons in custody. In relying on information alone to validate consent, such a standard fails to confront power differentials and structural factors that constrain and distort decision-making.

The work on prisoners confirms that it will be essential to focus on enabling conditions and the state's obligation to facilitate autonomous processes of decision-making. Intervention to prevent harm and facilitating enjoyment go together. But, since human rights advocates disagree about when the state should act, more investigation is needed to develop contemporary rules for state intervention. How can sexual rights policies frame the state's obligation to facilitate and respect the rights of people, in all their diversity, including people who have limited agency (who are in prison, for example, or who have developmental or physical disabilities)? A project on the affirmative conditions for consent would need to address these questions, taking account not only

of age, sexual orientation, gender, gender identity and health status, but other axes of discrimination, such as national status. Disability (both developmental and physical), and how it affects the capacity to engage in erotic behaviour, needs separate and careful attention.[209] Yet as Vera Paiva has noted, it is only through analysis of scenarios – contextual studies of sexual practice – that we can avoid simplistic rule-drawing based on acceptable and unacceptable conduct, of the kind that dominates existing sex law. As noted earlier, coercion and constraint are distinctly different ways of understanding and responding, via law and state action, to the factors that limit sexual expression.

Age, as noted earlier, raises a particularly sensitive mix of concerns that needs specific attention. How does a child's evolving capacity as a human being influence a child's capacity to act sexually – and how is this to be understood cross-culturally, and across gender, orientation and other cultural constructs?

Uma Narayan once formulated an ethical principle: the duty not to further constrain persons, whose circumstances are already constrained, by efforts to protect them from abuse. This principle can usefully be applied to work with sex workers, as they devise their own engagement with human rights.[210]

Informational privacy and the notion of 'informed consent' revisited

Individuals have a right to control what information is known about their sexual history, but the right is limited because some aspects of their history may influence their future action, or the actions of others. New laws registering 'sexual offenders' have been passed in many industrialised states;[211] globally, women still struggle to escape being judged against real or imputed past sexual behaviour;[212] and few can compel their sexual partners to disclose their history. Courts and human rights advocates tend to divide over the disclosure of HIV status to sexual partners, for example.

Sexual rights advocates working in feminism, post-colonial theory, anti-racism work and same sex politics, need to establish some basic principles (with regard to what affects the ability of women and men, hetero and same sex, to determine their erotic life), as well as resolve legal questions, about disclosure of information to partners or the general public. To arrive at a point where privacy interests and the principle of non-discrimination can be balanced across a range of state obligations to protect others from harm, NGO advocates, scholars and legal experts will need to create room for exploration, without promise of resolution. What can and should be known? By whom? With what limits?

In this exercise, it will be essential to bring together those working on public health, with LGBT, MSM and feminist groups, to contribute to the criteria for state intervention in this area. With regard to human rights law, key issues would be the justifications for invasions of privacy, and limitations on the state's authority, and the authority of other actors, to invade privacy.

Cautions: the limits of rights

Some human rights principles have specific pertinence to sexuality, and must be stressed in order to make sure that debate over sexual rights does not disintegrate into a number of competitive claims between groups that have different interests.

1. Like all rights, sexual rights are limited by the principle that one can only exercise a right until an action harms another.

Rights are not license; conversely, sexual rights should not be more constrained than other rights. The need to limit entitlement in order to ensure respect for the rights of others is a core value of human rights. While sexual diversity itself is threatening to many in authority, sexual rights do not necessarily destroy all rules, but rather change the rules according to which pressure and support can be applied to limit, suppress or punish behaviour.

Once one accepts that historical standards for sexual harm do not satisfy emerging standards for consensual sexual activity (offending the chastity of a woman in the terms of older humanitarian and national laws, for example, does not amount to a violation of sexual autonomy or integrity), then the key question becomes: how does one identify, and give content to, harms that should set limits on sexual action? This is a new problem to be considered in the human rights framework.

2. Some issues lie outside the scope of rights; sexual rights should not be a new vehicle of state control.

Formal rights work has limits. Each room in the house of sexuality may have its outer walls set by rights and law, but it is furnished and lived in through ethical, aesthetic and personal decisions which are outside the bounds of the state's interest, and outside rights' proper domain. Sexual satisfaction, devotion, even monogamy and fidelity, are properly outside of rights work. Human rights can ensure that, when men or women or trans persons are hurt, abused, exploited, or suffer discrimination, they have equal and equitable remedies available to them and viable options for a range of ways to live. Rights cannot protect us, however, from jealousy, broken hearts or failed marriages.

The right to pleasure is a persuasive "T-shirt right" (a claim on a T-shirt effective for mobilisation, but not always supported in formal rights standards) but ought not to be advanced formally in a law-oriented human rights context. Tastes are too different, the invitation to another authority to ensure sexual satisfaction too evident. The tendency of health-based rights to create regulatory regimes should be emphasised as an important risk in relation to all aspects of this subject.

A new concern is also emerging around state regulations that purport to protect against sexual harm in cyberspace. State interventions that censor or penalise

people who disseminate material with a sexual content need to be monitored carefully, because they can mask the introduction of policies or security laws that violate general privacy rights.[213]

These comments support the case for advancing sexual rights through a new approach: to focus on the right to participate and the notion of 'sexual citizenship' as ways to promote sexual rights and, more broadly, a politics of global and sexual justice.[214]

3. Laws are not equally felt by all people; repressive sexuality law is more likely to harmfully target or ignore the dispossessed.

Poorer people in all countries are disproportionately constrained in their ability to determine their sexual life. They are also particularly affected by policies criminalising sexuality. This reality must inform all consideration of the rules governing state practice on sex. At the same time, the administrative and law-based state itself is often irrelevant to the lives of many people in the global South.[215] How to deal with principles of sexual rights in a way that engages with people and their needs, and not just with legal frameworks?

4. Sexual rights talk simultaneously global and local, but local conversations face different processes of change and different histories.

It is now widely understood that global conversations around human rights are not automatically universal. However, the implication of this with regard to sexual rights needs more careful attention. Sexual rights cannot be treated as just another aspect of global vs. local, or universal vs. cultural specificity. History, and the specific trajectories of change around gender and sex, matter too. For example, women in many countries are simultaneously struggling to challenge the unequal structures of traditional marriage, resisting marketisation of new, contemporary forms of 'companionate marriage', and facing attacks that they advocate same sex marriage. The notion of same sex marriage crosses borders and enters the public debate before local advocates have themselves formulated a claim. How do we have simultaneous conversations globally without inadvertently forestalling the evolution of these questions locally?

Ways forward: focus, audience and need

By outlining the elements of key rules and principles that underlie jurisprudential developments for sexual rights, this paper has identified the need for

- Research to bring together relevant case law and jurisprudence on sexuality – not limited, as current work tends to be, by the claims of particular issues or claimant interests; and
- Specific inquiry into the use of 'public health', 'public order' and 'public morality' tests to promote (or constrain) state intervention in the domain of

sexuality. This work would resemble development of the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, but with diverse and contemporary sexuality as a focus. As already noted, the public health test can be brought up to date. It is less clear that the same can be said of public order, public morals and public security.

Advocates and states are already addressing the issue of sexual rights, but lack a shared analytical framework. Anxiety concerning the subject, coupled with lack of cross-cultural information about sexual practice, has complicated efforts to theorise and develop the foundation for an inclusive rights-based approach to sexuality. New standards for legitimate sexual expression and conduct need to be developed. The state's role in creating the conditions for sexual expression needs to be clarified and integrated with the role of other key actors, such as religious organisations, health institutions, the media and businesses.[216]

While full agreement or even close coordination are neither desirable nor possible, the absence of core agreement – about the nature of sexual harm, the links between sexual and gender expression, the value and danger of state regulation – poses particular problems.

Whatever discussions of this subject occur, the participation of a diverse range of actors will be crucial: across gender, gender identity, age, culture, ethnicity, class, law and other disciplines. Many legal projects are badly conceived or fail because they are not connected to the people most affected by their outcomes: in this case, sex workers, minoritised communities, migrants, people working in sexual health services, as well as those in human rights organisations and government.

This study takes the view that societies and individuals create the meaning of sexuality by political contestation and reflection and experience that change over time and place. It follows that, to develop a coherent, positive and relevant vision of sexual rights, and relate it to human rights, it will be necessary not just to bring together a wide range of participants but ensure they are all committed to working together towards certain principles and practice.

In conclusion, any effort to clarify and deepen conceptual understanding of sexual rights as human rights is a deeply political project. It is political both because of the importance and sensitivity of sexuality and sexual issues, and because this work will help to refashion the relationship between individuals and the state. As noted above, the state is not the only or even the main actor with regard to sexual rights. Nevertheless, where the focus is on formal rights, and on formal law, the state is an essential actor in policy terms, even if the larger understanding is that sexuality takes shape at the intersection of many different social, inter- and intra-personal systems.

In accordance with this understanding, many actors and issues are always in play. It is important to consider the past and the interactions between international and national; and to understand that sexuality is influenced by the history of colonialism, and currently by on-going disputes in international institutions and elsewhere.

Above all, we need to insist on asking ourselves – and others – whether the terms on which we invite states to take action with regard to sex and sexual behaviour support our broader ambition for justice.

ENDNOTES

1 Local work on sexuality and rights requires very careful and deliberate research. Part of the task is to show how local forms of repression or acceptance can be usefully and accurately captured in the discourse of international human rights. Giving careful attention to the tension between local and general understandings of sexuality can assist us to say what is in fact respectful of diversity in a rights project. We return to this question in the Conclusion.

2 Thanks to Stefano Fabeni for this phrase.

3 See e.g. the agenda pursued by the Swiss Initiative to Commemorate the 60th Anniversary of the UDHR – Protecting Dignity: An Agenda for Human Rights, www.udhr60.ch. See also Waldron, 2009.

4 Siegel, 2008; see also note 3 above.

5 Narrain, 2003; see also Miller, 2004. Recent state policies deploy language ostensibly derived from the right of women to be protected from sexual abuse to reinforce policies that 'protect women's dignity'. These policies 'protect' women (in fact, both over-protect in the name of feminism and traditional gender stereotypes, and under-protect out of ideological fidelity, as when law fails to protect from marital rape) from sexual information or deny them the right of movement in public life or across borders.

6 Rubin, 1984, p. 267.

7 A growing literature, both secular and faith-based, is examining and re-examining specific doctrines regarding sexuality in a wide variety of religious traditions. That discussion is beyond the scope of this paper, but some key entry points include: Women Living under Muslim Laws, www.wluml.org/english/about.shtml; Freedman, 1996; Catholics for A Free Choice, www.catholicsforchoice.org; Gudorf, 2001.

8 Rubin, 1984, p. 278. Stefano Fabeni points out that advocates of same sex marriage advance the idea of 'love sanctified by marriage', a notion which in fact suggest that sexual activity without 'love and marriage' is a less worthy form of sexuality. By relying upon the idea that sexuality is 'made good' by love, advocates may be undermining other forms of sexual rights claiming. See Franke, 2008.

9 Vance, 1991. Health is often a step forward for addressing sexuality. See, for example, United Nations Population Information Network, *Report of the International Conference on Population and Development*, 1994, www.un.org/popin/icpd/conference/offeng/poa.html, at paras 7.2 – 7.3: "…It also 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 diseases.... Bearing in mind the above definition, reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents."

10 For a discussion of intra- and cross-cultural development of consensus, see An-Na'im, 1992.

11 See, for example, the resources at Human Rights Tools – Resources for human rights professionals, 2009. For a discussion on how different legal claims demand different kinds of documentation, see Alexander, Freedman, and Miller, 2004.

12 Miller, and Vance, 2004.

13 Richardson, 2000.

14 For a small sampling of recent publications on the status of these claims, see Corrêa, Petchesky, and Parker, 2008; Datta, 2007; Miller, 2000. The sub-set of rights attached to homosexuality is also the subject of reflection on their status as sexual rights: see Kolman, and Waites, 2009.

15 Fried, and Landsberg-Lewis, 1998; Petchesky, 2000, p. 81.

16 A recent publication edited by Parker, Petchesky, and Sember, 2005, strives to show that state policies tend to repress the sexual rights of all individuals. Though the editors highlight a resurgent politics of nationalism as a common motivation for repression, the individual country analyses vary greatly in how much they actually engage with more than one aspect of sexuality. They tend to fall back into talking either about same sex behaviour or sexuality in the context of (heterosexual) women's reproductive health.

17 See Levine, 2002, for a lucid analysis of the way technology amplifies parental and policy-makers' fears of sexual predation in the United States. For an additional historical study, see Freedman, 1987. For a contemporary reflection on meaningfully addressing the South African 'baby rape crisis', see also Moffett, 2003. For a recent example of pornography regulation embedded in national security-based Internet regulations, see Martinson, 2009.

18 Girard, 2005.

19 Miller, 2000; Petchesky, 2000, p. 81; Fried, and Landsberg-Lewis, 1998. See also Saiz, 2004.

20 Saiz, 2004, pp. 66-67. (Internal notes omitted.)

21 Hunt, 2004.

22 Ibid, paras 24-44.

23 For a recent review, see Maticka-Tyndale, and Smylie, 2008.

24 For information about the "Sexual Rights Initiative" (SRI) see www.mulabi.org The Initiative began in 2006, and aims to "create a political space for advocacy on sexual rights by bringing together feminist, LGBT, Southern and Northern perspectives and incorporating diverse views without privileging particular experiences. The collaborating partners are Action Canada for Population and Development (ACPD), Creating Resources for Empowerment in Action (CREA), International Centre for Reproductive Health and Sexual Rights (INCRESE) and *Mulabi Espacio Latinoamericano de Sexualidades y Derechos*. Other organisations, like the Polish Federation for Women and Family Planning, are associated partners.

25 At various times, the right to "sexual autonomy" was used to connote sexual rights. See, for example, www.hrw.org/en/news/2001/10/23/letter-nigerian-president-obasanjo-regarding-womans-sentence-death-stoning.

26 See, for example, Human Rights Watch, 2008d.

27 www.ippf.org/en/Resources/Statements/Sexual+rights+an+IPPF+declaration.htm.

28 Women for Women's Human Rights, www.wwhr.org/musluman_toplumlarda_dayanisma_agi.php.

29 *Campaña por una Convención Interamericana de los Derechos Sexuales y los Derechos Reproductivos*, www.convencion.org.uy/.

30 Ilkkaracan, and Jolly, 2007. See also Cornwall, and Jolly, 2007; Global Rights, 2008.

31 The report by Ilkkaracan, and Jolly, 2007, provides an illustrative compendium of users of the WHO provisional definition of sexual rights (pp. 21-40). A brief Google search reveals that foundations, NGOs and scholars have all invoked the WHO as a promising first step definition.

32 WHO, www.who.int/reproductive-health/gender/sexualhealth.html#4.

33 Ibid.

34 Confidential conversation between the author and a WHO staff member, 15 April 2009.

35 Association for Women's Rights in Development, www.awid.org/eng/Issues-and-Analysis/Library/Where-is-the-money-for-women-s-rights-An-Action-Research-Initiative.

36 Charlesworth, 2005. See also Gender Equality Architecture Reform, http://gear.collectivex.com/main/summary.

37 Sheill, 2009.

38 Available at www.ippf.org/en/Resources/Statements/Sexual+rights+an+IPPF+declaration.htm.

39 Available at www.yogyakartaprinciples.org.

40 For example, see the presentation by Alejandra Sarda referred to in United Nations Office at Geneva, 2008. For a specific critique of the 'gay identity' focus of the Principles, see Waites, 2009.

41 Campaign for a Convention on Sexual and Reproductive Rights, at www.convencion.org.uy/.

42 Some key European Court/Commission of Human Rights cases include: Decriminalisation of same sex sexual activity: Dudgeon v. United Kingdom, Application No. 7525/76, Judgement of 22 October 1981; 1982 4 EHRR 149; Norris v. Ireland, Application No. 10581/83, Judgement of 26 October 1988; Modinos v. Cyprus, Application No. 15070/89, Judgement of 22 April 1993. Social inclusion (military ban on recruitment of homosexuals): Smith and Grady v. United Kingdom, Applications Nos. 33985/96 and 33986/96, Judgement of 27 September 1999; Lustig–Prean and Beckett v. United Kingdom, Application No. 31417/96, Judgement of 27 September 1999. Family rights/child custody, adoption, inheritance (non-discrimination and homosexuality): Salgueiro da Silva Mouta v. Portugal 1999-IX 309 (1999); Fretté v. France, Application No. 36515/97, Judgement of 26 May 2002 (cf. O'Flaherty, and Fisher, 2008, p. 215, on incorrect reasoning in this case not finding discrimination); E.B. v. France, Application No. 43546/02, Judgement of 22 January 2008; Karner v. Austria, Application No. 40016/98, Judgement of 24 July 2003. Non-discrimination, homosex and heterosex, age of consent: Sutherland v. United Kingdom, Application No. 25186/94, Judgement of 1 July 1997; L. and V. v. Austria, Applications nos. 39392/98 and 39829/98, Judgement of 9 January 2003; S.L. v. Austria, Application No. 45330/99, Judgement of 9 January 2003. Transsexual identity rights (affirmative action, privacy rights): Goodwin v. United Kingdom (2002) 35 EHRR 548; I. v. United Kingdom, Application No. 25680/94, Judgement of 11 July 2002. Courtesy of Stefano Fabeni. Note also L. v. Lithuania, Application No. 27527/03, Judgement of 11 September 2007, in which the ECHR produces a slightly different remedy, and the decisions of the European Court of Justice: P. and S. v. Cornwall City Council C-13/94; Grant v. South West Trains Ltd C-249/96 [1998] ECR I-621; (1998) 1 CMLR 993. I am grateful to Stefano Fabeni for directing my attention to the ECHR case of Van Kuck v. Germany, Application no. 35968/97, Judgement of 12 June 2003, on access to reimbursable health care treatments for trans persons; and to the recent ECJ cases of K.B. v. National Health Service Pensions Agency, Secretary of State for Health, United Kingdom C 47/04 (2004) and Tadao Maruko v. Versorgungswerk der deutschen Bühnen (2007) on the rights of transsexuals to marry and receive pensions.

43 In the case of Raquel Martí de Mejía v. Perú, Case 10.970, Decision of 1 March 1996, Report No. 5/96, Annual Report 2000, the Commission accepted that rape was not only a violation of privacy but could amount to torture.

44 A case in relation to a lesbian conjugal prison visit case was brought before the Commission (1999) and advanced through friendly settlement procedure after a Colombian court accepted that prison practice was discriminatory.

45 Karen Atala Riffo v. Chile, Case No. P-1271-04 is currently pending in the court. For more information see National Center for Lesbian Rights, www.nclrights.org/site/PageServer?pagename=issue_families_caseArchive.

46 Curtis Francis Doebbler v. Sudan, Communication No. 236/2000, Sixteenth Activity Report 2002–2004. See also Baderin, 2005.

47 www.hrw.org/en/news/2008/06/05/oas-adopts-resolution-protect-sexual-rights.

48 *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women* (Convention of Belém Do Pará) (1994) 33 ILM 1534; 3 IHRR 232 (1996): www.oas.org/cim/english/convention%20violence%20against%20women.htm. *Protocol to the African Convention on Human and People's Rights on the Rights of Women in Africa*, www.achpr.org/english/_info/women_en.html. *Protocol on the Rights of Women in Africa: An Instrument for Advancing Reproductive and Sexual Rights*, www.reproductiverights.org/worldwide.html.

49 X. and Y. v. Netherlands, Application No. 8978/80, Judgement of 26 March 1985; M.C. v. Bulgaria, Application No. 39272/98, Judgement of 4 December 2003.

50 Aydin v. Turkey, Application No. 23178/94, Judgement of 25 September 1997.

51 C.R. v. United Kingdom, Application No. 20190/92, Judgement of 22 November 1995; S.W. v. United Kingdom, Application No. 20166/92, Judgement of 22 November 1995.

52 The standard of due diligence was set in Velasquez Rodriguez v. Honduras, Series C No. 4, Judgement of 29 July 1988. In 2000, the IACHR applied the standard to domestic violence in the case of Maria da Penha v. Brazil, Case 12.051, Decision of 16 April 2001, Report No. 54/01, Annual Report 2000. It has an opportunity to develop this standard in a US case: see www.aclu.org/womensrights/violence/gonzalesvusa.html. Note that the Commission's reports on Haiti have given attention to sexual violence: see Miller, 2000, pp. 80-81.

53 Key cases include Prosecutor v. Furundzija, Case No. IT-95-17/1,-A, Judgement of 21 July 2000; Prosecutor v. Kunarać, Case No. IT-96-23, Trial Chamber Judgement of 22 February 2001; Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement of 15 July 1999. See Askin, 1997, as well as www.iccwomen.org for updated information.

54 Prosecutor v. Jean Paul Akayesu, ICTR-96-4, Judgement of 2 September 1998.

55 Prosecutor v. Laurent Semanza, ICTR-97-20, Judgement of 15 May 2003. For a theoretical discussion exploring why so few prosecutions for rape in the ICTR have been successful, see Nowrojee, 2005. See also Haffajee, 2006.

56 Glassborow, www.reliefweb.int/rw/RWB.NSF/db900SID/KHII-73M3MA?OpenDocument&rc=1&emid=ACOS-635NQG

57 Clifford, and Ntiryica, 2008.

58 www.iccwomen.org.

59 In particular, see the work of Kelly Dawn Askin and Patricia Viseur Sellers.

60 For an example of a thorough critique (albeit one unfortunately coupled with a slightly inaccurate account of international humanitarian law), see Halley, 2008.

61 See also O'Flaherty, and Fisher, 2008.

62 Center for Reproductive Rights, www.reproductiverights.org/pub_bo_tmb.html.

63 Draft *Jurisprudential Annotations to the Yogyakarta Principles*, on file with author.

64 See, for example, the ICJ compilation of various UN Experts' statements at www.icj.org/news. php3?id_article=4248&lang=en. Though the reports' titles refer to "Sexual

Orientation and Gender Identity", their comments mainly address abuses arising from same sex practices, men selling sex to men, gay identity and transgendered persons, without clear assignment to orientation or identity-based categories. In general, reports which invoke terms such as "Violence Against Women" and "Rape" report many human rights abuses against women, but raise attacks on lesbians only intermittently. See, for example, Amnesty International, 2005.

65 At time of writing, the current CEDAW session is engaging in a discussion with NGOs and internally on how to address lesbian and transwomen under the Convention.

66 See Brennan, 2002, for analysis of the jurisprudence of treaty bodies across thematic areas of information, non-discrimination, bodily integrity, access to health services, orientation and identity issues for heteros and homosex identified women. See also O'Flaherty, and Fisher, 2008, regarding treaty body jurisprudence on sexual orientation and gender identity.

67 Saiz, 2004, pp. 51-54.

68 O'Flaherty, and Fisher, 2008, p. 215. See also Brennan, 2002, and Brennan, 2008.

69 See Brennan, 2008, Chapter 3.

70 These precepts can be derived from the compilations assembled by the ICJ and the Yogyakarta Principles in relation to sexual minorities and for sexual orientation crimes, as well as the materials collected by the Center for Reproductive Rights on sexual and reproductive rights for women.

71 See Miller, and Vance, 2004, pp. 9-11.

72 For example in a 2006 alert, Amnesty International stated that the "UN Human Rights Committee (in the case of Toonen v. Australia) has made clear that treating adultery and fornication as criminal offences does not comply with international human rights standards", Amnesty International, *Death penalty/stoning/IRAN*; AI Index: MDE 13/113/2006 UA 257/06, 28 September 2006. www.amnesty.org/en/library/asset/MDE13/113/2006/en/2ee6af68-f774-11dd-8fd7-f57af21896e1/mde131132006en.pdf.

73 Girard describes many of the attacks at the UN, see Girard, 2005, pp. 341-355.

74 These arguments are made by, among others: Dottridge, 2008; Marshall, and Thatun, 2005.

75 This section draws heavily from a paper drafted by the author for the Yogyakarta Principles drafting meeting November 2007. At file with author. It includes a glossary of terms.

76 Gruskin, 2002.

77 Human Rights Watch, 2004; Massad, 2007; Long, 2009.

78 Among the many key theorists (publishing in English) developing this work, in addition to the much cited Foucault, are McIntosh, 1996; Weeks, 1986; Katz, 2007; Vance, 1991.

79 Feminists have explored historical and contemporary societies all over the world, exposing the social, religious, economic and legal rules around the behaviours of people identified as male and female, often using over-simplistic connections to biology. Contrast Vance, 1991.

80 Rothschild, Long, and Fried, 2005.

81 See the works of Michel Foucault, specifically Foucault, 1978. See also Weeks, 1986.

82 See Katz, 2007, pp. 1-19.

83 Waites, 2009, pp. 143-144.

84 Meyer, and Young, 2005.

85 For example, see Mufweba, 2003. These and other cases are under investigation by numerous scholars and human rights NGOs, to understand how, for many girls and women today, gender and sexuality are being 'patrolled' by violence.

86 Corrêa, and Petchesky, 1994.

87 See Parker, 1999; Lancaster, 1992. For more recent discussions of sexual diversity, non-conforming gender identities and sexual roles, see Corrêa, Parker, and Petchesky, 2008.

88 Thanks to Carole S. Vance for her careful elucidation of these points.

89 Some gay, lesbian and transgender advocates are uncomfortable with 'social construction' theories. They rely, instead, on the claim that sexual difference is in-born, and that discrimination on the basis of sexuality effectively punishes someone for an attribute of birth. See Stein, 2006, and Mertus, 2007.

90 Carl Stychin raised this concern early and consistently, as Mathew Waites points out in Waites, 2009, p. 146.

91 Miller, and Vance, 2004. See also Waites, 2009.

92 See the ICJ compilation.

93 Committee Against Torture, *Conclusions and recommendations: United States of America*, (2006) UN Doc. CAT/C/USA/CO/2 www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.USA.CO.2.En?Opendocument.

94 For research on the rape of men in armed conflict, see Oosterhoff, Zwanikken, and Ketting, 2004. For an example of documentation of rape in prison, see Human Rights Watch, 2001.

95 Slamah, 2005.

96 Peoples Union for Civil Liberties – Karnataka, http://ai.eecs.umich.edu/people/conway/TS/PUCL/PUCL%20Report.html.

97 Diwas, 2008.

98 For an investigation into diverse women's identities and roles, see Long, 2003.

99 Thanks to Stefano Fabeni for this point.

100 Gender-equality legal analysis has dominated human rights and international law analyses. See, for example, Charlesworth, Chinkin, and Wright, 1991. However, neither feminist nor queer theory has done sufficient sexuality-focused work on the nature of the state in the context of international law, an issue that lies at the centre of international human rights law's engagement with sexuality. For an early critique of simplified work on privacy, see Engle, 1993.

101 This is obviously a vast literature. Some provocative entry points are: Altman, 2001; Mernissi, 1987; Freedman, 1995.

102 For an introduction to this literature, see Phillips, 2004; Manderson, and Jolly, 1997; and Stoler, 2002.

103 Mani, 1990.

104 Ibid. See also the analysis presented by Phillips, 2004, and Stoler, 2002, in their articles on sexuality and nationalism and colonial struggles, and the recently released report by Human Rights Watch, 2008c.

105 Falk, Rajagopal, and Stevens, 2008.

106 See analyses on respectability and nation-building in Mosse, 1985. For general analyses of national politics of sexual respectability and power in Southern Africa, see the work of Phillips, 2004; with respect to Central and Eastern Europe, see Lambevski, 1999.

107 Freedman, Miller, and Alexander, 2004, pp. 7-9.

108 The United Nations 1956 *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* addressed servile forms of marriage, one of the rare early moments of direct international legal intervention into the domestic law of marriage.

109 Scully, 2001, pp. 74-106; Reanda, 1991.

110 Miller, 2000, p. 78; Miller, and Schleiffer, 2008, p. 34.

111 See, for example, the debate over sexual and reproductive rights in the *Convention on the Rights of Persons with Disabilities*, reflected in the letters of the Women's Rights Division of Human Rights Watch.

112 Sullivan, 1995, pp. 126-134.

113 Long, 1998.

114 The term 'standard of legitimacy' is taken from Carole S. Vance's body of work on sexuality.

115 Siegel, 2008, pp. 1736-1737, canvasses three aspects of dignity that underpin rights claims grounded in dignity (dignity as life, dignity as liberty, and dignity as equality). She also notes that dignity can constrain sexuality, referring to the work of Franke, 2004; and Warner, 1999 in particular.

116 Miller, 2004, pp. 31-35. See also University of Sussex Institute of Development Studies BRIDGE Project, www.bridge.ids.ac.uk/index.html.

117 Sites of inquiry for this claim include: the publications and material of the Sexual Rights Initiative, Amnesty International, the Women's Rights, HIV/AIDS and LGBT Divisions of Human Rights Watch publications, and on-line materials and publications by the International Gay and Lesbian Human Rights Commission, the International Planned Parenthood Federation, the Latin American and Caribbean Committee for the Defense of Women's Rights, the International Women's Health Coalition, the International Center for Research on Women, and the Egyptian Initiative for Personal Rights.

118 See, for example, the preamble and principles of the IPPF "Declaration on Sexual Rights" at www.ippf.org/en/Resources/Statements/Sexual+rights+an+IPPF+declaration.htm, and Ilkkaracan, and Jolly, 2007. The invocation by the Special Rapporteur on the right to health of the importance of the Millennium Development Goals falls into this category: see Hunt, 2004, para. 8.

119 Amnesty International, 1994.

120 The full text of paragraph 96 of the Platform of Action of the Fourth World Conference on Women in Beijing reads: "The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behaviour and its consequences." www.un.org/womenwatch/daw/beijing/platform/health.htm.

121 See University of Sussex Institute of Development Studies BRIDGE Project www.bridge.ids.ac.uk/index.html.

122 Waites, 1999. See also Richardson, 2000. Recent scholarship has suggested that the concept of 'sexual citizenship' has been overused, stretched too far beyond its meaningful role in describing actual capacities of persons in current polities. For example, see Wilson, 2009.

123 Article 2 of the IPPF "Declaration on Sexual Rights", which focuses on participation. Available at www.ippf.org/en/Resources/Statements/Sexual+rights+an+IPPF+declaration.htm. The early drafters, of which the author was one, sought to bring attention to this key aspect of rights by means of an early and strong placement.

124 For an indictment of the too-rosy theory of rights norms evolution, see wa Matua, 1996 or wa Matua, 2000. For a response, see Rosenblum, 2001.

125 Human Rights Watch, 2008b.

126 An emerging norm, that abortion must be made available as part of a response to sexual assault, can be seen in the work of several NGOs and is reflected in Article 14 of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, www.achpr.org/english/_info/women_en.html. For an optimistic analysis of the Protocol (which does not address its lack of explicit support for sexual diversity, or the rights of stigmatised women such as sex workers) see www.reproductiverights.org/sites/default/files/documents/pub_bp_africa.pdf.

127 Cheng, 2004.

128 Sunstein, 1996.

129 The Yogyakarta Principles do not suppose that current international law supports same sex marriage. See also Saiz, 2004.

130 Remarks on the panel on the Sexual Geography of Post-Colonial Asia, 2009 IASSCS Conference *Contested Innocence: Sexual agency in public and private space*, Hanoi, Vietnam, 15 to 18 April 2009, www.iasscspayment.org/IASSCSconf/index.aspx.

131 Among the extensive literature, see Merin, 2002; Waaldjik, 2004; Waaldijk, 2001.

132 See, for example, the Indian *Penal Code*, para. 375.

133 Malkin, and Thompson, 2005.

134 Petchesky, and Judd, 1998.

135 As summarised by Amnesty International in its Campaign Guide *Stop violence against women: How to use international criminal law to campaign for gender-sensitive law reform*, the ICTY has viewed rape as a violation of sexual autonomy and noted that such autonomy is "violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant": in Prosecutor v. Kunarać, Case No. IT-96-23, Trial Chamber Judgement of 22 February 2001, affirmed on appeal in Prosecutor v. Kunarać, Case No. IT-96-23, Appeals Chamber Judgement of 12 June 2002. See paragraphs 398, 409, and 398, which note that several national jurisdictions have included circumstances such as that "the victim was put in a state of being unable to resist, was particularly vulnerable or incapable of resisting because of physical or mental incapacity, or was induced into the act by surprise or misrepresentation". See also information in paras 401 and 404 which indicate that the victim was a minor. See also: Engle, 2005.

136 Miller, and Fabeni, 2006, pp. 93-129. See also the Masters dissertation of Sukthankar, 2002, on file with the author.

137 Memorandum of Law of AIDS Action and 21 Other Public Health Organizations for Preliminary Injunction and Summary Relief, filed in support of the plaintiff OSI, 15 November 2005 at www.genderhealth.org/loyaltyoath.php?TOPIC=PRG.

138 Parker, 1996.

139 Carillo, 2007.

140 Vance, 2001. Note, however, that a study of inter-generational, transactional sex in Africa found that girls could initially determine their sexual partners but, once in the relationship, could not determine its forms or insist on condom use. Luke, and Kurtz, 2002.

141 The UK law on 'forced marriage' has this formulation. Dostrovsky, Cook, and Gagnon, 2007. During a discussion of experts convened by the ICHRP in Kampala in May 2008, it was clear that advocates are split about whether making 'forced marriage' a special crime in the ad hoc tribunals is useful to women.

142 Human Rights Watch, "Open civil society letter to the participants of the 'Capacity building workshop on human rights and gender in HIV legal frameworks'", Human Rights Watch, 15 April 2008, www.athenanetwork.org/docs/Final_human_rights_statement_Dakar_workshop_Apri_2008.pdf. See also Burris, Cameron, and Clayton, 2008.

143 Miller, and Vance, 2004.

144 Ibid.

145 E-mail from Alejandra Sarda-Chandiramani, Mulabi Sexual Rights Initiative, 13 May 2008. Ms Sarda-Chandiramani opines: "...the problem persists because there is nothing in international HR law that says that adultery should not be a crime – while there is a very clear argument for consensual sex between unmarried people of the same sex, and that element makes the whole thing quite interesting as it is not actually "heterosexuality" the institution that is being protected here but "marriage"...."

146 In the author's experience, many NGOs and advocates are in favour of adultery laws to constrain men. A sexual rights group in Taiwan has specifically adopted this approach: see Ho, 2007. Also see Sai-hun, 2008.

147 *Goodridge v. Dept. of Public Health*, SJC-08860, 440 Mass. 309, 798 N.E. 2d 941 (2003), makes this argument in the context of same sex marriage.

148 Indeed, one reviewer agreed that child abuse and child marriage should be placed in this section, but that the question of adolescent sexual autonomy and capacity to act belonged in Category C (Areas of Disagreement). The issue of age is an explosive one, especially in the context of sexual non-conformity. In 1994 the International Lesbian and Gay Association (ILGA) had its hard-won UN consultative status revoked on the grounds that the North American Man-Boy Love Association was among ILGA's hundreds of member groups. The revocation was affirmed even though ILGA policy affirmed that sexual expression should protect the rights and interests of others.

149 See Mertus, 2007.

150 See, for example, Principle 4 (The Right to Life), of the Yogyakarta Principles.

151 Principle 2 and Articles 1, 2 and 4 of the IPPF "Declaration of Sexual Rights". Several commentators advance the promotion of the 'evolving capacity of the child', as a way through this problem. See Lansdown, 2005. Lansdown has argued that absolute age rules make no sense, because of different cultural determinations of children's capacity in different societies. She proposes a nuanced formulation, which accepts that children's capacities can differ according to the rights to be exercised: this permits appropriate respect to be granted to children's agency but does not expose them prematurely to full responsibilities. She does not apply this to sexual activity.

152 Committee on the Rights of the Child, *Concluding Observations: Austria*, (1999) UN Doc. CRC/C/15/Add.98; see also Council of Europe, L. and V. v. Austria, Applications nos. 39392/98 and 39829/98, Judgement of 9 January 2003, and S.L. v. Austria, Application No. 45330/99, Judgement of 9 January 2003.

153 See, for example, Waites, 2009.

154 For a comparison of the hyper-visibility of sexual harm with underwhelming practical interventions in other areas, see Miller, 2004, pp.17-47.

155 Kempadoo, 2005; Abrams, 1995.

156 For an analysis in the Indian context, see Ghosh, 2004.

157 See, for example, Barry, 1979. As a number of rights advocates (including Sunila Abeyesekeera, Ratna Kapur and Meena Seshu) have recently noted, the choice/

coercion trope has been re-invented as a metaphor of the difference between global North and South, with 'brown women' always understood to be already coerced. See also Shah, 2006; and Doezema, 1998.

158 See Brennan, 2004, and Cheng, 2010. Most legal research has also focused on an ideological or analytical examination of the meaning of legal frameworks. However, see Mossman, 2007.

159 Gallagher, 2001; Jordan, 2002.

160 For a clear discussion of these issues, see ibid. See the *UN Convention on Organised Transnational Crime*, the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, and the *Protocol against the Smuggling of Migrants by Land, Sea and Air*, all adopted in 2000.

161 See, for example, the OSI Sexual Health and Rights Project, www.soros.org/initiatives/health/focus/sharp/events/pledge_2007. Some well-known women's rights NGOs, such as Equality Now, actively support the United States government's conditionality policies on prostitution; see www.genderhealth.org/loyaltyoath.php. The Women's Network for Unity (WNU), a group of sex workers who work to empower vulnerable women and who are involved in the reduction of the spread of HIV/AIDS, works in close collaboration with the Cambodian Prostitutes Union (CPU) and Cambodian Men, Women Network for Development (CMNWD), to campaign for the repeal of the recently passed Cambodian *Law on Suppression of Human Trafficking and Sexual Exploitation*.

162 See for example, the statement of Raven Bowe, PACE/Vancouver, in Miller, 2006.

163 Amnesty International and Human Rights Watch currently take 'neutral' positions on prostitution, though Human Rights Watch is considering a new policy. IGLHRC supports sex workers' rights. See Dorf, 2006.

164 Cohen, 1995.

165 For an early and rare report on male male rape in armed conflict, see Oosterhoff, Zwanikken, and Ketting, 2004.

166 For general statements of this principle, see University of Sussex Institute of Development Studies BRIDGE Project www.bridge.ids.ac.uk/index.html; Miller, 2000; and Cohen, 2008.

167 Hunt, 2004, para. 15.

168 A few advocacy programmes publicly engage with the 'messiness' of sexual relations, and the negotiations and incommensurate desires that occur between partners, especially heterosexual couples. The scholarly (non-rights) literature captures the complexity a little better. Talking About Reproductive and Sexual Health Issues (TARSHI) in Delhi is an exception to this approach: www.tarshi.net. The 1998 publication by the International Reproductive Rights Research Action Group (IRRRAG), *Negotiating Reproductive Rights*, also dealt frankly with changing desire, marital negotiation and manoeuvring and strategies for survival. Conversely, a recent ICRW report, while tackling an important and sensitive subject, displays more reductionist tendencies: Sunstein, 2008.

169 Narrain, 2004.

170 Committee on the Rights of the Child, *General Comment No. 3 – HIV/AIDS and the rights of the child* (2003), UN Doc. CRC/GC/2003/1; Committee on the Rights of the Child, *General Comment No. 4 – Adolescent health and development in the context of the Convention on the Rights of the Child* (2003), UN Doc. CRC/GC/2003/4. Critiques of the NACO-UNICEF education materials focus on a number of different issues. Some advocates raised concerns that materials were too gender normative, while others claimed they would destroy Indian culture. Contrast National Center for

Lesbian Rights, 2008, and see National Center for Lesbian Rights, 2007. Thanks to Sandriya Bandrinath and Abigail Ziv for drawing this to my attention.

171 Miller, and Schleiffer, 2008.

172 'Folk knowledge', Vance explains, dominates much sex law and policy: Vance, 1984. 'Folk knowledge' is often on display in UN and NGO settings, when people who are expert on one aspect of rights opine on the complexities of sexual practice, often based on their own subjective experience and without reference to critical or scholarly literature. For example, an otherwise well-regarded Special Rapporteur asked women talking about sexual rights how "lesbians can have sex if they don't have a penis". This anecdote was told to the author by a rights advocate in March 2005. Similarly, judges have opined that rape stories of men were incredible because, to their (folk) knowledge, men would never rape other men. See Miller, 2005.

173 Clapham, and Marks, 2005.

174 Ibid.

175 For an analysis that links expressive autonomy to both privacy and expression rights, see Katyal, 2006. See also Jakobsen, 2004.

176 The Icelandic Human Rights Centre has begun a jurisprudence-based analysis of these provisions, which can support one aspect of this work. This effort would benefit from being brought together with the specific challenges arising from complex sexuality, see www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/comparativeanalysis/therighttorespect. Theories of inter-sectionality require us to understand how the different axes of age, race gender and disability work, and whether the work of treaty bodies helps or harms this effort in the context of sexuality.

177 For a discussion of the politics of sexuality at the UN, see Girard, 2005.

178 Thanks to Stefano Fabeni for flagging this issue in his comments to this draft.

179 Three 2008 cases that concerned the rape of young women in Eastern and Central Europe reveal this construction. See www.astra.org.pl. Wanda Nowicka analyses the ideology in Poland that "pregnancy is a just result, even punishment for sex by women", in Nowicka, 2007.

180 For a traditional human rights groups' condemnation of recent debates on religion at the UN Human Rights Council, see www.article19.org/pdfs/press/hrc-resolution-passed.pdf. Debates among advocates in Muslim and Catholic countries suggest we need a more sophisticated account of the strategies and ideological claims of both the Organisation of the Islamic Conference and the Holy See.

181 See, for example, Sunstein, 2008.

182 Toonen v. Australia, Communication No. 488/1992, Views of 31 March 1994.

183 Leo R. Hertzberg, et al v. Finland, Communication No. 61/1979, Views of 2 April 1982.

184 In this context, sexual rights advocates would benefit from carefully analysing the arguments advanced around deference to claims of 'national morality' and national secularity/solidarity. These are currently being contested in expression and non-discrimination cases before the ECHR in France and Turkey. To follow the debate, see http://opiniojuris.org/author/karima-bennoune. Also, see Danchin, 2008; Bennoune, 2007. Advocates should also attend to the implications of the various arguments for and against the new claims made in the Human Rights Council on defamation of religion.

185 Saiz, 2004, pp. 62-64.

186 The author is part of a multi-person research team convened by WHO to gather information on international, regional and national laws governing sexuality (behaviour, expression, institutions such as marriage, etc.). For a description of the panel, see abstracts for Abrams, 2009.

187 Laskey, Jaggard and Brown v. United Kingdom, Applications Nos. 21627/93, 21826/93, 21826/93 and 21974/93, Judgement of 19 February 1997.

188 *Aldona Malgorzata Jany and others v. Staatssecretaris van Justitie (The Netherlands)* European Court of Justice, 2001 was decided on grounds that prostitution was a service; a recent South African decision refused to strike down prostitution provisions on grounds of either unjustifiable interference with privacy or discrimination. See *S. v. Jordan and Others*, 2002 (1) SACR 17 (T).

189 Otto-Preminger-Institut v. Austria, Application No. 13470/87, Judgement of 20 September 1994. Interestingly this case about public decency and respect for religion arose in Catholic Austria concerned a film that sexualised Christian heavenly judgement. Article 19 filed an amicus brief thoroughly detailing the *trend away from* criminal restraint based on 'offense to religious feelings/public decency'. The brief revealed the extent to which sexually-informed images dominated art that ridiculed Christian religious authorities, www.article19.org/pdfs/cases/austria-case-of-otto-preminger-v.-austria.pdf.

190 Kjeldson, Busk, Madsen, and Pederson v. Denmark, Application Nos. 5095/71, 5920/72, 5926/72, Judgement of 7 December 1976.

191 Handyside v. the United Kingdom, Application No. 5493/72, Judgement of 7 December 1976.

192 Bączkowski and others v. Poland, Application No. 1543/06, Judgement of 3 May 2007.

193 Halley, Kotiswaran, Shamir, and Thomas, 2006.

194 For an example of this logic, applied to justify a new convention on sexual orientation non-discrimination, see Heinze, 1995.

195 Interestingly, the Yogyakarta Principles attempt to remedy the problem of uncertain content by using the principle of non-discrimination to circumscribe the 'clawbacks'. The Principles propose that states must "ensure that notions of public order, public morality, public health and public security are not employed to restrict any exercise of the rights [to peaceful assembly or association] solely on the basis that it affirms diverse sexual orientations or gender identities", or to restrict the right to freedom of expression "in a discriminatory manner" (Yogyakarta Principles 19 and 20). The IPPF "Declaration of Sexual Rights" accepts this frame as well, but ducks the question "what is the underlying basis of justification?". If morals/health/order justifications result in standards that are too restrictive across the board, the problem is not cured by prohibiting discrimination. This discussion incorporates the views of practitioners from a variety of fields: sexuality theorists, traditional rights and state power scholars, feminists and post-colonial studies approaches to state power, etc. See Bamforth, 1997.

196 See the discussion by Scott Long tying together Egyptian state repression of men having sex with men with French regulation of the prostitute in Long, 2004.

197 Recent NGO alerts highlight the many moral imperatives that states claim when they publicly regulate sexual or gender expression. They include: to secure women's protection and prevent women's sexual excess; and to restrain men from discarding their (privileged but tightly patrolled) masculinity. See also Katjasungkana, 2009. BAOBAB for Women's Human Rights and the network Women Living Under Muslim Laws have called attention to the Nigerian *Bill for an Act to Prohibit and Punish Public Nudity, Sexual Intimidation and Other Related Offences in Nigeria*, which they describe as "an attempt to set a subjective standard to determine personal

dressing and to criminalize and penalize offenders… clearly discriminatory against women…. In addition to legislating on morality which is distinct from law, it provides an expansive definition of public nudity beyond its ordinary meaning, overlooking the diverse cultural and belief systems in Nigeria.... We are concerned that this will essentially invite the police to invade not only individuals' personal lives but to also intrude upon women's bodies." Kuwait adopted a law targeting transgender people on 10 December 2007 that criminalised "imitat[ing] the appearance of the opposite sex". Human Rights Watch claimed the law violated both freedom of expression and personal autonomy; see Human Rights Watch, 2008a.

198 Principle 19, Yogyakarta Principles; Article 6, IPPF "Declaration of Sexual Rights".

199 Statement dated 18 December 2008 by the Permanent Representatives of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the United Nations, addressed to the President of the General Assembly. UN Doc. A/63/635 (2008).

200 Statement dated 18 December 2008 by the Permanent Representative of Syria in response to the statement on sexual orientation and gender identity, www.ishr.ch/index.php?option=com_docman&task=doc_ download&Itemid=&gid=307.

201 For examples of implicit re-visioning of 'public health' as an empowering or constraining force in the context of sexuality, see the amicus brief filed by AIDS Actions, on behalf of 25 other public health organisations and experts in support of the plaintiff, *DKT International Inc. v. United States Agency for International Development*, United States District Court for the District of Columbia, No. 06-5225. For a discussion of public health and citizenship, see also Berkman, Garcia, Muñoz-Laboy, Paiva, and Parker, 2005.

202 The most recent debates on this question arise in the context of the "Danish Cartoon case" and the traditional question of the limits of political speech. See Cerone, 2006.

203 United Nations Security Council Resolution 1325 (2000) on Women, Peace and Security, UN Doc. S/Res/1325 (2000), www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/S.RES.1325(2000).En?Opendocument.

204 Critical commentary has begun: see Kinoti, 2008.

205 See Ghosh, 2004 for a perspective on the politics of censorship in the developing world, in this case India. For an interesting US analysis of sexual speech and violence against women, see Hunter, and Law, 1987-1988. Vance, and Snitow, 1984; Duggan, Hunter, and Vance, 1985.

206 The 'limits of consent' literature is vast and ranges across national cultures and many legal systems. For an interesting approach that raises human rights and sex questions that are similar to this study, see Waites, 2005.

207 Miller, 2009. See also Human Rights Watch, 2001; Gear, 2007; Smith, 2006.

208 'Informed consent' derives from a medical model. It is a standard ethical baseline for the provision of health services or for engaging in research, premised on giving information about a treatment or project such that the patient/research subject can exercise her rights of decision through meaningful evaluation of the risks, benefits and alternatives. For a comparison of ethics and rights on consent, among other questions, see Chris Beyrer, and Kass, 2003. It has arisen in indigenous peoples' claims as the standard of review for participatory decision-making over use of resources: Department of Public Information, "United Nations Forum Calls for 'Free, Prior and Informed Consent' by Indigenous Peoples for Projects on their Lands…" United Nations Economic and Social Council (2007), www.un.org/News/Press/docs/2007/hr4926.doc.htm. It has also been used as the standard for decision-making for sexual activity (in the context of HIV) and marriage. The UK law on 'forced marriage' has shifted from the ICCPR standard of 'full and free' consent (Article

23) to an 'informed consent' standard. For a compilation of standards on 'forced marriage' which suggests that rigorous global research involving knowledgeable actors is needed, see the report by Dostrovsky, Cook, and Gagnon, 2007.

209 There is a growing literature on physical disability and sexuality. See, for example, Shakespeare, Gillespie-Sells, and Davies, 1996; and the various Disability Studies websites: www.leeds.ac.uk/disability-studies/archiveuk; www.law.syr.edu/lawlibrary/electronic/humanrights.aspx. By contrast, little global research on *developmental* disability and sexuality is visible.

210 See, for example, Miller, 2006.

211 Human Rights Watch, 2007.

212 Rothschild, Long, and Fried, 2005.

213 The Electronic Frontier Foundation at www.eff.org has begun work on this question. The ICHRP is preparing a report on information gathering technologies, privacy and human rights: www.ichrp.org/en/projects/132.

214 As Stefano Fabeni puts it: "the notion of social justice as applied to sexual rights."

215 Key Human Rights Issues, remarks to the 11th Meeting of the International Council of the International Council on Human Rights Policy, Kampala, Uganda, 9 May 2008.

216 A project that analysed the documentation and advocacy reports on sexual rights abuses that rights-oriented organisations have produced could be an extremely productive project, complementing the focus of this paper.

CASES

African commission on human and people's rights

Curtis Francis Doebbler v. Sudan, Communication No. 236/2000, Sixteenth Activity Report 2002–2004.

European court of human rights

Aydin v. Turkey, Application No. 23178/94, Judgement of 25 September 1997.

Bączkowski and others v. Poland, Application No. 1543/06, Judgement of 3 May 2007.

C.R. v. United Kingdom, Application No. 20190/92, Judgement of 22 November 1995.

Dudgeon v. United Kingdom, Application No. 7525/76, Judgement of 22 October 1981.

E.B. v. France, Application No. 43546/02, Judgement of 22 January 2008.

Fretté v. France, Application No. 36515/97, Judgement of 26 May 2002.

Goodwin (Christine) v. the United Kingdom, Application No. 28957/95, judgement of 11 July 2002.

Handyside v. the United Kingdom, Application No. 5493/72, Judgement of 7 December 1976.

I. v. United Kingdom, Application No. 25680/94, Judgement of 11 July 2002

Karner v. Austria, Application No. 40016/98, Judgement of 24 July 2003.

Kjeldson, Busk, Madsen, and Pederson v. Denmark, Application Nos. 5095/71, 5920/72, 5926/72, Judgement of 7 December 1976.

L. v. Lithuania, Application No. 27527/03, Judgement of 11 September 2007.

L. and V. v. Austria, Applications nos. 39392/98 and 39829/98, Judgement of 9 January 2003.

Laskey, Jaggard and Brown v. United Kingdom, Applications Nos. 21627/93, 21826/93, 21826/93 and 21974/93, Judgement of 19 February 1997.

Lustig–Prean and Beckett v. United Kingdom, Application No. 31417/96, Judgement of 27 September 1999.

M.C. v. Bulgaria, Application No. 39272/98, Judgement of 4 December 2003.

Modinos v. Cyprus, Application No. 15070/89, Judgement of 22 April 1993

Norris v. Ireland, Application No. 10581/83, Judgement of 26 October 1988.

Otto-Preminger-Institut v. Austria, Application No. 13470/87, Judgement of 20 September 1994.

S.L. v. Austria, Application No. 45330/99, Judgement of 9 January 2003.

Smith and Grady v. United Kingdom, Applications Nos. 33985/96 and 33986/96, Judgement of 27 September 1999.

Sutherland v. United Kingdom, Application No. 25186/94, Judgement of 1 July 1997.

S.W. v. United Kingdom, Application No. 20166/92, Judgement of 22 November 1995.

Van Kuck v. Germany, Application no. 35968/97, Judgement of 12 June 2003.

X. and Y. v. Netherlands, Application No. 8978/80, Judgement of 26 March 1985.

Human rights committee

Leo R. Hertzberg, et al v. Finland, Communication No. 61/1979, Views of 2 April 1982.

Toonen v. Australia, Communication No. 488/1992, Views of 31 March 1994.

Inter-american commission on human rights

Karen Atala Riffo v. Chile, Case No. P-1271-04 (pending).

Maria da Penha v. Brazil, Case 12.051, Decision of 16 April 2001, Report No. 54/01, Annual Report 2000.

Raquel Martí de Mejía v. Perú, Case 10.970, Decision of 1 March 1996, Report No. 5/96, Annual Report 2000.

Inter-american court of human rights

Velasquez Rodriguez v. Honduras, Series C No. 4, Judgement of 29 July 1988.

International criminal tribunal for rwanda

Prosecutor v. Jean Paul Akayesu, ICTR-96-4, Judgement of 2 September 1998.

Prosecutor v. Laurent Semanza, ICTR-97-20, Judgement of 15 May 2003.

International criminal tribunal for the former yugoslavia

Prosecutor v. Furundzija, Case No. IT-95-17/1,-A, Judgement of 21 July 2000.

Prosecutor v. Kunarać, Case No. IT-96-23, Appeals Chamber Judgement of 12 June 2002.

Prosecutor v. Kunarać, Case No. IT-96-23, Trial Chamber Judgement of 22 February 2001.

Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement of 15 July 1999.

Domestic jurisdictions

Aldona Malgorzata Jany and others v. Staatssecretaris van Justitie (The Netherlands).

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Campaña por una Convención Interamericana de los Derechos Sexuales y los Derechos Reproductivos
www.convencion.org.uy/

Catholics for A Free Choice
www.catholicsforchoice.org

Center for Reproductive Rights
www.reproductiverights.org/pub_bo_tmb.html

Disability Archive UK
www.leeds.ac.uk/disability-studies/archiveuk/

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www.udhr60.ch

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www.law.syr.edu/lawlibrary/electronic/humanrights.aspx

Women Living under Muslim Laws
www.wluml.org/english/about.shtml

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Recent controversies around sexuality and human rights have made clear that serious conceptual challenges remain to be addressed. Should states regulate sexual information or speech? What limits should be placed on expressions of sexuality and sexual rights? Are states obliged to protect diverse forms of sexual behaviour? And do the answers to such questions vary across societies and over time? *Sexuality and Human Rights* identifies questions, confusions and dilemmas that impede the discussion of sexual rights, and suggests some of the ideas and principles that should guide future work in this area.

We hope it will assist human and sexual rights advocates to find common ground, and promote human rights engagement with an essential dimension of human experience.

The report is the first in a new series of *Discussion Papers* by the International Council. It was prepared by Professor Alice Miller.

ICHRP
48 chemin du Grand-Montfleury
CH-1290 Versoix
Geneva, Switzerland

Phone: +41 (0) 22 775 33 00
Fax: +41 (0) 22 775 33 03
ichrp@ichrp.org
www.ichrp.org