

REDEFINING “CEDAW” TO INCLUDE LGBT RIGHTS: INCORPORATING PROHIBITIONS AGAINST THE DISCRIMINATION OF SEXUAL ORIENTATION AND GENDER IDENTITY

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I. INTRODUCTION

Since the end of World War II, the international community has established a comprehensive body of human rights law described by the United Nations (“UN”) as a “universal and internationally protected code to which all nations can subscribe and all people aspire.”¹ Article 2 of the Universal Declaration of Human Rights (“UDHR”)² states that all individuals are entitled to the “human rights” proscribed in the document regardless of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”³ Since the adoption of the UDHR,⁴ the UN has expanded international human rights law to encompass specific standards for marginalized groups, including women, children, people with disabilities, and certain races.⁵ Despite these inclusions, the UN has never mentioned sexual orientation or gender identity as a legal basis for protection from discrimination and for human rights.

Although the UDHR and other treaties do not explicitly protect the fundamental human rights of lesbian, gay, bisexual, and transgender (“LGBT”) people, multiple studies have shown that LGBT people experience discrimination around the globe.⁶ In fact, as of August 2017, there

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¹ *Human Rights*, UNITED NATIONS, <http://www.un.org/en/sections/issues-depth/human-rights/>.

² The Universal Declaration of Human Rights (“UDHR”) is described by the United Nations (“UN”) as the “foundation” of human rights international law. The UDHR establishes “broad” fundamental rights that should be proscribed to all humans, including the right to “life, liberty and security,” “privacy,” “free choice of employment,” and access to food and education. *See id.*; G.A. Res. 217, *Universal Declaration of Human Rights*, Articles 3, 12, 23, 25–26 (Dec. 10, 1948), <http://www.un.org/en/universal-declaration-human-rights/> [hereinafter UDHR].

³ UDHR, *supra* note 2, at art. 2.

⁴ *Human Rights*, *supra* note 1 (stating that the UDHR was adopted by the General Assembly in 1945 and 1948 respectively).

⁵ *See, e.g.*, Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 13, 2006, 660 U.N.T.S. 195; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

⁶ *See* Michelle A. Marzullo & Alyn J. Libman, *Research Overview: Hate Crimes and Violence Against Lesbian Gay, Bisexual and Transgender People*, HUM. RTS. CAMPAIGN FOUND. (May 2009), https://assets2.hrc.org/files/assets/resources/Hatecrimesandviolenceagainstlgbtpeople_2009.pdf?_ga=2.8771255.363658303.1544229700-1186203972.1541109634; *see also* Rosamond Hutt, *This is the State*

are ten countries where homosexuality may be punishable by death.⁷ Today, approximately seventy-three countries criminalize homosexual activity,⁸ unjustly punishing thousands and leaving LGBT individuals with no avenue of protection. Although the UN has recently acknowledged LGBT rights in nonbinding resolutions and joint statements, there is no binding authority addressing or enforcing such rights within the international community. Because there is no mention of sexual orientation or gender identity in the UN's human rights treaties, a heated debate has ensued amongst LGBT organizations and international scholars over the best course of action to promote LGBT human rights. While some authors advocate for an entirely new treaty specifically addressing members of the LGBT community, others argue that LGBT human rights can be derived from other binding authorities.⁹ The Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") remains the most cited potential authority from which LGBT human rights protection can be inferred.

CEDAW, which was adopted by the UN General Assembly in 1979 and entered into force in 1981, is the paramount codification of the UN's efforts to prohibit discrimination against women. CEDAW has been described as a "landmark" and deemed as "one of the most successful human rights treaties ever."¹⁰ CEDAW embodies three major principles: elimination of discrimination against women, equality between men and women, and state responsiveness to achieve both goals.¹¹ Unlike the UDHR, CEDAW takes an asymmetric approach by prohibiting all discrimination against "women," rather than symmetrically or categorically prohibiting discrimination based on "sex" or "gender."¹² Some scholars argue that the term "woman" can be understood to include all individuals who identify as such,¹³ whereas others suggest that the document's definition of "discrimination" could include all

of *LGBTI Rights Around the World in 2018*, WORLD ECON. F. (June 14, 2018), <https://www.weforum.org/agenda/2018/06/lgbti-rights-around-the-world-in-2018/>.

⁷ The ten countries where homosexuality may be punishable by death include Yemen, Iran, Mauritania, Nigeria, Qatar, Saudi Arabia, Afghanistan, Somalia, and United Arab Emirates. Max Bearak & Darla Cameron, *Here Are the 10 Countries Where Homosexuality Can be Punished by Death*, WASH. POST (June 16, 2016, 7:37 AM), https://www.washingtonpost.com/news/worldviews/wp/2016/06/13/here-are-the-10-countries-where-homosexuality-may-be-punished-by-death-2/?utm_term=.1d73c527939c.

⁸ Hutt, *supra* note 6.

⁹ See Kerstin Braun, Note, *Do Ask, Do Tell: Where is the Protection Against Sexual Orientation Discrimination in International Human Rights Law?*, 29 AM. UNIV. INT'L L. REV. 871, 890 (2014).

¹⁰ Lenora M. Lapidus, *30 Years of Fighting Discrimination Against Women – It's Time the U.S. Stepped Up*, ACLU (Dec. 18, 2009), <https://www.aclu.org/blog/human-rights/human-rights-and-womens-rights/30-years-fighting-discrimination-against-women-its> (describing top-level U.N. officials' praise about CEDAW and its capacity to empower women); Phumzile Miambo-Ngcuka, *New CEDAW Recommendation a Landmark For Women in Conflict – UN Women Executive Director*, UN WOMEN (Nov. 5, 2013), <https://www.unwomen.org/en/news/stories/2013/11/ed-statement-on-adoption-of-cedaw-general-recommendation-on-women-in-conflict>.

¹¹ SUSANNE ZWINGEL, TRANSLATING INTERNATIONAL WOMEN'S RIGHTS: THE CEDAW CONVENTION IN CONTEXT 219 (2014).

¹² See generally CEDAW, *supra* note 5. See Rikki Holtmaat & Paul Post, *Enhancing LGBTI Rights by Changing the Interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women?*, 33 NORDIC J. HUM. RTS. 319, 321–22 (2015); cf. Darren Rosenblum, *Unsex CEDAW, or What's Wrong with Women's Rights*, 20 COLUM. J. GENDER & L. 98, 125 (2011).

¹³ See, e.g., Elise Meyer, *Designing Women: The Definition of "Woman" in the Convention on the Elimination of All Forms of Discrimination Against Women*, 16 CHI. J. INT'L L. 553 (2016).

individuals discriminated against based on their sexual orientation or gender identity.¹⁴

This Note evaluates the most effective avenue for promoting LGBT human rights. More specifically, I evaluate whether CEDAW adequately protects the rights of LGBT individuals, especially LBT women,¹⁵ whether these rights should be expanded through CEDAW, and whether a new binding convention specifically addressing LGBT discrimination is warranted. Part 2 provides an overview of CEDAW in international law, while Part 3 provides preliminary definitions. Parts 4 and 5 provide a brief history of the protection of women’s and LGBT rights in international law. Part 6 analyzes CEDAW and whether it can be interpreted to include LGBT rights to any extent. Part 7 explores alternatives to such an interpretation and argues that CEDAW should be amended to explicitly incorporate “sexual orientation” and “gender identity” to codify the rights of LGBT individuals. Part 8 explores ways in which such a method could be implemented, and Part 9 provides concluding thoughts on the matter.

II. ORIENTING CEDAW IN INTERNATIONAL LAW

Under international law, a treaty is any legally binding agreement between states that undergoes an intense negotiation and ratification process.¹⁶ Currently, CEDAW is legally binding upon its 189 “member States”;¹⁷ the CEDAW Committee, comprised of twenty-three gender equality experts, is responsible for reviewing each state’s progress, as well as developing jurisprudence through decisions and official General Recommendations.¹⁸

The effectiveness of human rights treaties continues to stir debate among international law and relations scholars. For example, former Judge at the Human Rights Chamber for Bosnia Jakob Th. Möller insists that “treaty-based human rights petitions procedures take the State down from the pedestal of sovereignty to the level of the individual. One of their great merits is the principle of equality of harms.”¹⁹ From this perspective, CEDAW’s codification of women’s rights empowers individuals to hold their respective states accountable for implementing such protections into domestic law. Additionally, international articulation of rights norms can reshape

¹⁴ See, e.g., Sophie M. Clavier, *Objection Overruled: The Binding Nature of the International Norm Prohibiting Discrimination Against Homosexual and Transgendered Individuals*, 35 FORDHAM INT’L L.J. 384, 390–94 (2012).

¹⁵ Here, LBT is used to encompass lesbian, bisexual, and transgender women. Because CEDAW’s current text does not explicitly mention men, the term “LGBT” is inappropriate since it includes gay men.

¹⁶ U.S. Dep’t of Health & Human Servs., *International Agreements*, PUB. HEALTH EMERGENCY: SCI. SAFETY SECURITY (Feb. 15, 2018), <https://www.phe.gov/s3/law/Pages/International.aspx#> (“A treaty can be called a Convention, a Protocol, a Pact, an Accord, etc.; it is the content of the agreement, not its name, which makes it a treaty.”).

¹⁷ CEDAW, *supra* note 5; see also *Member State*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/member-state> (last visited Jan. 19, 2020) (“a country that belongs to a political, economic, or trade organization or treaty”).

¹⁸ *How is CEDAW Monitored?*, UN WOMEN: ASIA & PACIFIC, <https://asiapacific.unwomen.org/en/focus-areas/cedaw-human-rights/faq#howcedawmonitored> (last visited Apr. 10, 2020).

¹⁹ BERTRAND G. RAMCHARAN, *THE FUNDAMENTALS OF INTERNATIONAL HUMAN RIGHTS TREATY LAW* 1 (2011) (citing Jakob Th. Möller’s quote from August 2, 2009); see also Jakob Th. Möller, *Foreword* to BERTRAND G. RAMCHARAN, *THE FUNDAMENTALS OF INTERNATIONAL HUMAN RIGHTS TREATY LAW* (2011) (reflecting on the importance of human rights treaties).

“domestic dialogues” in law, politics, and the press.²⁰ Arguably, CEDAW’s enforcement mechanisms protect lives, prompt legislative reform, and afford otherwise unattainable justice in areas where women were afforded little to no protection.²¹ Conversely, an equal number of scholars argue that international law fails to enforce the protection of human rights. University of Chicago Law School Professor Eric Condren points out that despite the CEDAW’s 189 signatories, the majority of non-Western countries continue to endorse customs and laws that subordinate women.²² In particular, both Egypt and Saudi Arabia arguably endorse discriminatory laws and customs despite their membership in CEDAW.²³ While the efficiency of international law in addressing discrimination against women and LGBT individuals is beyond the scope of this Note, the debate impacts the scholarship and arguments explored throughout this analysis.

III. TERMINOLOGY

Several key terms are used frequently throughout this Note: (a) sex, (b) gender, (c) gender identity, (d) sexual orientation, (e) transgenderism. In order to understand how international law could be construed to protect discrimination on the basis of sexual orientation and gender identity, it is essential to understand these terms’ meanings and fluid nature. *Sex* refers to attributes that characterize biological maleness and femaleness.²⁴ *Gender* is a set of socially constructed standards of community, identity, and covert and overt behaviors, ascribed to persons by virtue of their apparent biological sex.²⁵ *Gender identity* refers to an individual person’s basic sense of being male, female, or of indeterminate sex.²⁶ *Sexual orientation* refers to the tendency to be sexually attracted to persons of the same sex, opposite sex, both sexes, or neither sex.²⁷ *Transgenderism* is an umbrella term used to describe people with a wide range of gender identities that are different from the sex assigned at birth.²⁸

It is also important to note that there is a broad spectrum of terms identifying dozens of sexual orientations and gender identities outside of the term “LGBT,” such as bisexual, pansexual, cisgender, and nonbinary.²⁹

²⁰ See Douglass Cassel, *Does International Human Rights Law Make a Difference*, 2 CHI. J. INT’L L. 121, 122 (2001).

²¹ *Id.*

²² Eric Posner & Kenneth Roth, *Have Human Rights Treaties Failed?*, N.Y. TIMES: ROOM FOR DEBATE (Dec. 28, 2014), <https://www.nytimes.com/roomfordebate/2014/12/28/have-human-rights-treaties-failed>.

²³ *Id.* (“Notable parties of the treaty include Saudi Arabia (where women are prohibited from driving) and Egypt (where 97% of married women were found to have undergone genital cutting in 2000).”).

²⁴ APA Task Force on Gender Identity & Gender Variance, *Report of the Task Force on Gender Identity and Gender Variance*, AM. PSYCHOL. ASS’N (Aug. 2008), <https://www.apa.org/news/press/releases/gender-variant-2.pdf> (“In humans, the best-known attribute that constitute biological sex include the sex-determining genes, the sex chromosomes, the H-Y antigen, the gonads, sex hormones, the internal reproductive structures, the external genitalia, and secondary sexual characteristics.”).

²⁵ *Id.*

²⁶ See generally ROBERT J. STOLLER, *SEX AND GENDER: THE DEVELOPMENT OF MASCULINITY AND FEMININITY* (Karnac Books Ltd. 1984) (1968).

²⁷ See generally *id.*

²⁸ Rebekah Thomas et al., *Ensuring an Inclusive Global Health Agenda for Transgender People*, 95 BULL. WORLD HEALTH ORG. 154, 154 (2017).

²⁹ See Michael Gold, *The ABCs of L.G.B.T.Q.J.A.+*, N.Y. TIMES (June 21, 2018), <https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html>.

While this analysis refers to this spectrum of such identities with the simplified term “LGBT,” this usage does not fully encompass every sexuality or gender identity.

IV. BRIEF HISTORY OF INTERNATIONAL LAW IN PROTECTION OF WOMEN’S RIGHTS

Since the UN’s formation in 1945,³⁰ equality between men and women has been one of the most consistently upheld fundamental guarantees of human rights. The UN Charter defines one of its goals “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women.”³¹ Furthermore, Article 1 of the Charter stipulates that one of the UN’s purposes is to promote respect for human rights without distinction as to “race, sex, language, or religion;”³² this prohibition against sex-based discrimination is also referenced in Articles 13 and 55.³³ These sentiments are reflected in the 1948 UDHR, which expressly prohibits discrimination “without distinction of any kind, such as . . . sex”³⁴ Likewise, the International Covenant on Civil and Political Rights³⁵ and the International Covenant on Economic and Cultural Rights³⁶ both incorporate the same language prohibiting discrimination based on “sex.”³⁷ Alongside CEDAW, these treaties provide a strong framework and incentive for nations to take appropriate measures to ensure the advancement of women’s and gender equality.

V. BRIEF HISTORY OF INTERNATIONAL LAW’S PROTECTION OF LGBT RIGHTS

A. INTERNATIONAL JURISPRUDENCE

Although the UN Human Rights (“HR”) Committee has yet to establish clear and specific rights for LGBT people, the international community has moved forward in its recognition of such rights in recent years. Whereas the HR Committee upheld the Finnish government’s decision to censor a broadcasting program featuring homosexuality in its 1982 decision *Hertzberg et al. v. Finland*,³⁸ the Committee reversed its holding in *Toonen*

³⁰ *About the UN: Overview*, UNITED NATIONS, <http://www.un.org/en/sections/about-un/overview/index.html> (last visited Feb. 5, 2019).

³¹ U.N. Charter preamble.

³² *Id.* at art. 1, ¶ 3; *see also* U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM’R, WOMEN’S RIGHTS ARE HUMAN RIGHTS 3 (2014), <https://www.ohchr.org/Documents/Events/WHRD/WomenRightsAreHR.pdf>.

³³ U.N. Charter art. 13, ¶ 1.b, art. 55, ¶ c.

³⁴ UDHR, *supra* note 2, at art. 2.

³⁵ International Covenant on Civil and Political Rights arts. 2, 4, 24, 26, *opened for signature* Dec. 19, 1966, 99 U.N.T.S. 171, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [hereinafter ICCPR].

³⁶ International Covenant on Economic and Cultural Rights art. 2, *opened for signature* 19 Dec. 1966, 993 U.N.T.S. 3, <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>.

³⁷ *Id.*; ICCPR, *supra* note 35, at arts. 2, 4, 24, 26.

³⁸ INT’L COVENANT ON CIV. & POL. RTS., *Communication No. 61/1979: Hertzberg et al. v. Finland* in HUMAN RIGHTS COMMITTEE SELECTED DECISIONS UNDER THE OPTIONAL PROTOCOL, at 124, U.N. Doc. CCPR/C/OP/1, U.N. Sales No. E.84.IV.2 (1985), https://www.ohchr.org/Documents/Publications/SelDec_1_en.pdf

v. *Australia* and “established that jurisdiction concerning matters of sexual orientation and gender identity did not lie exclusively in Member States.”³⁹ These cases illustrate that jurisprudence has essentially evolved from holding that states have exclusive jurisdiction over LGBT matters to ruling that human rights law offers some protection for LGBT individuals in the public sphere.⁴⁰ Nevertheless, subsequent cases have demonstrated that the interpretation of the applicability of international human rights law to LGBT people is still evolving,⁴¹ and it remains largely unclear the extent to which this jurisprudence actually protects LGBT individuals.

B. SUBSEQUENT RESOLUTIONS, PRINCIPLES, AND DECLARATIONS

Although there has never been a binding treaty articulating LGBT rights, the UN has issued three important non-binding instruments explicitly addressing LGBT rights. First, the 2003 Draft Resolution on Human Rights and Sexual Orientation, otherwise known as the “Brazilian Resolution,”⁴² stated that the International Bill of Human Rights applied to all individuals regardless of sexual orientation.⁴³ Although the Brazilian Resolution did not expand the rights of LGBT individuals, its introduction was met with shock and fierce protests, ultimately leading to the resolution’s postponement and gradual dissolution.⁴⁴ The second and arguably most influential UN document regarding LGBT rights is the Yogyakarta Principles, which explicitly articulates the “application of international human rights law in relation to sexual orientation and gender identity.”⁴⁵ Although the Principles are nonbinding, they are significant because the text identifies explicit protections for LGBT members, including the right to enter into a marriage or legalized partnership.⁴⁶ The third and most recent instrument is the 2008 UN Declaration on Sexual Orientation and Gender Identity,⁴⁷ which aims to specifically acknowledge LGBT individuals’ rights within international human rights law and to condemn human rights violations against LGBT people.⁴⁸

The reaffirmation of these documents show that the international community is progressively moving forward by recognizing the LGBT community and acknowledging its notable absence in human rights

(holding that the private human right to freedom of expression and information could be subjected to restrict state morals).

³⁹ See Braun, *supra* note 9, at 880 (citing INT’L COVENANT ON CIV. & POL. RTS., *supra* note 38, at 133).

⁴⁰ *Id.* at 882.

⁴¹ See, e.g., Human Rights Committee, Views Adopted from Comm. No. 902/1999 *Joslin v. New Zealand*, U.N. Doc. CCPR/C/75/D/902/1999, at 8.2–8.3 (July 30, 2002) (holding that the right to marriage articulated in the International Covenant on Civil and Political Rights was commonly understood as between men and women only).

⁴² Promotion & Protection of Human Rights, Commission on Human Rights on its Fifty-Ninth Session, U.N. Doc. E/CN.4/2003/L.92 (Apr. 17, 2003).

⁴³ See generally *id.*

⁴⁴ See generally *id.*

⁴⁵ *The Yogyakarta Principles: Principles on the Application of International Human Rights in Relation to Sexual Orientation and Gender Identity*, YOGYAKARTA PRINCIPLES 7 (2007), http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf.

⁴⁶ *Id.* at 27.

⁴⁷ RAMA YADE & MAXIME VERHAGEN, STATEMENT ON HUMAN RIGHTS, SEXUAL ORIENTATION AND GENDER IDENTITY: PRESENTED IN THE SIDELINE OF THE UNITED NATIONS GENERAL ASSEMBLY ¶¶ 3, 6, 11–12 (2008), <http://www.unhcr.org/refworld/docid/49997ae312.html>.

⁴⁸ *Id.* at ¶¶ 3, 6, 11–12.

jurisprudence and treaties. Despite these improvements, however, a lack of protection in a binding international treaty leaves states free to implement discriminatory policies against LGBT members with little accountability.⁴⁹

VI. INTERPRETING CEDAW: IS THERE ROOM FOR LGBT RIGHTS?

A. BACKGROUND ON CEDAW’S RATIFICATION

CEDAW emerged as a conglomerate of former treaties that addressed women’s rights as well as the emergence of the feminist movement in the 1960s and 1970s,⁵⁰ which gave rise to a number of organizations committed to advocating for gender equality.⁵¹ In response to growing awareness of worldwide discrimination against women, the UN’s Commission on the Status of Women (“CSW”)⁵² considered the possibility of preparing a binding treaty defining discrimination against women and explicitly prohibiting different forms of discrimination. At its twenty-fifth session in 1974, the CSW announced its decision to prepare a “single, comprehensive and internationally binding instrument to eliminate discrimination against women.”⁵³ The CSW worked with members of the UN General Assembly from 1977 to 1979 to conduct extensive negotiations and further prepare CEDAW’s text.⁵⁴ Because the notion of women’s rights challenged deeply entrenched social traditions, the CEDAW negotiation and drafting process was contentious; several states perceived their allegedly “discriminatory” practices to be culturally legitimate ones, *not* human rights violations or grounds for state sovereignty infringement.⁵⁵ Despite these contentions, CEDAW was adopted on December 18, 1979 by the UN General Assembly by a vote of 130 to none, with 10 abstentions.⁵⁶

⁴⁹ *Id.*

⁵⁰ In feminist literature, this social movement promoting women’s social, political, and legal rights is typically denoted as “second wave feminism.” Second wave feminism was prominent during the late 1960s and 1970s in the United States and other Western countries, and the movement advocated non-governmental organizations, government officials, and lobbyists to promote women’s rights. See generally Sarah T. Partlow Lefevre, *Second Wave Feminism*, in THE SAGE ENCYCLOPEDIA OF COMMUNICATION RESEARCH METHODS 1580 (Mike Allen ed., 2018).

⁵¹ United Nations Dep’t of Pub. Info., *Short History of CEDAW Convention*, UN WOMEN, <https://www.un.org/womenwatch/daw/cedaw/history.htm> (last visited Jan. 19, 2020).

⁵² The Commission on the Status of Women (“CSW”) is the principal global intergovernmental body exclusively dedicated to the promotion of gender equality and the power of women. Established in 1946, the CSW’s purpose is to “promote women’s rights, document the reality of women’s lives throughout the world, and shaping global standards on gender equality and the empowerment of women.” *Commission on the Status of Women*, UN WOMEN, <https://www.unwomen.org/en/csw> (last visited Jan. 19, 2020).

⁵³ United Nations Dep’t of Pub. Info., *supra* note 51.

⁵⁴ *Id.*

⁵⁵ ZWINGEL, *supra* note 11, at 37.

⁵⁶ *Id.*; The ten abstaining states were Bangladesh, Brazil, Comoros, Haiti, Mali, Mauritania, Mexico, Morocco, Saudi Arabia, and Senegal. Thirteen more states did not vote. See Fareda Banda et al., *Introduction*, in THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY 1 (Marsha A. Freeman, Christine Chinkin & Beate Rudolf eds., 2012).

B. CEDAW'S INCORPORATION OF RESERVATIONS

One key aspect of CEDAW's ratification is the General Assembly's decision to permit reservations under the treaty. In international law, a reservation is essentially a formal declaration made by a signing party of a treaty (i.e. a state) purporting to "exclude or to modify the legal effect" of certain treaty provisions in their application to the signing party.⁵⁷ Although CEDAW has been ratified by 189 states as of 2018,⁵⁸ there have been several reservations made by states, many of which arguably undermine CEDAW's primary purpose of promoting equality between men and women. Studies have shown that these CEDAW reservations have had negative impacts on women's rights in several states.⁵⁹ Although the effects of treaty reservations on women's and LGBT rights is beyond the scope of this Note, it should be noted that CEDAW's allowance of reservations might render additional interpretations or amendments supporting LGBT rights ineffective. If the UN amended or made formal statements including prohibitions against members of the LGBT community in CEDAW, Member States could make additional reservations and severely limit CEDAW's effectiveness. This characteristic of CEDAW is therefore an important one to consider when evaluating whether the treaty is the most effective means of addressing LGBT issues.

C. PURPOSE AND OBJECTIVES OF CEDAW

Many scholars argue that CEDAW's broadly defined purpose and objectives are expansive enough to encompass LGBT rights.⁶⁰ The stated purpose of CEDAW is to require parties to "take all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."⁶¹ Similarly, according to Article 4, the CEDAW's objective is to achieve "equality of opportunity and treatment" between men and women.⁶² The CEDAW committee expanded upon these broad statements in a General Recommendation, stating that the treaty's three main objectives are: (1) to realize full legal equality between men and women; (2) to enhance *de facto* equality of women; and (3) to eliminate cultural and social roots of gender inequality.⁶³

Many scholars argue that because violations of LGBT rights are based on gender stereotypes, violations of such rights could be addressed in the framework of the "social roots of gender inequality" objective defined by the Committee.⁶⁴ For example, the denial of education and employment

⁵⁷ Vienna Convention on the Law of Treaties, art. 2(1)(d), May 23, 1969, 1155 U.N.T.S. 331.

⁵⁸ CEDAW, *supra* note 5, at 1–3.

⁵⁹ MARSHA A. FREEMAN, RESERVATIONS TO CEDAW: AN ANALYSIS FOR UNICEF (Dec. 2009), https://www.unicef.org/gender/files/Reservations_to_CEDAW-an_Analysis_for_UNICEF.pdf.

⁶⁰ See generally Holtmaat & Post, *supra* note 12.

⁶¹ CEDAW, *supra* note 5, at preamble.

⁶² *Id.* at art. 4.

⁶³ See *id.* at art. 5; Committee on the Elimination of Discrimination Against Women, General Recommendation No. 25 on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, ¶¶ 6–7, U.N. Doc. CEDAW/C/GC/25 (2004).

⁶⁴ Holtmaat & Post, *supra* note 12, at 324–25.

opportunities based on individuals’ sexual orientation or gender identity should be encompassed by CEDAW because these discriminatory practices are rooted in social and cultural gender inequality.⁶⁵ The broad term “gender inequality” suggests that CEDAW’s specific prohibitions could be understood to prohibit all forms of discrimination based on gender or, by extension, sexual orientation.

Nevertheless, this argument is undermined by CEDAW’s explicit usage of the asymmetric approach toward protecting women’s rights. Because CEDAW’s actual text only refers to discrimination against “women,” rather than discrimination on account of gender or sex, protecting against discriminatory practices for such a broad group of individuals based only on CEDAW’s broadly construed objectives could undermine the treaty’s legitimacy.

D. ASYMMETRIC APPROACH

While CEDAW provides that women have rights “on a basis of equality between men and women,” its focus clearly prohibits discrimination against women and not on the basis of gender or sexual orientation.⁶⁶ The CEDAW Committee has explained that, to achieve actual equality, the underlying causes of women’s equality must be addressed; it is not enough to guarantee identical treatment with men.⁶⁷ CEDAW’s approach towards women is asymmetrical because it ultimately aims to not only end discrimination on the basis of a particular characteristic but also end the “oppression and exclusion of groups that are subordinated in society.”⁶⁸ Many praise CEDAW’s asymmetric approach, arguing that the more “gender-blind” a particular right is, the less likely it is to effectively achieve equity.⁶⁹ Advocates of the asymmetric approach argue that its exclusive application to women effectively avoids enhancing the already privileged status of men in society.⁷⁰

Conversely, CEDAW’s asymmetric approach has been fiercely criticized and debated in relation to LGBT rights. Most notably, Darren Rosenblum argues that CEDAW’s asymmetric approach reinforces the gender binary and constructs women as victims of gender-based discrimination.⁷¹ Whereas CEDAW is “identity driven,” other human rights treaties are able to provide equally successful prohibitions on discrimination based on inclusive

⁶⁵ *Id.*

⁶⁶ CEDAW, *supra* note 5, at 1.

⁶⁷ U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM’R, *supra* note 32, at 31 (citing Committee on the Elimination of Discrimination Against Women, Gen. Rec. No. 25 on Art. 4, Para. 1 (2004)) (quoting Committee on the Elimination of Discrimination Against Women, Gen. Rec. No. 25 (2004)).

⁶⁸ See generally Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003) (discussing the difference between anti-classification and anti-subordination principle in non-discrimination law).

⁶⁹ According to the World Health Organization (“WHO”), equity is defined as “the absence of avoidable or remediable differences among groups of people, whether those groups are defined socially, economically, demographically or geographically. Equity differs from equality in that it addresses disparities amongst marginalized communities. *Equity*, WORLD HEALTH ORG., <https://www.who.int/healthsystems/topics/equity/en/> (last visited Jan. 19, 2020). For a more in depth discussion of the differences between equity and equality, see Blair Mann, *Equity and Equality Are Not Equal*, EDUC. TR. (Mar. 12, 2014), <https://edtrust.org/the-equity-line/equity-and-equality-are-not-equal/>.

⁷⁰ Holtmaat & Post, *supra* note 12, at 325.

⁷¹ ZWINGEL, *supra* note 11, at 221 (summarizing Rosenblum, *supra* note 12).

“categories.”⁷² The Convention on the Elimination of All Forms of Racial Discrimination (“CERD”), for example, broadly prohibits discrimination based on “race, colour, descent, or national or ethnic origin,”⁷³ and some view it as equally successful as CEDAW in preventing discrimination.⁷⁴ Rosenblum and others argue that the CEDAW’s asymmetric approach not only fails to address inequality based on gender and sexuality but also perpetuates the very heteropatriarchy⁷⁵ that oppresses women in the first place.⁷⁶ This latter point originates from the notion that CEDAW’s emphasis on “female subjectivities” tends to define women *relative* to men, which tends to reinforce the superiority of men and further exclude members of the LGBT community who experience discrimination based on their sexuality or gender.⁷⁷

In short, CEDAW’s asymmetric approach is probably not conducive to interpreting rights on behalf of all LGBT individuals because it fails to include a categorical prohibition against discrimination based on gender or sexuality. Nevertheless, some scholars argue that while the treaty’s text only refers to women, the specific principles articulated in CEDAW largely intersect with issues dealt with by the LGBT community. Therefore, at the very least, perhaps CEDAW could extend to protect lesbian, bisexual, and transgender (“LBT”) *women* from such discrimination because of their inability to enjoy the core rights enumerated in CEDAW.

E. KEY COMPONENTS OF CEDAW AND THEIR INTERSECTIONAL NATURE

1. Defining Discrimination

Before evaluating the principles articulated in CEDAW, it is appropriate to determine CEDAW’s definition of discrimination. According to the treaty, discrimination encompasses any “distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . on a basis of equality of men and women, of human rights and fundamental freedoms”⁷⁸ Article I’s definition of discrimination is broad, and it embodies a more symmetric approach than the rest of the articles through its use of the categories of “sex” and “equality of men and women.”⁷⁹ Because

⁷² Rosenblum, *supra* note 12, at 148, 158.

⁷³ International Convention on the Elimination of All Forms of Racial Discrimination, art. I, Mar. 12, 1969, 660 U.N.T.S. 195.

⁷⁴ Rosenblum, *supra* note 12, at 148–49.

⁷⁵ The term “heteropatriarchy” refers to a socio-political system where heterosexual and cisgender males have authority over other sexual orientations and identities. Valdes argues that the heteropatriarchy consists of four tenets: “the bifurcation of personhood into “male” and “female” components . . . the polarization of these male/female sex/gender ideals into mutually exclusive, or even opposing identity composites; the penalization of gender atypicality or transitivity; and the devaluation of persons who are feminized.” Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 *YALE J.L. & HUMAN.* 161, 170 (1996).

⁷⁶ See, e.g., Holtmaat & Post, *supra* note 12, at 322–23; see also Rosenblum, *supra* note 12, at 175–76.

⁷⁷ See Dianne Otto, *Disconcerting ‘Masculinities:’ Reinventing the Gendered Subject(s) of International Human Rights Law*, in *INTERNATIONAL LAW: MODERN FEMINIST APPROACHES* 105 (Doris Buss & Abreena Manji eds., 2005).

⁷⁸ CEDAW, *supra* note 5, at art. 1.

⁷⁹ *Id.*

Article I describes discrimination in relation to sex and equality, some scholars argue that CEDAW’s definition encompasses oppression related to women’s sex, sexuality, gender roles, and/or gender identity.⁸⁰

If CEDAW’s definition of discrimination was universally understood to incorporate sexuality and gender identity, perhaps LGBT advocates could encourage CEDAW signatories and its Committee to enforce LGBT rights in light of such discrimination. Proponents of reinterpretation, however, would likely face resistance because many states’ domestic interpretations of “sex” and “gender” do not include sexuality or gender identity.⁸¹ Nevertheless, reinterpretation of CEDAW might be feasible based on its most prominent prohibitions and their intersectionality with the LGBT community.

2. Right to Equal Education and Employment Opportunities

CEDAW explicitly protects women’s access to education and employment opportunities—two fundamental principles of CEDAW. In Article 10, CEDAW requires parties to take appropriate measures to provide women with “equal rights” in the field of education, including access to the same curricula and programs of continuing education as men.⁸² Similarly, according to Article 11 of CEDAW, parties are required to take all appropriate measures to eliminate discrimination against women in the field of employment to ensure the right to the same employment opportunities as men and the right to choose their profession.⁸³

Here, proponents of reinterpretation argue that discrimination based on sexual orientation or gender identity constitutes a barrier to an enjoyment of Articles 10 and 11 because there is ample evidence of such discrimination preventing students and employees alike from seeking equal opportunities in education and employment. According to the International Gay and Lesbian Human Rights Commission, LGBT students face obstacles accessing education due to gender stereotyping; such stereotyping leads to severe violence in the forms of beatings and arbitrary arrests,⁸⁴ as well as bullying in the forms of homophobic and transphobic hate speech.⁸⁵ In the United States, for example, 45 percent of LGBT students have experienced homophobic, bi-phobic, or transphobic bullying. International surveys similarly depict an excessive amount of anti-LGBT violence and bias directed at youth in schools.⁸⁶ LGBT men and women are thereby deterred

⁸⁰ See Holtmaat & Post, *supra* note 12, at 323.

⁸¹ In the United States, for example, the interpretation of Title VII’s prohibition against discrimination based on “sex” has been hotly debated for decades. Even today, “sex” does not explicitly include sexual orientation or gender identity within the meaning of Title VII. See *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000). *But see Zarda v. Altitude Express*, 855 F.3d 76, 82 (2d Cir. 2017) (reversing the district court’s holding that an employee, who was fired after he disclosed his sexual orientation to a client, failed to show discrimination because of his sex).

⁸² CEDAW, *supra* note 5, at art. 10.

⁸³ *Id.* at art. 11.

⁸⁴ INT’L GAY & LESBIAN HR COMM’N, WHY SEXUAL ORIENTATION AND GENDER IDENTITY MUST BE SPECIFICALLY REFERENCED IN THE FORTHCOMING CEDAW GENERAL RECOMMENDATION ON GIRLS’ AND WOMEN’S ACCESS TO EDUCATION 3 (2014), <https://www.ohchr.org/Documents/HRBodies/CEDAW/WomensRightEducation/IGLHRCContribution.pdf> [hereinafter IGLHRC Report].

⁸⁵ *Id.* at 4.

⁸⁶ See generally Joseph G. Kosciw & Oren Pizmony-Levy, *International Perspectives on Homophobic and Transphobic Bullying in Schools*, 13 J.LGBT YOUTH 1 (2016).

from attending school and are often prevented from accessing the same educational opportunities as cisgender, heterosexual men. Similarly, LGBT men and women are often prevented from seeking the same employment opportunities due to employer biases based on gender identity or sexual orientation.⁸⁷ As of May 2017, a mere 37 percent of UN member States prohibit employment discrimination based on sexual orientation or gender identity.⁸⁸

In sum, proponents of reinterpreting CEDAW argue that, to effectively prevent discrimination on the basis of sex in the fields of education and employment, state parties should interpret “sex” to include sexual orientation and gender identity.⁸⁹ Without reinterpreting CEDAW to include this broad prohibition, CEDAW is arguably unable to effectively enforce individuals’ right to access the same educational and employment opportunities as cisgender, heterosexual men. As the International Gay and Lesbian HR Commission proclaims, even if CEDAW’s text is literally read to exclude men, a broad interpretation of discrimination is necessary to enable LBT women to achieve equal access in education and employment.

3. Marriage

Article 16 of CEDAW requires states to ensure that women have the “same right” to enter into marriage and to freely choose a spouse on a basis of “equality of men and women.”⁹⁰ Today, only about 12% of UN Member States allow same-sex couples to marry.⁹¹ Based on these restrictions, proponents of reinterpretation might argue that LGBT individuals – namely, LBT women – are deprived of their right to enter into marriage and to choose their spouses. Although there are significant cultural perspectives that should be considered, an international endorsement of same-sex marriage through a reinterpretation of CEDAW might encourage Member States to implement domestic legislation permitting same-sex marriage.

4. Reproductive Rights & Sexuality

Interestingly, CEDAW is the only international treaty to mention family planning.⁹² Member States are required to enable women to have access to specific educational information for family planning purposes⁹³ as well as access to family planning healthcare services.⁹⁴ Furthermore, CEDAW compels its Member States to enable women to decide on “the number and spacing of their children.”⁹⁵ Thus, although CEDAW does not explicitly mention women’s “reproductive rights,” the treaty arguably affirms women’s

⁸⁷ See, e.g., Stephen Whittle, Lewis Turner & Maryam Al-Alami, *Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination*, PRESS FOR CHANGE 15, 31–40 (2007), <http://www.pfc.org.uk/pdf/engenderedpenalties.pdf>.

⁸⁸ *State-Sponsored Homophobia – A World Survey of Sexual Orientation Laws: Criminalization, Protection and Recognition*, INT’L LESBIAN, GAY, BISEXUAL, TRANS & INTERSEX ASS’N 48 (May 2017). For a full list of State legislation, see *id.* at 48–53.

⁸⁹ See generally IGLHRC Report, *supra* note 84.

⁹⁰ CEDAW, *supra* note 5, at art. 16.

⁹¹ IGLHRC Report, *supra* note 84, at 8.

⁹² See *Content and Significance of the Convention*, UNITED NATIONS (2018), <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>.

⁹³ CEDAW, *supra* note 5, at art. 10.

⁹⁴ *Id.* at arts. 12, 14.

⁹⁵ *Id.* at art. 16.

right to reproductive choice.⁹⁶ The definition and scope of “reproductive rights” differs among professionals. The World Health Organization defines reproductive rights as the ability to decide freely when to have children and the right to attain the highest standard of “sexual and reproductive health.”⁹⁷ Similarly, Amnesty International intermingles its definitions of “sexual and reproductive rights,” stating that the universal right to reproductive healthcare is based on the assumption that all people have the right to a healthy, safe, consensual, and enjoyable sex life.⁹⁸

Proponents of reinterpreting CEDAW argue that linking reproductive rights and sexuality suggests that CEDAW encompasses discrimination based on sexual orientation. Because reproductive rights are inextricably linked to sexuality, an individual’s choice of sexual partners and preferences falls under the realm of reproductive freedom.⁹⁹ Under this broad interpretation of family planning and reproductive rights, CEDAW could arguably be extended to prohibit discrimination on the basis of sexual orientation. This approach reflects a highly inclusive definition of reproductive rights that has been endorsed by the UN. In fact, the UN’s most recent reproductive rights handbook explicitly refers to sexual health—defined in the document as providing healthcare in such a way that enhances “communication and love”¹⁰⁰—in its definition of reproductive rights.¹⁰¹ This interpretation corroborates the possibility that CEDAW could be extended to prohibit discrimination on the basis of sexual preferences. Furthermore, by extending the definition of reproductive rights to encompass sexual orientation, the international community would be affirming women’s self-determination by giving them the freedom to dictate their sexuality.¹⁰²

Nevertheless, the fact remains that CEDAW itself only mentions “family planning,” rather than “reproductive” or “sexual” rights. Even if CEDAW could be extended to incorporate discrimination based on sexual orientation, proponents are likely to face an uphill battle convincing other Member States of this complicated connection. Additionally, major religious and cultural divisions would likely prevent Member States from supporting this interpretation.

F. DEFINING “WOMAN”: DOES CEDAW INCLUDE TRANSGENDER WOMEN?

Interestingly, CEDAW does not provide a definition of “woman.” This lack of a specific definition poses an interesting question: What makes a woman? Are women characterized by their biology (e.g. sex organs,

⁹⁶ See United Nations Dep’t of Pub. Info., *supra* note 51.

⁹⁷ *Programme of Action of The International Conference on Population and Development*, Cairo, 1994. New York: United Nations; 1995: ¶¶ 7.2–7.3.

⁹⁸ AMNESTY INT’L USA, SEXUAL AND REPRODUCTIVE HEALTH RIGHTS 1 (2017).

⁹⁹ See generally Braun, *supra* note 9; Debra L. DeLaet, *Don’t Ask, Don’t Tell: Where is the Protection Against Sexual Orientation Discrimination in International Human Rights Law?*, 7 LAW & SEXUALITY 31 (1997).

¹⁰⁰ U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM’R ET AL., REPRODUCTIVE RIGHTS ARE HUMAN RIGHTS: A HANDBOOK FOR NATIONAL HUMAN RIGHTS INSTITUTIONS 19 (2014).

¹⁰¹ *Id.*

¹⁰² See Yakaré-Oulé Jansen, *The Right to Freely Have Sex? Beyond Biology: Reproductive Rights and Sexual Self-Determination*, 40 AKRON L. REV. 311, 313, 337 (2007).

chromosomes, etc.) or by their gender identity? Proponents of reinterpreting CEDAW argue that the treaty's lack of specificity suggests that a transgender inclusive interpretation of the term is possible.

The Vienna Convention on the Law of Treaties ("VCLT") states that treaties should be interpreted in accordance with the term's ordinary meaning and in light of its "object and purpose."¹⁰³ This mandate suggests determining the goals by examining "the normative logic that presents itself when the entirety of the treaty's provisions are considered together."¹⁰⁴ In a student comment, Elise Meyer argues that an application of VCLT's guiding principles of interpretation supports such an inclusive definition. She argues that (1) an ordinary understanding of the word "woman" encompasses both biological sex and gender performance/identity,¹⁰⁵ and (2) because CEDAW's "object and purpose" is to eliminate all forms of discrimination to promote gender equality, a trans-inclusive interpretation would bolster the treaty's objectives.¹⁰⁶

Not all scholars agree with Meyer's approach, however. Darren Rosenblum, for example, argues that the actual application of a trans-inclusive definition would produce unjust outcomes between trans-men and trans-women. Because of CEDAW's asymmetric approach in only protecting "women," Rosenblum argues that it seems "strange" that a transgender individual, who is born a man, is suddenly transformed into the bearer of rights under CEDAW, whereas a transgender man suddenly loses those set of rights.¹⁰⁷ Based on this application, he argues that a trans-inclusive definition would be difficult to achieve in light of the ordinary meaning of a woman. In sum, even if CEDAW were to endorse such an inclusive interpretation, the application of such an interpretation might lead to inequitable outcomes of protecting only some transgender individuals.

G. CEDAW COMMITTEE POSITIONS

In order for the reinterpretation of CEDAW to be implemented effectively, active support from the UN Committee on CEDAW is essential. Article 21 of the CEDAW empowers the Committee to make suggestions and General Recommendations based on the examination of reports and information received from state parties.¹⁰⁸ The Committee is the main authority that can interpret the Convention; while its views are not binding, the Committee provides a critical analysis of the anti-discrimination policies in various state parties and facilitate dialogue about such discrimination.¹⁰⁹

The Committee has referenced LGBT issues several times in its recommendations and concluding observations; a reference to LGBT discrimination was made in roughly one-third of all concluding observations.¹¹⁰ For example, the Committee explicitly stated in General

¹⁰³ Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331.

¹⁰⁴ David S. Jonas & Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 VAND. J. TRANSNAT'L L. 565, 571 (2010).

¹⁰⁵ Meyer, *supra* note 13, at 577.

¹⁰⁶ *Id.* at 579.

¹⁰⁷ Rosenblum, *supra* note 12, at 175.

¹⁰⁸ CEDAW, *supra* note 5, at art. 21.

¹⁰⁹ Holtmaat & Post, *supra* note 12, at 325–26.

¹¹⁰ *Id.* at 326.

Recommendation 28 that “[t]he discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity.”¹¹¹ This explicit reference indicates that the UN Committee recognizes that discrimination against the LGBT community exists and is closely connected to the very principles codified in CEDAW. Proponents of reinterpretation argue that this recognition suggests the Committee is supportive of including LGBT issues into its reading of CEDAW.

Nevertheless, CEDAW’s advice thus far is broad and unlikely to provide effective guidance in eliminating discrimination in the LGBT community. Although it has generally referenced the LGBT community, the Committee has been critiqued for “refus[ing] to take a clear stance on . . . whether the discrimination ground ‘sex’ in CEDAW includes . . . LGBT identities”¹¹² Thus, it remains unclear whether CEDAW would be willing to actively reinterpret CEDAW in any of the aforementioned methods to incorporate LGBT members.

H. PRELIMINARY THOUGHTS: IS REINTERPRETING CEDAW THE BEST COURSE OF ACTION?

The obvious benefit of reinterpreting CEDAW’s original text is that it would be the most time-efficient method of protecting the human rights of the LGBT community. CEDAW has already been written so advocates would not have to spend time and capital writing and negotiating a treaty. Instead, advocates could expend their resources by encouraging state parties to advocate for LGBT inclusive interpretations and the Committee to adopt a General Recommendation espousing these interpretations.¹¹³

Despite the time efficiency of this method, CEDAW’s text is not the most effective mechanism for addressing discrimination in the LGBT community. Although reinterpretation advocates have strong arguments based on the intersectional nature of discrimination against women and LGBT individuals, CEDAW’s asymmetric approach largely limits the scope of a reinterpreted CEDAW that could prevent such discrimination. Even if advocates were able to successfully garner international support of such changes, CEDAW would likely only protect LBT women, leaving GBT men unprotected. Additionally, reinterpretation would be extremely hard to enforce because the text itself does not explicitly reference sexual orientation or gender identity. Although reinterpretation might promote more LGBT-

¹¹¹ Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them.

Committee on the Elimination of Discrimination Against Women, General Recommendation No. 28 on the Core Obligations of State Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, ¶ 18, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010).

¹¹² Holtmaat & Post, *supra* note 12, at 330.

¹¹³ Meyer, *supra* note 13, at 586.

friendly policies that deter discrimination, it would be difficult for the Committee to enforce violations against the LGBT community when the reinterpretation is not codified in any legally binding document. A convention that solely focuses on discrimination against women is not comprehensive enough to work toward gender equality.¹¹⁴ Thus, I suggest that LGBT advocates consider alternatives to reinterpreting CEDAW.

VII. ALTERNATIVES TO INTERPRETING LGBT RIGHTS IN CEDAW

A. NEW CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST THE LGBT COMMUNITY

One alternative to reinterpreting CEDAW would be to initiate an entirely new multilateral treaty¹¹⁵ that explicitly prohibits discrimination against individuals on the basis of their sexual orientation or gender identity. Similar to CEDAW and other international human rights treaties, a legally binding instrument might incentivize countries to develop anti-discriminatory policies and would further hold state parties accountable for violations of such policies. Although a new treaty would undoubtedly face cultural backlash from particular states,¹¹⁶ the adoption of a legally binding convention on sexual orientation and gender identity could create “definitive normative framework for transforming rights of sexual minorities into reality.”¹¹⁷

While a new binding treaty would be the most effective means of enforcing violations and mandating anti-discrimination policies, the process of instituting an entirely new human rights treaty requires substantial time, capital, and effort. Because the treaty would ideally be a multilateral treaty, a new convention would require a large number of Member States to sign and ratify the treaty. LGBT advocates would thus have to spend a considerable amount of time and effort gaining the support of state members who oppose the inclusion of sexual orientation and gender identity. The cultural and religious differences between the Western States and Sub-Saharan and Islamic States and their past disagreements on the protection of LGBT people pose a significant problem to gathering a large network of support for a new treaty. The Declaration on Sexual Orientation in 2008, for example, faced stark opposition in a counter statement signed by fifty-seven countries, including the Vatican.¹¹⁸ The counter statement explicitly rejected

¹¹⁴ See Rosenblum, *supra* note 12, at 175–76.

¹¹⁵ A “multilateral” treaty means that it has multiple state parties, whereas a “bilateral” treaty only has two signatory state parties. *Multilateral Treaties*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/multilateral_treaties (last visited Jan. 26, 2020).

¹¹⁶ See, e.g., Zamir Akram, OIC Grp. on Human Rights & Humanitarian Issues, *Letter from UN’s Islamic Group to UNHRC President Opposing Panel on Violence Against Gays*, UN WATCH (Feb. 14, 2012), <https://unwatch.org/letter-from-uns-islamic-group-to-unhrc-president-opposing-panel-on-violence-against-gays/> (expressing concern at the United Nations’ attempt to encourage discrimination based on sexual orientation and gender identity as presented in Resolution 17/19).

¹¹⁷ ERIC HEINZE, *SEXUAL ORIENTATION: A HUMAN RIGHT* 90–92 (1995); see also Braun, *supra* note 9, at 892.

¹¹⁸ See generally Catherine Wolfe, *The United Nations Declaration on Sexual Orientation and Gender Identity 2008: Tracing the Evolution of LGBT Minority Rights Within the UN*, 22 TRINITY C. DUBLIN SOC. & POL. REV. 49, (2012); see also Braun, *supra* note 9, at 893.

the notion of protecting sexual orientation, declaring that such an endorsement could lead to “social normalization” of “pedophilia.”¹¹⁹ Similarly after the 2003 Brazilian Resolution, which reaffirmed the application of international human rights law to LGBT people, several Sub-Saharan States and members of the Organization of the Islamic Conference fiercely protested the Resolution by bringing hundreds of amendments to the text and delaying the resolution.¹²⁰

In short, LGBT advocates would face tremendous challenges gathering support of enough states to support a viable treaty. There is little evidence suggesting that Member States are more willing to negotiate a convention on sexual orientation since the resolution attempt in 2008. Resolution 17/19 on Human Rights, Sexual Orientation and Gender Identity, for example, was adopted by an extremely narrow margin.¹²¹ LGBT advocates would have to expend tremendous resources to persuade opposing Member States, which would be extremely time consuming and costly. Additionally, even if such a convention were drafted and made it to the negotiation process, failure to adopt such a treaty might send a negative message to the international community.¹²² Thus, the major risks and problems associated with creating an entirely new treaty prohibiting discrimination against the LGBT community suggest that a new convention is probably not the most preferable method at this point in time.

B. AMENDMENT OF CEDAW: EXPLICITLY PROHIBITING DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER

A third option that LGBT advocates might consider is amending CEDAW to categorically eliminate all forms of discrimination based on gender identity and sexuality. Article 18 of CEDAW’s optional protocol requires “two-thirds majority” of member parties’ support of an amendment for it to be enforced and binding on the states that accepted the amendment.¹²³ Although obtaining the support of a two-third majority would pose an uphill battle for LGBT activists, taking this “middle-road” between reinterpretation and drafting an entirely new treaty has several potential benefits.

First, amending the treaty to include all forms of discrimination based on “sex, sexual orientation, or gender identity” would allow CEDAW to symmetrically enforce violations of discriminatory policies against women *and* members of the LGBT community. Although some scholars might argue that the symmetric approach would undermine CEDAW’s purpose of

¹¹⁹ See *Syrian Statement: Response to SOGI Human Rights Statement*, ARC INT’L (Dec. 18, 2008), <https://arc-international.net/global-advocacy/sogi-statements/syrian-statement/>.

¹²⁰ See Wolfe, *supra* note 118, at 53 (detailing the delay of the resolution until 2004).

¹²¹ Human Rights Council Res. 17/19, U.N. Doc. A/HRC/RES/17/19 (July 14, 2011) (“Adopted by a recorded vote of 23 to 19, with three abstentions.”); see Braun, *supra* note 9, at 894.

¹²² Braun, *supra* note 9, at 894.

¹²³ Any State Party may suggest amendments to be sent to the Secretary-General of the United Nations to be communicated to all States Parties to the Protocol. If requested by a minimum of one-third of States Parties, a conference may be convened to discuss and vote on any amendments. With the support of a two-thirds majority and the General Assembly, an amendment comes into force and is binding on States that have accepted the amendments.

CEDAW, Optional Protocol, Article 18.

specifically promoting women's equity,¹²⁴ a symmetric approach would avoid classifying women in a rigid, binary gender regime.¹²⁵ In fact, by adopting a blanket discriminatory approach, the international community would endorse a more fluid approach to gender and sexuality that avoids defining all "women" with respect to men.¹²⁶ Currently, men are the only other gender recognized in CEDAW, which paradoxically reaffirms the tradition of gender duality and hierarchy in an instrument that "seeks to promote women's full humanity."¹²⁷ Amending CEDAW to incorporate all gender identities would therefore not only reinforce a fluid approach to gender identity but also disestablish the notion that men's experience is the "universal standard" for comparison.¹²⁸

Furthermore, the CEDAW Committee supported its usage of an asymmetric approach as a "temporary" method to achieve women's equity.¹²⁹ While women are by no means equitable in their respective socioeconomic or political status to men, LGBT individuals have far fewer avenues to achieve legal protection from unjust criminalization and discrimination.¹³⁰ Arguably, the benefits of including LGBT members in CEDAW's provisions substantially outweigh potential negative impacts on women because Member States would still be legally obliged to protect and empower women as is currently mandated. Amending CEDAW to protect the LGBT community, however, would enable the international community to support and protect multiple forms of gender and sex discrimination, including LBT women.¹³¹

¹²⁴ Equity and equality are two strategies we can use in an effort to produce fairness. While equity gives everyone what they need to be successful, equality is treating everyone the same. Amy Sun, *Equality Is Not Enough: What the Classroom Has Taught Me About Justice*, EVERDAY FEMINISM (Sept. 16, 2014), <https://everydayfeminism.com/2014/09/equality-is-not-enough/>; see also *What's the Difference Between Equity and Equality?*, MILKEN INST. SCH. PUB. HEALTH GEO. WASH. U. (Apr. 5, 2018), <https://publichealthonline.gwu.edu/blog/equity-vs-equality/> ("The route to achieving equity will not be accomplished through treating everyone equally. It will be achieved by treating everyone justly according to their circumstances.").

¹²⁵ The gender binary refers to the notion that gender comes in two distinct types: men and women, in which men are masculine, women are feminine, and, importantly, men are of the male sex and women are of the female sex. Today, the global community has become increasingly more accepting of the notion that gender and sexual orientation is fluid and often on a spectrum. See Laura McGuire, *It's Not in Your Head: The History and Science of Gender Fluidity*, SPECTRUM S. (July 4, 2018), <https://www.spectrumsouth.com/history-science-gender-fluidity/>; see also Karen L. Blair, *Has Gender Always Been Binary?*, PSYCHOL. TODAY (Sept. 16, 2018), <https://www.psychologytoday.com/us/blog/inclusive-insight/201809/has-gender-always-been-binary>; see, e.g., Will Oremus, *Here Are All The Different Genders You Can Be on Facebook*, SLATE (Feb. 13, 2014, 3:03 PM), <https://slate.com/technology/2014/02/facebook-custom-gender-options-here-are-all-56-custom-options.html> (explaining how Facebook has embraced the notion of gender fluidity by adding more than fifty custom gender identity options for its users).

¹²⁶ See generally Rosenblum, *supra* note 12.

¹²⁷ Dianne Otto, *Queering Gender [Identity] in International Law*, 33 NORDIC J. HUM. RTS. 299, 302 (2015).

¹²⁸ *Id.*

¹²⁹ See Committee on the Elimination of Discrimination Against Women, General Recommendation No. 25 on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, U.N. Doc. CEDAW/C/GC/25 (2004) ("Adoption by States parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved."); see also U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, *supra* note 32, at 39.

¹³⁰ See, e.g., Hutt, *supra* note 6; see also *LGBTI Rights*, AMNESTY INT'L, <https://www.amnesty.org/en/what-we-do/discrimination/lgbt-rights/> (last visited Apr. 1, 2020).

¹³¹ See generally Holtmaat & Post, *supra* note 12.

Second, the adoption of a symmetric approach would acknowledge and address all forms of discrimination in accordance with CEDAW’s purpose, objectives, principles, and Committee recommendations. A cumulative understanding of these aforementioned characteristics show that CEDAW, above all else, seeks to eliminate discrimination of all forms in order to promote gender equality. Discrimination on the basis of sex, sexual orientation, and gender identity affects individuals on both sides of the gender spectrum.¹³² Additionally, discrimination on the basis of gender identity and sexual orientation affects the enjoyment of each right laid out in CEDAW, and the Committee has already acknowledged the intersectionality between gender equality and LGBT rights.¹³³ Thus, such an approach produces a much more comprehensive approach to enforcing and eliminating discrimination, thereby more effectively promoting CEDAW’s overarching goal of eradicating gender inequality.

Third, from a logistical perspective, it is far more feasible and time efficient for LGBT advocates to persuade two-thirds of CEDAW’s member parties to accept an amendment than to draft an entirely new treaty. Although a new treaty would be the most effective way to uphold anti-discriminatory policies, past evidence suggests that LGBT advocates would have a difficult time consolidating enough UN Member States to sign onto an entirely new treaty.¹³⁴ Although advocates would undoubtedly face a great deal of resistance in successfully passing an amendment, gaining the approval of two-thirds of the CEDAW signatories is more feasible than obtaining the support of a large number of UN Member States.

Fourth, from a normative perception, amending CEDAW to explicitly address discrimination against members of the LGBT community would send a stronger message to the international LGBT community than would reinterpretation. Although reinterpreting CEDAW may potentially benefit the LGBT community by providing persuasive authority to the international community, codifying anti-discriminatory law in a binding instrument would send a powerful message that the UN vehemently opposes discriminatory policies.

Despite these positive effects, amending CEDAW may not be feasible in practice. Although amending CEDAW would provide the same binding authority as drafting an entirely new treaty, amending CEDAW would likely generate the same amount of resistance as a new treaty.¹³⁵ In addition, an amendment could potentially damage the effectiveness of CEDAW and could have a detrimental impact on the progress of women’s rights.¹³⁶

¹³² Today, modern gender studies scholars understand gender and sex on a spectrum, rather than a binary distinction between “man” and “woman.” The Gender Spectrum has been defined as a range of gender identities between and outside of the categories of male and female. See PRIDE EDUC. NETWORK, THE GENDER SPECTRUM: WHAT EDUCATORS NEED TO KNOW 13, 21 (2011). For a more general discussion of perceived gender discrimination in both men and women, see generally Diane Kobrynowicz & Nyla R. Branscombe, *Who Considers Themselves Victims of Discrimination?: Individual Difference Predictors of Perceived Gender Discrimination in Women and Men*, 21 PSYCHOL. WOMEN Q. 347 (1997).

¹³³ See Committee on the Elimination of Discrimination Against Women, General Recommendation No. 28 on the Core Obligations of State Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010).

¹³⁴ See Braun, *supra* note 9, at 893–95.

¹³⁵ See generally *id.*

¹³⁶ Holtmaat & Post, *supra* note 12, at 334.

Further, amending CEDAW to include such language would require extensive negotiations to obtain two-thirds majority and would take years to materialize.¹³⁷ Even if such an amendment were successfully added, member parties would still have the ability to make a reservation to the new obligations pursuant to CEDAW's Article 28, thereby undermining the amendment.¹³⁸ Finally, modifying CEDAW's approach from asymmetric to symmetric could mitigate CEDAW's overarching purpose of eliminating discrimination against women. CEDAW was intentionally written as a "woman-only" convention in an effort to recognize that it is predominantly women who suffer from sex discrimination and to specifically help women achieve equity with men.¹³⁹ Thus, an amendment that symmetrically applies the law to both sexes might result in fierce criticism.

Nevertheless, even if amending CEDAW would cause tremendous backlash or would result in an increase in the treaty's reservations, the amendment of CEDAW would undoubtedly encourage other states to change their policies. As Delaet observes, even if international human rights law alone does not prevent discrimination, it is a "necessary tool in the struggle to promote human rights for all individuals."¹⁴⁰ Further, although negotiating an amendment would require a tremendous amount of time and effort, encouraging states and other non-governmental organizations to include discussions of discrimination against LGBT persons in their interpretations of CEDAW are equally slow and less authoritative than amending the treaty.¹⁴¹ Finally, implementing a symmetric approach would not necessarily impede CEDAW's overarching purpose. By adopting such an approach, CEDAW would parallel other symmetric treaties, such as CERD's all-encompassing prohibition on the basis of race. Whereas approximately half of all humans are women, all individuals may be construed as having a gender identity and sexual orientation, thereby codifying such rights as universal ones.¹⁴²

VIII. IMPLEMENTATION OF AN AMENDED TREATY

Even if CEDAW were successfully amended to incorporate prohibitions against all forms of discrimination of LGBT individuals, the enforcement of this amendment poses a significant problem to the actual implementation of these changes. Although international treaties and conventions constitute approximately one-half of the corpus of international law,¹⁴³ there is a growing trend for states to entirely decline their treaty obligations with no ramifications.¹⁴⁴ Contrary to the provisions of the Vienna Convention on the

¹³⁷ *Id.* at 336.

¹³⁸ CEDAW, *supra* note 5, at art. 28.

¹³⁹ Diane Otto, *International Human Rights Law: Towards Rethinking Sex/Gender Dualism*, in THE ASHGATE COMPANION TO FEMINIST LEGAL THEORY 197, 199 (Margaret Davies & Vanessa E. Munro eds., 2013).

¹⁴⁰ DeLaet, *supra* note 99, at 51 (arguing that the international community should address LGBT rights through international law).

¹⁴¹ Holtmaat & Post, *supra* note 12, at 335.

¹⁴² See Rosenblum, *supra* note 12, at 145.

¹⁴³ Aliyu Ahmed-Hameed, *The Challenges of Implementing International Treaties in Third World Countries: The Case of Maritime And Environmental Treaties Implementation in Nigeria*, 50 J. L., POL'Y, & GLOBALIZATION 22, 22 (2016).

¹⁴⁴ *Id.* at 24.

Law of Treaties in 1969,¹⁴⁵ several states frequently become parties to international treaties that (i) breach its duties under other treaties, (ii) it does not have the resources or capacity to implement, (iii) it lacks the willingness to comply with the treaty’s obligations, and (iv) knowingly breach such treaty obligations arising from changed circumstances.¹⁴⁶ While the United Nations Security Council (UNSC)¹⁴⁷ has the ability to implement reactionary sanctions in response to treaty breaches, sanctions are only intended for situations that are egregiously “out of hand.”¹⁴⁸ Thus, in instances where international rules are not self-enforcing, it is essential for both the UN and Member States of a treaty work together to implement treaty provisions. While a full discussion of treaty implementation is beyond the scope of this Note, implementing a controversial provision of CEDAW is dependent on (a) local state involvement and (b) support from the CEDAW Committee and other UN agencies.

A. LOCAL INVOLVEMENT

Because the real effect of human rights is experienced locally, the key to implementing human rights treaties is local state involvement.¹⁴⁹ Without the support and willingness of Member State governments, the amendment to CEDAW would undoubtedly fail or never be enforced. Thus, it is essential that the CEDAW committee and the UN focus on connecting with regional leaders and creating an educational, global dialogue about gender politics and equity. For example, the CEDAW Committee could join forces with non-governmental organizations (“NGOs”) that have regional chapters to educate local leaders about the CEDAW amendment and its purpose of achieving a more wholesome gender equality. The CEDAW Committee has previously implemented this strategy to spread the treaty’s message, purpose, and implications for local governments by pairing with the International Women’s Rights Action Watch.¹⁵⁰ It could continue to promote global

¹⁴⁵ The Vienna Convention on the Law of Treaties established the obligations of states to discharge duties which they have assumed as parties to international treaties. *See generally* Vienna Convention on The Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331; *see also* Ahmed-Hameed, *supra* note 143, at 24–25.

¹⁴⁶ In fact, available records show that the United States has championed several of these approaches in its foreign policy. The U.S. has either refused to participate in, pulled out of, or actively worked against “the spirit” of several international treaties and conventions. Examples of such major treaties include: United Nations Framework Convention on Climate Change (1992), the Kyoto Protocol (1997), the Rome Statute of the International Criminal Court (1998), and the Comprehensive Nuclear-Test-Ban-Treaty (1996). Ahmed-Hameed, *supra* note 143, at 24–25.

¹⁴⁷ The United Nations Security Council (“UNSC”) has the primary responsibility for the maintenance of international peace and security. Pursuant to Chapter VII of the UN Charter, the UNSC may impose mandatory sanctions, such as economic sanctions, diplomatic sanctions, and military sanctions, in response to a breach of peace or act of aggression. *See* UNITED NATIONS, UNITED NATIONS SECURITY COUNCIL, <https://www.un.org/securitycouncil/> (last visited Apr. 1, 2020); *see* Frederic L. Kirgis, *Enforcing International Law*, 1 AM. SOC. INT’L L. (Jan. 22, 1996), <https://www.asil.org/insights/volume/1/issue/1/enforcing-international-law>.

¹⁴⁸ Kirgis, *supra* note 147.

¹⁴⁹ *See generally* United Nations, General Assembly, *Role of Local Government in The Promotion And Protection of Human Rights—Final Report of the Human Rights Council Advisory Committee*, A/HRC/30/49 (Aug. 7, 2015), <https://www.ohchr.org> (navigate to “Session30” then “Documents” then “A_HRC_30_49_ENG”).

¹⁵⁰ ZWINGEL, *supra* note 11, at 219.

discourses on women's and LGBT rights by partnering with similar NGOs throughout the world.

B. SUPPORT FROM THE CEDAW COMMITTEE & OTHER UN AGENCIES

In addition to local involvement, it is imperative that the CEDAW committee and other UN agencies continue to lend consistent support to the CEDAW amendment and the international LGBT community in any manner possible. First, the CEDAW committee should shift the focus of its recommendations to include LGBT individuals. In conjunction with its recommendations for women around the globe, CEDAW should include provisions that specifically reference the barriers faced by LGBT individuals around the globe, including access to education, employment opportunities, marriage, and healthcare.¹⁵¹ This inclusion would encourage legislation that meaningfully protects and empowers *all* individuals, thus enabling CEDAW to more effectively achieve the very gender equality it embodies. Second, the CEDAW Committee and other UN agencies should continue to support the inclusion of LGBT members by supporting initiatives and NGOs dedicated to LGBT rights. For example, the CEDAW Committee could issue a recommendation or public statement supporting the UN Free & Equal Campaign, a global UN public information campaign aimed at promoting equal rights and fair treatment of LGBT individuals.¹⁵² Similarly, the UN General Assembly and other branches of the UN Human Rights Council¹⁵³ could continue to support the gathering of international data regarding the humanitarian status of LGBT people around the globe, as well as future resolutions and joint statements supporting equality based on both gender identity and sex.

IX. CONCLUSION

There is a dire need in the international community for an explicit affirmation of LGBT rights. Although the UN has made significant progress promoting LGBT rights in non-binding instruments, the formal codification of anti-discriminatory policies toward the LGBT community would send a significant message that has the potential to encourage the endorsement of LGBT-friendly policies and customs on the state and local levels. While creating an entirely new treaty would be the strongest way to codify these rights, reinterpreting or, preferably, amending CEDAW to incorporate protections for members of the LGBT community is the most efficient way to solidify these rights.

¹⁵¹ See generally IGLHRC Report, *supra* note 84.

¹⁵² *The United Nations' Global Campaign Against Homophobia and Transphobia*, UNITED NATIONS FREE & EQUAL, <https://www.unfe.org/about> (last visited Jan. 23, 2020).

¹⁵³ The Human Rights Council is an inter-governmental body within the UN responsible for the promotion and protection of "all human rights around the globe." U.N. Human Rights Office of the High Comm'r, UNITED NATIONS HUM. RTS. COUNCIL, <https://www.ohchr.org/en/hrbodies/hrc/pages/home.aspx> (last visited Apr. 1, 2020).