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## Adoption of a Second Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women as a Means of Enhancing LGBT Rights

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# **Adoption of a Second Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women as a Means of Enhancing LGBT Rights**

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## I. INTRODUCTION

The strides made to ensure equality, discourage discrimination, and end violence based on sexual orientation and gender identity have been remarkable.<sup>1</sup> States have employed various legal and statutory mechanisms to achieve these goals.<sup>2</sup> Since 2011, three states have abolished criminal sanctions for homosexuality; fourteen have adopted or strengthened anti-discrimination laws by extending legal protections to included sexual orientation and gender identity; twelve have legally recognized same-sex marriage or civil unions; and ten have made it easier for transgender persons to obtain legal recognition of their gender identity.<sup>3</sup> Many countries are going beyond legal attempts to end violence and discrimination based on sexual orientation and gender identity by implementing sensitivity training for police, judges, medical staff, and teachers as well as anti-bullying programs in schools.<sup>4</sup>

While these advances are certainly noteworthy, unspeakable human rights violations continue to occur against individuals based on their sexual orientation and gender identity around the world.<sup>5</sup> In Houston, Texas, a proposed ordinance that called for the end of discrimination on the basis of sexual orientation, race, age, and other categories was defeated due to a successful fear mongering campaign against transgender citizens.<sup>6</sup> Extremist groups such as the Islamic

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<sup>1</sup> United Nations Office of the High Commissioner for Human Rights, *Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, A/HRC/29/23, 3 (4 May 2015) [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/29/23&referer=/english/&Lang=E](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/29/23&referer=/english/&Lang=E).

<sup>2</sup> Throughout this article, 'states' and 'countries' will be used interchangeably.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

State (ISIS) have thrown men accused of homosexuality off of tall buildings, shot them, and stoned them to death in Iraq, Syria, and Libya.<sup>7</sup>

Despite not necessarily gaining as much attention as physical acts of violence, legislative and judicial means of discrimination can be just as damning. In Malaysia, the federal court reversed a ruling that held a Sharia provision that forbids “a male person posing as a women” to be unconstitutional, resulting in the reinstatement of policies that permit arbitrary detention of trans women.<sup>8</sup> Finally, Kyrgyzstan, Kazakhstan, and Belarus have all proposed legislation that imposes penalties for providing objective or positive information about homosexuality.<sup>9</sup> Despite the tremendous advances in the protection from discrimination and violence based on sexual orientation and gender identity, these aforementioned examples of continuous and increasingly egregious human rights violations serve as justification for the argument that more concerted and cooperative steps need to be taken.

This paper addresses the central question of whether the protections afforded under the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) can or should be extended to members of the lesbian, gay, bisexual, and transgender (LGBT) community.<sup>10</sup> Section II examines what it means to be a member of the LGBT community and the respective protections that are currently afforded under international law. Section III explores the Feminist Paradox and the application of this theory to the LGBT community. Section IV

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<sup>7</sup> Graeme Reid, *Equality to Brutality: Global Trends in LGBT Rights*, WORLD ECONOMIC FORUM, Jan. 7, 2016, <https://www.weforum.org/agenda/2016/01/equality-to-brutality-global-trends-in-lgbt-rights/>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> There is an ongoing discussion about the appropriate acronym to encompass the entirety of “the gay community”. Throughout this article, I will be using LGBT for the sake of simplicity, but that should not be taken as an attempt to exclude those that identify as pansexual, asexual, gender nonconforming, nonbinary, genderqueer, gender fluid, gender neutral, or intersex. For definitions of all of these terms, see Michael Gold, *The ABCs of the L.G.B.T.Q.I.A.* +, N.Y. TIMES (June 21, 2018), <https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html>.

evaluates CEDAW and its' applicability to LGBT persons. Lastly, Section V analyzes the merit of options for protection under CEDAW.

## II. LGBT COMMUNITY

### A. Definitions

The first step in advocating for the rights of a particular population is to define the population. Two central components necessary to understanding membership in the LGBT community are 'sex' and 'gender'. The World Health Organization defines sex as, "the biological characteristics that define humans as female or male."<sup>11</sup> Gender is defined as, "the socially constructed characteristics of women and men- such as norms, roles and relationships of and between groups on men and women."<sup>12</sup> Despite the fact that sex and gender are often used interchangeably, it is clear that the terms have distinctive definitions and any legal mechanism hoping to protect people based on their gender or sex should include definitions of both.

Although the concept of gender identity has become a mainstream topic in recent years, historically, the idea that someone could identify as a different gender than which their biological sex indicates has not always been accepted.<sup>13</sup> Gender identity is generally understood to "reflect a deeply felt and experienced sense of one's own gender."<sup>14</sup> Gender identity can be expressed in

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<sup>11</sup> *Sexual and Reproductive Health: Defining Sexual Health*, WORLD HEALTH ORGANIZATION, [https://www.who.int/reproductivehealth/topics/sexual\\_health/sh\\_definitions/en/](https://www.who.int/reproductivehealth/topics/sexual_health/sh_definitions/en/) (last visited Nov. 10, 2017).

<sup>12</sup> *Gender, Equality and Human Rights*, WORLD HEALTH ORGANIZATION, <http://www.who.int/gender-equity-rights/understanding/gender-definition/en/> (last visited Nov. 10, 2017).

<sup>13</sup> Darren Rosenblum, *Unsex CEDAW, or What's Wrong with Women's Rights*, 20(2) COLUMBIA J. GENDER & L. 98, 125 (2011).

<sup>14</sup> *Ending Violence and Other Human Rights Violations Based on Sexual Orientation and Gender Identity: A Joint Dialogue of the African Commission on Human and Peoples' Right, Inter-American Commission on Human Rights and United Nations*, Pretoria University Law Press, p.1 (2016), [http://www.ohchr.org/Documents/Issues/Discrimination/Endingviolence\\_ACHPR\\_IACHR\\_UN\\_SOGI\\_dialogue\\_EN.pdf](http://www.ohchr.org/Documents/Issues/Discrimination/Endingviolence_ACHPR_IACHR_UN_SOGI_dialogue_EN.pdf).

a variety of ways including the way one dresses, speaks, or embodies certain mannerisms. Although gender identity usually corresponds with sex, that alignment is not universal.<sup>15</sup>

The concept of gender identity is most closely related to transgender and intersex persons. As a point of comparison, someone whose gender identity matches the sex they were assigned at birth is considered ‘cis’ or ‘cisgender’.<sup>16</sup> Transgender, or trans, is an umbrella term used to describe a wide range of identities – including transsexual people, cross-dressers (sometimes referred to as ‘transvestites’), people who identify as third gender, and others whose appearance and characteristics do not correspond with the sex they were assigned at birth and/or are perceived as gender atypical.<sup>17</sup> On the other hand, someone who is intersex was born with “the sexual anatomy, reproductive organs, and/or chromosome patterns that do not fit the typical definition of male or female.”<sup>18</sup> The assumptions that sex is synonymous with gender or that sex is dichotomous inhibits our ability to ensure equal rights for all people because those whose sexual identities differ from their gender identities can be excluded or forgotten easily.

In addition to gender identity, sexual orientation is another common term that is not often thought to need definitive clarification. Sexual orientation “refers to a person’s physical, romantic, and/or emotional attraction towards other people.”<sup>19</sup> There are several terms under the umbrella of sexual orientation. The term ‘gay’ is generally used to describe men who are attracted to men, but it can also be used to describe women who are attracted to women.<sup>20</sup> The

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<sup>15</sup> *Id.*

<sup>16</sup> Michael Gold, *The ABCs of L.G.B.T.Q.I.A.*, N.Y. TIMES (June 21, 2018), <https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html>.

<sup>17</sup> *Id.* at 2.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> U.N. High Commissioner for Refugees, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of*

term ‘lesbian’ defines women who are attracted to women.<sup>21</sup> Those who are attracted to both men and women are considered ‘bisexual.’<sup>22</sup> The term ‘bisexual’ is often thought to mean that a person is equally attracted simultaneously to both men and women, but it can also mean exclusive attraction to one gender at one time and attraction to a different gender at a different time, or varying levels of attraction for different genders.<sup>23</sup> The failure to include the respective terms that express the various forms of sexual orientation can lead to a failure for members to be correctly included within the LGBT population.

### *B. Population Determination Challenges*

Determining exact statistics on the number of people who identify as a member of the LGBT community is difficult for a variety of reasons. First, the definition of who is included within that community varies from country to country.<sup>24</sup> Next, the lack of standardized survey methods, such as self-reporting or multiple-choice questions, can skew the results.<sup>25</sup> Finally, population identity problems are compounded, as most countries’ censuses do not inquire about sexual orientation or gender identity.<sup>26</sup> Illegality of homosexuality in some countries and powerful negative social stigma that in some cases has resulted in violence may also keep people from openly divulging their sexual orientation or gender identity even in countries where the

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*the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, ¶ 10, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012), available at <http://www.unhcr.org/50ae466f9.pdf>.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Gary J. Gates, *How Many People are Lesbian, Gay, Bisexual, and Transgender*, THE WILLIAMS INSTITUTE (2011) <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>.

<sup>25</sup> *Id.*

<sup>26</sup> *Counting the LGBT Population: 6% of Europeans Identify as LGBT*, DALIA RESEARCH (Oct. 18 2016) <https://daliaresearch.com/counting-the-lgbt-population-6-of-europeans-identify-as-lgbt/>.

census enquires.<sup>27</sup> These circumstance culminate in incomplete and inaccurate estimates of the number of individuals who identify as LGBT.

Despite these limitations, LGBT population data is still being gathered. One study estimated that 5.9% of Europeans identify as LGBT.<sup>28</sup> However, this study was not immune to data collection difficulties. For example, it produced wildly different results of sexuality based on the type of question asked.<sup>29</sup> When asked to answer in terms of ‘yes’, ‘no’, or ‘prefer not to say’ to the question ‘do you identify as lesbian, gay, bisexual, or transgender?’, 5.9% of people answered affirmatively.<sup>30</sup> In contrast, when asked “which of the following options best describes your current sexual orientation” with answers of “only heterosexual”, “mostly heterosexual, sometimes homosexual”, “equally heterosexual and homosexual”, “mostly homosexual, sometimes heterosexual”, “only homosexual,” or “asexual”, 10% of participants choose options other than “only heterosexual”.<sup>31</sup> It should be noted that the difference in percentages from this particular study is especially significant because respondents were asked to answer both questions at the same time as opposed to being asked of different sample sets or of the same group but at different times.<sup>32</sup>

In contrast, studies from the United States, Canada, the United Kingdom, Australia, and Norway estimated that anywhere from 1.2% to 5.6% of respondents identify as lesbian, gay, or

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<sup>27</sup> For example, the death penalty is a possible punishment for homosexuality in Mauritania, Sudan, northern Nigeria and southern Somalia. *Mapping Anti-Gay Laws in Africa*, AMNESTY INTERNATIONAL UK: LGBTI RIGHTS (Feb. 16 2017), <https://www.amnesty.org.uk/lgbti-lgbt-gay-human-rights-law-africa-uganda-kenya-nigeria-cameroon>.

<sup>28</sup> DALIA RESEARCH, *supra* note 24.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

bisexual.<sup>33</sup> It would be a mistake to interpret the dearth of readily available LGBT population data as evidence that members of the LGBT community comprise a statistically insignificant portion of the global population. This erroneous assumption would make it easy to assume that specialized protections are unnecessary, despite the fact that members of the LGBT community are at risk for some of the most egregious human rights violations.

### C. Sources of Legal and Statutory Protection

As of 2017, there is not an international mechanism dedicated to the protection of the LGBT community.<sup>34</sup> However, the core human rights treaties do in fact, or at least in theory, protect the rights of those that identify as LGBT by being framed in the terms of “all people”. Although there is a lack of legally binding, LGBT specific mechanisms, there are several sources of soft-law directed at protecting this community’s human rights. Additionally, there are numerous general comments to the core human rights treaties that address the LGBT community specifically, albeit superficially.<sup>35</sup> This section will explore the sources of protections for the LGBT community and the specific rights enumerated within those sources.

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<sup>33</sup> Gates, *supra* note 22, at 3.

<sup>34</sup> Aengus Carroll & Lucas Ramon Mendos, *State Sponsored Homophobia: A World Survey of Sexual Orientation Laws*, ILGA, p. 13 (May 2017), [http://ilga.org/downloads/2017/ILGA\\_State\\_Sponsored\\_Homophobia\\_2017\\_WEB.pdf](http://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf).

<sup>35</sup> U.N. Econ. & Soc. Council, *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc E/C. 12/GC/20 (July 2, 2009), available at <https://www.refworld.org/docid/4a60961f2.html>; U.N. Convention on the Rights of the Child, *General comment No. 13 (2011): The right of the child to freedom from all forms of violence*, U.N. Doc CRC/C/GC/13 (April 18, 2011), available at <https://www.refworld.org/docid/4e6da4922.html>; U.N. Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, U.N. Doc CAT/C/GC/2 (Jan. 24, 2008), available at <https://www.refworld.org/docid/47ac78ce2.html>; U.N. Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 27 on older women and protection of their human rights*, U.N. Doc CEDAW/C/GC/27 (Dec. 16, 2010), available at <https://www.refworld.org/docid/4ed3528b2.html>; U.N. CEDAW, *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 (Oct. 19, 2010), available at <https://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW-C-2010-47-GC2.pdf>; U.N. High

*i) International Bill of Rights*

International Bill of Human Rights, which is comprised of the Universal Declaration of Human Rights (UDHR), together with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESC)<sup>36</sup> all include lists of prohibited grounds of discrimination in their non-discrimination guarantees.<sup>37</sup> These lists do not explicitly include “sexual orientation” or “gender identity”, but they all conclude with the words “other status.”<sup>38</sup> The concepts of universality, equality, and non-discrimination lie at the core of international human rights law treaties.<sup>39</sup>

The UDHR was adopted by the United Nations General Assembly on December 10, 1948.<sup>40</sup> The Declaration set out to define a set of protections fundamental to all humans.<sup>41</sup> Article 1 of the UDHR states that, “[a]ll human beings are born free and equal in dignity and rights.”<sup>42</sup>

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Commissioner for Refugees, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, U.N. Doc HCR/GIP/12/09 (Oct. 23, 2012), available at <https://www.unhcr.org/50ae466f9.pdf>

<sup>36</sup> Fact Sheet No.2 (Rev.1): The International Bill of Human Rights, Office of the High Commissioner of Human Rights, <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>.

<sup>37</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/217\(III\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/217(III)); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

<sup>38</sup> United Nations Office of the High Commissioner for Human Rights, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, HR/PUB/12/06, p. 41, <http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf>.

<sup>39</sup> U.N. High Commissioner for Human Rights, *Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, U.N. Doc. A/HRC/29/23 (4 May 2015), available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/29/23&referer=/english/&Lang=E](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/29/23&referer=/english/&Lang=E).

<sup>40</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), available at <http://www.un.org/en/universal-declaration-human-rights/>.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*, at Art. 1

Article 3 states that, “everyone has the right to life, liberty and security of person.”<sup>43</sup> Members of the LGBT community are not specifically protected nor are they specifically excluded from the protections afforded by the UDHR. The UDRH has been in existence for over half a decade, yet, the rights of the LGBT community are still far from being protected as compared to the non-LGBT population.

The International Covenant on Civil and Political Rights (ICCPR) was adopted and opened for signature on December 16, 1966 by the United Nations General Assembly and entered into force on March 23, 1976.<sup>44</sup> “The ICCPR obligates countries that have ratified the treaty to protect and preserve basic human rights, such as: the right to life and human dignity; equality before the law; freedom of speech, assembly, and association; religious freedom and privacy; freedom from torture, ill-treatment, and arbitrary detention; gender equality; the right to a fair trial; and minority rights.”<sup>45</sup> State parties that have signed onto the treaty obligate themselves to protecting the rights included in the treaty through administrative, legal, and judicial means.<sup>46</sup> As with the UDHR, the ICCPR addresses the protection of human rights generally.<sup>47</sup>

Finally, the International Covenant on Economic, Social, and Cultural Rights (ICESC) was adopted by the United National General Assembly in 1966.<sup>48</sup> Like the UDHR and the

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<sup>43</sup> *Id.*

<sup>44</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

<sup>45</sup> *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, ACLU, <https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr>, (last updated Apr. 2014).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

ICCPR, the ICESCR addresses human rights in terms of ‘all people’.<sup>49</sup> Article 1 of the Covenant is especially important because it specifically states, “all peoples have the right of self-determination.”<sup>50</sup> Additionally, no State, group or person has the right to engage in activities aimed at destructing any of the rights enumerated in the Covenant. Each component of the International Bill of Human Rights provides general protections for all citizens but lacks specific designations for the LGBT community.<sup>51</sup>

*ii) Soft Law*

The concept of soft law is challenging for law students and legal scholars alike because soft law is not actually law at all.<sup>52</sup> Soft law usually refers to any written international instrument, other than a treaty or convention, containing principles, norms, standards, or other statements of expected behavior.<sup>53</sup> Soft law “expresses a preference and not an obligation that state should act, or refrain from acting, in a specific manner.”<sup>54</sup> While not legally binding, different forms of soft law can be very powerful in informing expectations.

However, soft law is more than just political or policy statements.<sup>55</sup> In November 2006, twenty-nine experts from twenty-five different countries met in Yogyakarta, Indonesia to discuss the current obligations of state parties to ensure the protection of LGBT rights under

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at Art. 1.

<sup>51</sup> *Id.* at Art. 6(a).

<sup>52</sup> Andrew Guzman and Timothy Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 172 (2010) <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1694&context=facpubs>.

<sup>53</sup> Dinah L Shelton, *Soft Law*, GWU. L. SCH. PUB. L. AND LEGAL THEORY WORKING PAPER No. 322, 3 (2008) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1003387](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1003387).

<sup>54</sup> Joseph Gold, INTERPRETATION: THE IMF AND INTERNATIONAL LAW 331 (1996).

<sup>55</sup> *Id.*

international law.<sup>56</sup> Following a unanimous vote, nineteen principles and sixteen additional recommendations were set out “affirming binding international legal standards with which all States must comply” with respect to sexual orientation and gender identity.<sup>57</sup> Named the Yogyakarta Principles, this documents details various LGBT rights that range from the right to the universal enjoyment of human rights<sup>58</sup> to the right to a fair trial.<sup>59</sup> Though the Principles themselves are not binding on State Parties, they do affirm demands already laid out in the core human rights treaties.

While there is still a continuous debate about the binding nature of United Nations resolutions and decisions, they still carry weight as formal expressions of the opinion or will of UN organs.<sup>60</sup> The Human Rights Council has adopted three resolutions specific to sexual orientation and gender identity.<sup>61</sup> The first adopted resolution was Resolution 17/19 enacted in 2011.<sup>62</sup> In recognition of the protections afforded by the UDHR and the call to action contained in General Assembly Resolution 60.251 of 2006, the Human Rights Council requested that the UN High Commissioner for Human Rights commission a study of discriminatory laws and

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<sup>56</sup> The Yogyakarta Principles: Principle on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Mar. 2007), *available at* [http://data.unaids.org/pub/manual/2007/070517\\_yogyakarta\\_principles\\_en.pdf](http://data.unaids.org/pub/manual/2007/070517_yogyakarta_principles_en.pdf).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 10.

<sup>59</sup> *Id.* at 15-16.

<sup>60</sup> *Are UN Resolutions Binding*, DAG HAMMARSKJOLD LIBRARY, (Jan. 9, 2017), <http://ask.un.org/faq/15010>.

<sup>61</sup> United Nations Human Rights Council, *Human Rights Resolution: Human Rights, Sexual Orientation and Gender Identity*, A/HRC/RES/17/19 (June 17, 2011); United Nations Human Rights Council, *Human Rights Council Resolution: Human Rights, Sexual Orientation and Gender Identity*, A/HRC/RES/27/32 (Sept. 26, 2014); United Nations Human Rights Council, *Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, A/HRC/RES/32/2 (June 30, 2016) <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNResolutions.aspx>.

<sup>62</sup> U.N. Human Rights Council, *Human Rights Resolution: Human Rights, Sexual Orientation and Gender Identity*, A/HRC/RES/17/19 (June 17, 2011), <https://documentsddsny.un.org/doc/UNDOC/GEN/G11/148/76/PDF/G1114876.pdf?OpenElement>.

practices based on sexual orientation or gender identity.<sup>63</sup> Although Resolution 17/19 does not call for direct action by member states to the UN to ensure the protection of LGBT rights, the UN's recognition of vulnerability based on sexual orientation and gender identity by the Human Rights Council was monumental.

The second resolution adopted, Resolution 27/32, was enacted in 2014.<sup>64</sup> Resolution 27/32 was written based on the acknowledgment and appreciation of United Nations High Commissioner for Human Rights' report pursuant to Resolution 17/19.<sup>65</sup> Resolution 27/32 requested that the High Commissioner update the report, paying special attention to recommending best practices for eliminating discrimination based on sexual orientation and gender identity.<sup>66</sup>

Finally, Resolution 32/2 was enacted in 2016 and was an important step in ensuring the elimination of discrimination against members of the LGBT community.<sup>67</sup> Resolution 32/2 calls for several actions: it appoints an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; calls upon all States to cooperate with the Independent Expert; and requests that the Expert submit annual reports back to the High Rights Council.<sup>68</sup> Again, acknowledging the limitations and debate regarding the binding nature of resolutions, these three resolutions serve as evidence that the Human Rights Council not only

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<sup>63</sup> *Id.*

<sup>64</sup> U.N. Human Rights Council, *Human Rights Resolution: Human Rights, Sexual Orientation, and Gender Identity*, A/HRC/27/L.27/Rev.1 (24 Sept. 2014) <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G14/171/09/PDF/G1417109.pdf?OpenElement>.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> U.N. Human Rights Council, *Human Rights Resolution: Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, A/HRC/32/L.2/Rev.1 (28 June 2016) <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G16/135/00/PDF/G1613500.pdf?OpenElement>.

<sup>68</sup> *Id.*

recognizes the problem of discrimination based on sexual orientation and gender identity but is also taking steps to eradicate it.

Currently, legally binding international human rights law provides theoretical protections for members of the LGBT community grounded in the concept of basic humanity. Soft law has gone much further in specifying the unique struggles of LGBT persons and urging states to eliminate discrimination and bias based on gender identify and sexual preference. The progress in LGBT legal and statutory protections is undeniable. Yet, the lack of specific, legally binding obligations to ensure the equal rights for differently sexed or gendered individuals leaves too much room for discrimination.

### **III. Edward's Feminist Paradox as applied to the LGBT community**

In her seminal book *Violence Against Women Under International Human Rights Law*, Alice Edwards introduced the idea of the feminist paradox.<sup>69</sup> Edwards endeavored to explain why women experience obstacles to equal treatment and proposed solutions to that problem. She explained that, "the more that women's specific concerns of violence are raised in human rights institutions, the more women become reduced to essences and are marginalized."<sup>70</sup> Accordingly, women have two choices when it comes to realizing equal rights. Women can either equate their experiences to harm normally perpetrated against men or justify why their experiences deserve an exception to the rule.<sup>71</sup> Just as women as a group experience inequality as a result of an immutable characteristic, so do members of the LGBT community.

By extension, it is a reasonable inference that, parallel to the struggle for women's protections, members of the LGBT community must either equate their experiences to those

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<sup>69</sup> Alice Edwards, *VIOLENCE AGAINST WOMEN UNDER INTERNATIONAL HUMAN RIGHTS LAW*, 4 (2010).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

experienced by gender and sex conforming individuals or justify why they deserve specialized protections. This section will explore the advantages and disadvantages of equation and justification as mechanisms to ensure equality and eliminate discrimination.

#### A. Equation as a Mechanism

Equation advocates argue that equating the experiences of a unique population, women for the purpose of this paper, to the experiences of the dominant group, helps to frame protection disparities in terms that those in power understand. The rationale is that those who make the law are often not the same people that experience breakdowns in the law. Subsequently, how those breakdowns occur, and the consequences of those breakdowns need to be related to the experiences of those creating the law, so those who created the law can become aware of the various experiences of the people that the law will encompass.

Edwards explained that, “women’s experiences are seen as an exception to the main or general understanding of those particular provisions. In other words, women are seen as deviation from that standard and as an exception to the rule, rather than as equal beneficiaries of the human rights protection system. The practical effect as men *de jure* is to impose additional burdens on women *de facto*.”<sup>72</sup>

Conversely, there are many reasons that negate the feasibility of Edwards’ equation approach. First, this approach disregards the fact that women experience discrimination in qualitatively different ways than men, therefore ignoring the very reasons that these violations occur in the first place.<sup>73</sup> Additionally, the approach forces women to equate their experiences to

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<sup>72</sup> Edwards, *supra* note 68, at 5.

<sup>73</sup> See Ruskshanda Zarar et al., *Causes and Consequences of Gender Discrimination Against Women in Quetta City*, 8(3) ARTS AND SOCIAL SCIENCE J. 1 (2017) <https://www.omicsonline.org/open-access/causes-and-consequences-of-gender-discrimination-against-women-inquetta-city-2151-6200-1000277.pdf>.

what men experience which not only reinforces the sexual hierarchy that already exists in the system, but also works to tell women that their experiences are not of valid concern unless men also experience them.<sup>74</sup>

Finally, “the more gender-neutral or gender-blind a particular right (or any law or public policy) is, the more likely it is to enhance the privilege of men and eclipse the needs of women as subordinates.”<sup>75</sup> Although commonly explained in terms of the power inequality between men and women, these same concerns translate to inequality based on race, gender, ability, nationality, and sexual identity. The fact that the international community have agreed to create treaties specific to unique groups furthermore serves as conclusive evidence of the deficiencies of the equation approach.

As opposed to multiple conventions aimed at protection the rights of distinct vulnerable populations, international human rights law has traditionally viewed a single document, framed in terms of ‘all people’, as sufficient to protect the rights of everyone. This point is evidenced by the fact that the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, are collectively written in terms of “all humans”<sup>76</sup> or “all people”.<sup>77</sup>

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<sup>74</sup> 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(4) NORDIC J. OF HUMAN RIGHTS 319, 322 (2015).

<sup>75</sup> Wendy Brown, *Rights as Paradoxes*, 7 CONSTELLATIONS 230, 231 (2000), <https://onlinelibrary.wiley.com/doi/abs/10.1111/1467-8675.00183>.

<sup>76</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

<sup>77</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

Yet, there is a shift away from the equation mechanism. The International Convention on the Elimination of All Forms of Racial Discrimination is still framed in terms of “all people”, but was the first international human rights law treaty to address discrimination against a specific group.<sup>78</sup> Subsequently, six more international human rights law treaties have been ratified and entered into force.<sup>79</sup> That said, of the nine-core international human rights law treaties, only five directly address unique populations, such as women, children, persons with disabilities, and migrant workers.<sup>80</sup>

### *B. Justification as a Mechanism*

The second approach Edwards offers to advance women’s rights is to justify why women’s experiences deserve the establishment of an exception to the pre-existing, ‘universal’

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<sup>78</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>.

<sup>79</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, *available at* <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, *available at* <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>; Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 Dec. 1990, 2220 U.N.T.S. 3, *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx>; Convention for the Protection of All Persons from Enforced Disappearance, 20 Dec. 2006, 2716 U.N.T.S. 3, *available at* <http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx>; Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S.3, *available at* <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx>.

<sup>80</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, *available at* <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, *available at* <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>; Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 Dec. 1990, 2220 U.N.T.S. 3, *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx>; Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S.3, <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx>.

rule.<sup>81</sup> With all of the inherent challenges of the equation approach, it is a logical extension that the justification approach is worth analysis.

There are three primary disadvantages in justifying the need to create an exception to the general rule. First, creating an exception to the ‘general rule’ further perpetuates the myth that women are weak and not truly equal to men; if women and men were actually equal, they wouldn’t need a separate rule to protect them.<sup>82</sup> Secondly, creating a separate rule exceptionalizes the experiences of women and thereby “essentializes her”.<sup>83</sup> Because the focus is being placed on how men and women experience life differently, and because men’s life experience is considered standard, women are being reduced to their differences; differences that are traditionally seen as ‘less than’. Finally, focusing solely on the differences between men and women runs the risk of contemplating women as monolithic, as opposed to appreciating the rich diversity of characteristics inherent in women beyond their sex.<sup>84</sup>

Regardless of the obstacles, justifying why the unique experiences of women deserve an exception to the rule provides many advantages. First, explaining why women deserve exceptions to the rule brings the issues to light.<sup>85</sup> Additionally, this method gives women a platform not only to discuss what the problems are, but why the problems exist. Next, examining issues in terms of unique experiences instead of equating to “normal” experiences legitimizes the struggles of a distinctive population. Finally, it is clear that universal declarations to eliminate

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<sup>81</sup> Edwards, *supra* note 68, at 5.

<sup>82</sup> See Margie Warrell, *What Will it Take to Make Gender Equality the Norm, Not the Exception?*, Forbes: Leadership (10 Mar. 2015) <https://www.forbes.com/sites/margiewarrell/2015/03/10/what-will-it-take-to-make-gender-equality-the-norm-not-the-exception/#cf2dfe37f4fc>

<sup>83</sup> Holtmaat, *supra* note 73, at 322.

<sup>84</sup> Berta E. Hernández-Truyo, *Unsex CEDAW? No! Super-Sex it!*, 20(2) COLUMBIA J. GENDER & L. 195, 214 (2011).

<sup>85</sup> Rosenblum, *supra* note 13, at 107.

discrimination do not provide adequate protections.<sup>86</sup> Despite the challenges of this approach, justifying why an experience is unique and therefore is deserving of special protections is sometimes the only way to ensure equal rights.

#### IV. CEDAW

##### A. *What is CEDAW*

The Convention of the Elimination of All Forms of Discrimination Against Women (CEDAW) was adopted by the UN General Assembly in 1979.<sup>87</sup> As one of the most widely ratified human rights law treaties with 189 state parties,<sup>88</sup> CEDAW is a perfect example of the ‘justification’ prong of Edwards’ feminist paradox in practice. “The preamble of CEDAW expressly recognizes that, despite the international obligations to put an end to discrimination between men and women that were laid down in the previously adopted human rights treaties, extensive discrimination against women continues to exist.”<sup>89</sup>

State parties to CEDAW are obligated to eliminate all forms of discrimination against women by incorporating equality measures into their legal systems, eliminating discriminatory laws that are already implemented, and taking appropriate measures to change negative cultural stereotypes.<sup>90</sup> The Convention defines discrimination as "...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of

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<sup>86</sup> *Id.* at 213.

<sup>87</sup> *Convention on the Elimination of All Forms of Discrimination Against Women: Overview of the Convention*, UN WOMEN, <http://www.un.org/womenwatch/daw/cedaw/> (last visited Nov. 6, 2017).

<sup>88</sup> *Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13.

<sup>89</sup> Holtmaat, *supra* note 73, at 321.

<sup>90</sup> UN WOMEN, *supra* note 91.

equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”<sup>91</sup>

Even though the elimination of discrimination is the main purpose of the Convention, the definition of discrimination used is much broader than the traditional scope of the definition. As a point of comparison, Merriam-Webster defines discrimination as, “prejudiced or prejudicial outlook, action, or treatment.”<sup>92</sup> CEDAW’s definition expresses discrimination as an instance of women’s oppression.<sup>93</sup> “The notion of oppression goes beyond mere unequal treatment, but also includes instances of marginalization, powerlessness, cultural imperialism, and violence.”<sup>94</sup> This expansive definition of discrimination recognizes the indivisibility and interdependence of the different categories of rights and the compounding effects of having those rights go unrecognized.<sup>95</sup>

States that have ratified CEDAW are legally bound to put its provisions into practice and submit national reports to the CEDAW Committee at least every four years detailing their compliance with the treaty.<sup>96</sup> There are three specific measures state parties are obligated to undertake by virtue of signing onto the treaty: 1) they must incorporate the principle of equality between men and women into the legal system which includes abolishing discriminatory laws and adopting ones that prohibit discrimination against women, 2) where mechanisms don’t exist, they must establish tribunals or other public institutions, or properly support existing mechanisms to ensure the effective protections of women’s rights, and 3) they must ensure the

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<sup>91</sup> Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13.

<sup>92</sup> *Discrimination*, MERRIAM-WEBSTER.COM, <https://www.merriamwebster.com/dictionary/discrimination> (last visited April 29, 2018).

<sup>93</sup> Holtmaat, *supra* note 73, at 323.

<sup>94</sup> *Id.*

<sup>95</sup> Hernández-Truyo, *supra* note 83, at 214.

<sup>96</sup> UN WOMEN, *supra* note 91.

elimination of discrimination against women in all forms and by perpetrated by all actors.<sup>97</sup> Finally, states are obligated not only to ensure the elimination of discrimination in the public sector, but also to enact laws and public policy aimed at the elimination of discrimination in private life as well.<sup>98</sup> In short, the protections under CEDAW have been monumental for bringing issues of women's rights into the central focus of the international human rights law arena.<sup>99</sup>

### *B. Application of CEDAW to the LGBT Community*

At first glance, it appears obvious that the protections afforded under CEDAW are specific to women. The convention title directly refers to women: the Convention of the Elimination of all forms of Discrimination Against Women.<sup>100</sup> Additionally, the Convention is colloquially called the Women's Rights Treaty.<sup>101</sup> However, notwithstanding the title, the Convention is framed in terms of sex. As stated previously, CEDAW defines discrimination as "any distinction, exclusion or restriction made on the basis of sex..."<sup>102</sup> The facial analysis of this conventions leads to an easy assumption that the protections of CEDAW do not and should not extend past women. However, the use of sex and gender interchangeably within the Convention and the similarity in discrimination experienced by both women and members of the LGBT community are significant and serve to challenge the assertion that CEDAW only applies to females.

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<sup>97</sup> *Id.*

<sup>98</sup> Hernández-Truyo, *supra* note 83, at 213.

<sup>99</sup> Rosenblum, *supra* note 13, at 107.

<sup>100</sup> Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 92.

<sup>101</sup> Harold Hongju Koh, *Why America Should Ratify the Women's Right's Treaty (CEDAW)*, 34(3) CASE WESTERN RES. J. OF INT'L L. 263, 263 (2002), available at <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1465&context=jil>.

<sup>102</sup> Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 92, at Art. 1.

## i) “Sex” v. “Gender”

Despite the stated goals of CEDAW of eliminating discrimination against women and defining discrimination in terms of sex, CEDAW fails to define ‘sex’, ‘gender’, or ‘women’ within the body of the Convention.<sup>103</sup> Further, a significant part of the Convention explicitly prohibits discriminatory actions based on gender roles despite being framed in terms of sex.<sup>104</sup> The World Health Organization defines sex as “the biological characteristic that define humans as female or male.”<sup>105</sup> Gender, on the other hand, is generally understood as a concept that is socially constructed.<sup>106</sup> Even though the construction of the definition of gender is complex and varies depending on culture, construction is often determined by the roles women are expected to occupy and play, the relationship of those roles to the role of men, and the value society places on those roles.<sup>107</sup>

Despite the growing consensus that sex and gender occupy two different definitions, the terms ‘are rarely explicitly mentioned in the documentation of human rights treaty bodies, and if they are referred to, they are often used interchangeably and without explanation.’<sup>108</sup> The lack of definition or differentiation between sex and gender within CEDAW may be a product of the time period in which the Convention was written.<sup>109</sup> While the 1970’s saw a drastic increase in

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<sup>103</sup> Rosenblum, *supra* note 13, at 124.

<sup>104</sup> Hernández-Truyo, *supra* note 83, at 216-17.

<sup>105</sup> *Defining Sexual Health*, WORLD HEALTH ORGANIZATION, [http://www.who.int/reproductivehealth/topics/sexual\\_health/sh\\_definitions/en/](http://www.who.int/reproductivehealth/topics/sexual_health/sh_definitions/en/) (last visited April 29, 2018).

<sup>106</sup> Edwards, *supra* note 68, at 13.

<sup>107</sup> United Nations, *Division for the Advancement of Women, 1999 World Survey on the Roles of Women in Development: Globalization, Gender and Work ix* (1999)

<sup>108</sup> Alice Edwards, *VIOLENCE AGAINST WOMEN UNDER INTERNATIONAL HUMAN RIGHTS LAW*, p. 3 (2010).

<sup>109</sup> *Short History of CEDAW Convention*, DEP’T OF ECON. & SOC. AFFS., U.N. DIVISION FOR THE ADVANCEMENT OF WOMEN, <http://www.un.org/womenwatch/daw/cedaw/history.htm> (last visited November 21, 2018).

the discussion of women's rights and equality, there was still little dialog of or acceptance for anyone that did not conform to traditional gender norms or sexual preferences.<sup>110</sup>

This lack of distinction works in favor of extending the protections of CEDAW to members of the LGBT community. In light of contemporary views about the uses and definitions of sex and gender, it is a viable argument that the protections afforded under CEDAW already extend beyond the biological sex classification of 'woman'.<sup>111</sup> "Despite variations across cultures and over time, gender relations throughout the world entail asymmetry of power between men and women as a pervasive trait. Thus, gender is a social stratifier, and in this sense, it is similar to other social stratifiers such as race, class, ethnicity, sexuality, and age."<sup>112</sup> Under a "living law" model, interpreting the protections of CEDAW to extend to the modern definitions of sex and gender is not just plausible, but necessary.<sup>113</sup>

Analogous to a woman's experience of asymmetry of power due to her perceived relationship to men, members of the LGBT community experience an asymmetry of power in comparison to their cisgender, cissexual counterparts. "The Convention's references to gender stereotypes and to culture, taken together with the prohibition in the Convention as well as in other documents against sex discrimination, can be utilized to expand and modernize the reach and application of CEDAW in light of the existing interpretations expanding the meaning of terms such as 'sex'."<sup>114</sup>

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<sup>110</sup> Rosenblum, *supra* note 13, at 118-20.

<sup>111</sup> Hernández-Truyo, *supra* note 83, at 216.

<sup>112</sup> United Nations, *Division for the Advancement of Women, 1999 World Survey on the Roles of Women in Development: Globalization, Gender and Work ix* (1999)

<sup>113</sup> Hernández-Truyo, *supra* note 83, at 218.

<sup>114</sup> Hernández-Truyo, *supra* note 83, at 218.

ii) *Similarity in Discriminatory Experiences*

One aspect that makes CEDAW unique is its inclusion of articles mandating that states implement measures to eliminate negative stereotypes as a means to eliminate discrimination against women.<sup>115</sup> In addition to the realization of full legal equality between men and women and enhancing *de facto* equality of women, CEDAW's main objective is to take away the cultural and social roots of gender inequality.<sup>116</sup> Article 5(a) and 2(f) work together to recognize that gender stereotypes and fixed paternal roles affect women in an individual capacity but also on the level of societal structures and institutions.<sup>117</sup> The Convention not only demands that States endeavor to eliminate systematic and structural discrimination against women, but also discrimination that exists on a personal level due to social and cultural convictions.<sup>118</sup> "Concepts of individual autonomy, freedom, and diversity are crucial for a correct understanding of the content and scope of article 5a and of the Convention as a whole."<sup>119</sup>

One of the most damning stereotypes precluding women's equal rights is that a woman's value is derived mainly from being a wife and a mother. "Women's sexuality and their reproductive capacity are crucial for the construction of gender stereotypes and fixed paternal gender roles."<sup>120</sup> Rikki Holtmaat and Paul Post argue that "the most blatant transgression of the patriarchal female gender identity and her fixed gender role is the lesbian women who chooses to

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<sup>115</sup> Convention on the Elimination of All Forms of Discrimination Against Women, art. 2(f) and 5(a), *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13.

<sup>116</sup> See U.N. Comm. 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).

<sup>117</sup> Holtmaat, *supra* note 73, at 324. See U.N. Comm. 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*, ¶ 7, U.N. Doc. CEDAW/C/GC/25 (2004).

<sup>118</sup> Holtmaat, *supra* note 73, at 324.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

renounce a male sexual partner and thereby also rejects the protection of the male head of household, and all other forms of male supervisions on and control of her life.”<sup>121</sup> Negative gender stereotypes in general, and this line of reasoning specifically, demonstrate why the protections of CEDAW can and should extend to all members of the LGBT community.

The implications of negative sexual and gender-based stereotypes do not affect females exclusively. All people that renounce traditional heterosexual and universal feminine and masculine gender identities and gender roles are affected as well.<sup>122</sup> Forced marriage of those who do not adhere to traditional heterosexual preferences, denial of rights to healthcare, reproductive care, housing, education, and employment on the basis of sexual preference or gender identity, and “curative” rape are all examples of the type of discrimination and violence people of the LGBT community, as well as women, can face as a product of negative cultural stereotypes.<sup>123</sup> Because members of the LGBT community experience discrimination on the basis of negative cultural stereotypes, just as women do, and because one of CEDAW’s main objectives is to eliminate the negative cultural stereotypes that lead to discrimination, the protections of CEDAW should apply to both groups of people equally.

## **V. Options under CEDAW to Protect the LGBT Community**

The question of whether the protections afforded under CEDAW facially include, can be interpreted to include, or can be reimagined to include members of the LGBT community is not novel. For example, Darren Rosenblum suggested unsexing CEDAW by replacing ‘women’ with ‘sex and gender’ to put it in line with many of the other international human rights law

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<sup>121</sup> *Id.* at 324-25.

<sup>122</sup> The Yogyakarta Principles, *supra* note 56.

<sup>123</sup> Holtmaat, *supra* note 73, at 325.

treaties.<sup>124</sup> Rikki Holtmaat and Paul Post explored the possibility of changing the interpretation of CEDAW in an effort to enhance LGBT rights.<sup>125</sup> Finally, in a short reaction article to Rosenblum’s proposition to unsex CEDAW, Berta E. Hernández-Truyo suggested “super-sexing” the treaty by expanding the reach of the Convention to include sexuality, gender, and gender identity by means of an optional protocol.<sup>126</sup> This section will explain each option, examine the benefits and pitfalls of each, and finally recommend a strategy for the protection of the LGBT community.

#### A. *Unsex CEDAW*

Darren Rosenblum was one of the first scholar to suggest a change to the frame of CEDAW to incorporate protections for all people.<sup>127</sup> He suggested replacing the word “women” within the Convention with “sex and gender”.<sup>128</sup> He first explains the historical background and positive effects of specifically including “women” versus “sex” or “gender” in the treaty title and text. Rosenblum then presents numerous compelling arguments for why CEDAW should be ‘unsexed’. First, though never defined within the Conventions itself, he argues that the use of ‘women’ creates a false sense of universality among all women and therefore essentializes them.<sup>129</sup> Next, framing the Treaty in terms of “equality between men and women” creates a male/female binary.<sup>130</sup> This section will explore Rosenblum’s arguments for un-sexing CEDAW and critically analyze their feasibility.

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<sup>124</sup> Rosenblum, *supra* note 13.

<sup>125</sup> Holtmaat, *supra* note 73, at 321.

<sup>126</sup> Hernández-Truyo, *supra* not 83, at 213.

<sup>127</sup> Rosenblum, *supra* note 13.

<sup>128</sup> Hernández-Truyo, *supra* not 83, at 219.

<sup>129</sup> Rosenblum, *supra* note 13, at 128.

<sup>130</sup> *Id.* at 101.

Soon after the adoption of Universal Declaration on Human Rights (UDHR) and the International Convention of Civil and Political Rights (ICCPR), the framers of CEDAW sought to ensure women's place at the proverbial international human right law table.<sup>131</sup> The march toward inclusion began when the Economic and Social Council of the United Nations (ECOSOC) established the Commission on the Status of Women (CSW).<sup>132</sup> The Declaration on the Elimination of Discrimination against Women (DEDAW) arrived in 1967.<sup>133</sup> DEDAW represented a significant step forward in ensuring the recognition and consideration of women's rights at the international level, but the 'soft' nature of the document left space for a legally binding instrument.

In 1974, the Commission on the Status of Women held discussions about the potential text of CEDAW.<sup>134</sup> These discussions introduced the idea of framing the Conventions in terms of 'sex' instead of 'women', but "some representatives believed that because the Commission has been known for twenty-six years as the Commission on the Status of Women, a change would only create confusion and that what was really important was the content of the program."<sup>135</sup> The concerns of those representatives prevailed. "CEDAW reflected an historical need to focus on women and their experiences in order to define and address the harms of sexism."<sup>136</sup>

Despite the fact that there are deeply significant historical roots for the use of 'women' instead of 'sex' or 'gender', the decision to use women instead of sex or gender comes with some important consequences. Regardless of whether the Framers thought the definition of 'women'

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<sup>131</sup> *Id.* at 118.

<sup>132</sup> ECOSOC Res. 2/11, U.N. DOC. E/RES/2/11 (June 21, 1946).

<sup>133</sup> Declaration on the Elimination of Discrimination Against Women, G.A. Res. 2263 (XXII) (Nov. 7, 1967).

<sup>134</sup> U.N. Econ. & Soc. Council, Comm'n on the Status of Women, Rep. on the Twenty-Fifth Session, 267, U.N. Doc. E/5451 (Supp. No. 4) (Jan. 25, 1974).

<sup>135</sup> *Id.*

<sup>136</sup> Rosenblum, *supra* note 13, at 122.

was so obvious that it did not need defining<sup>137</sup> or consciously choose not to define the term in order to avoid contested language that may have hampered widespread ratification<sup>138</sup>, the failure to define women in the Convention is consequential. The lack of definition creates a false sense of universality of women.<sup>139</sup> Cultural interpretations of what it means to be a woman can vary wildly.<sup>140</sup> For example, the availability of sex-related surgery, whether cosmetic, gender identity related, or ritual, has broadened what it means to be a biological female.<sup>141</sup> Beyond the fundamental sex and gender concerns over what it means to be a woman, the use of ‘women’ in the treaty ignores the impact of other factors such as race, nationality, and sexual orientation on the female experience.<sup>142</sup> All of these factors serve to hinder, rather than promote, the rights of women.

Problematic in itself, the criticism of the use and focus on ‘women’ within the Convention is not limited to the false sense of universality it promulgates. The focus of the Convention on the elimination of inequality between men and women creates a gender binary.<sup>143</sup> Departing for the more universalist approach of ‘sex’ used in the UDHR and ICCPR, CEDAW’s use of men versus women not only asserts the existence of only two sexes, but also establishes the desirability of equality between the two.<sup>144</sup> This fact is especially important for the argument of extending the protections of CEDAW to the LGBT community because reframing or

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<sup>137</sup> *Id.* at 124.

<sup>138</sup> *Id.* at 126.

<sup>139</sup> *Id.* at 127

<sup>140</sup> Sex, referring to biological difference, may vary minimally from country to country. Gender, in contrast, depends on culture and varies substantially across borders. Katherine Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995).

<sup>141</sup> Rosenblum, *supra* note 13, at 129.

<sup>142</sup> Dianne Otto, *Disconcerting "Masculinities": Reinventing the Gendered Subject(s) of International Human Rights Law*, INTERNATIONAL LAW: MODERN FEMINIST APPROACHES 105, 105 (Doris Buss & Abreana Manji eds., 2005).

<sup>143</sup> Rosenblum, *supra* note 13, at 101.

<sup>144</sup> *Id.* at 125.

reconceptualizing the Conventions in terms of sex rather than women would allow for the inclusion of men, women, transgenders, intersex, and other differently sexed and gendered people.<sup>145</sup>

In theory, replacing “women” with gender and sex neutral terms makes the treaty as a whole more inclusive.<sup>146</sup> No longer focusing on women’s inequality as compared to men, but instead demanding equal treatment no matter what gender the person identifies with or sexual preferences they have, opens up the protections enumerated not only to men and the LGBT community, but also to women that do not suffer from the specific types of discrimination explained in the treaty.<sup>147</sup> Un-sexing CEDAW is the most conservative approach because putting the Convention in terms of sex and gender eliminates the need to specifically reference the LGBT community, therefore lessening the possibility of organized resistance to the treaty.<sup>148</sup> However, due to its deep historical roots, changing the wording of the Convention is bound to be met with resistance.<sup>149</sup> Finally, by un-sexing CEDAW, the risk of essentializing women is greatly reduced because they are no longer being reduced to what makes them different than men.

Despite the positive implications of reframing the treaty, changing the entire Convention to ‘sex’ and ‘gender’ instead of ‘women’ is unrealistic. Not without its flaws, the focus of CEDAW on women’s rights did and has continued to give women’s rights a place at the international human rights law table.<sup>150</sup> The Convention has allowed not just for international conversations about the rights of women at government and state levels, but it has also given

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> Rosenblum, *supra* note 13, at 101.

<sup>148</sup> Hernández-Truyo, *supra* note 83, at 219.

<sup>149</sup> Rosenblum, *supra* note 13, at 125.

<sup>150</sup> Rosenblum, *supra* note 13, at 118.

nongovernmental organizations a platform to demonstrate on the ground inequality and demand change.<sup>151</sup> I agree with Rosenblum’s fundamental arguments to increase CEDAW’s scope to ‘sex’ and ‘gender’ and not just ‘women’, but disagree with the approach of redrafting the Convention.

### *B. General Recommendation*

The second possibility for the applicability of CEDAW to the LGBT community stems from the Committee’s increased willingness to read the LGBT community into the protections afforded under the Convention. Holtmaat and Post conducted a systematic analysis of the Committee’s position regarding LGBT rights.<sup>152</sup> They analyzed the language of General Recommendations, Concluding Observations, and responses to Individual Complaints.<sup>153</sup> The results of this analysis suggest that the Committee may be willing to write a General Recommendation expanding the protections of CEDAW to the LGBT community.

Within international human rights law, state parties to treaties must send reports to the treaty committees at regular intervals detailing their compliance with the mandate of the specific treaty. In response to these reports, the committee for the treaty body writes concluding observations, which are specific to that country, recognizing the country’s accomplishments during the reporting period while also suggesting areas of improvement.<sup>154</sup> Between January 1, 2010 and December 31, 2014, the CEDAW Committee wrote one hundred and ten (110) Concluding Observations in response to reports submitted by State parties to the treaty.<sup>155</sup> Thirty-seven of those one hundred and ten Concluding Observations included the terms ‘gay’, ‘lesbian’,

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<sup>151</sup> *Id.* at 103.

<sup>152</sup> Holtmaat, *supra* note 75.

<sup>153</sup> *Id.* at 326.

<sup>154</sup> *Glossary of Treaty Body Terminology*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <https://www2.ohchr.org/english/bodies/treaty/glossary.htm> (last visited Nov. 21, 2018).

<sup>155</sup> Holtmaat, *supra* note 73 at 326.

‘transgender’, ‘transsexual’, ‘LGBT’, ‘same-sex’, or ‘sexual-orientation’.<sup>156</sup> Importantly, those thirty seven reports spanned all continents.<sup>157</sup> Lesbian women and transsexual or transgendered persons were most often mentioned in connection with discussion of intersectionality or within lists of particularly vulnerable groups in need of special protection.<sup>158</sup> Beyond their discussion in connection with intersectionality, the Committee also made a point to address LGBT issues within their discussion of violence against women.<sup>159</sup> Previous to 2010, the Committee tended to be vague and cautious when referencing the LGBT community in Concluding Observations.<sup>160</sup> In comparison, reference to the LGBT community within one third of the Concluding Observations authored during the four-year study period is a drastic and necessary increase.

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 327. See eg U.N. Comm. on the Elimination of Discrimination Against Women, *Concluding observations on the combined seventh and eighth periodic reports of the Bolivarian Republic of Venezuela*, ¶ 36-37, U.N. Doc. CEDAW/C/VEN/CO/7-8 (2014); see also U.N. Comm. on the Elimination of Discrimination Against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Argentina*, ¶43-44, CEDAW/C/ARG/CO/6 (2010); U.N. Comm. on the Elimination of Discrimination Against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Belarus*, ¶ 41-42, CEDAW/C/BLR/CO/7 (2011); U.N. Comm. on the Elimination of Discrimination Against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Paraguay*, ¶ 12, CEDAW/C/PRY/CO/6 (2011); U.N. Comm. on the Elimination of Discrimination Against Women, *Concluding observations on the combined seventh and eighth periodic reports of Peru*, ¶ 39-40, CEDAW/C/PER/CO/7-8 (2014).

<sup>159</sup> 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(4) NORDIC J. OF HUMAN RIGHTS 319, 328 (2015). See, e.g., Holtmaat & Post, *supra* note 73, at 328; U.N. Committee on the Elimination of Discrimination Against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Albania*, ¶ 42-43, CEDAW/C/ALB/CO/3 (2010); see also U.N. Comm. on the Elimination of Discrimination Against Women, *Combined fourth and fifth periodic reports of States parties due in 2011: Georgia*, ¶ 34-35(e), CEDAW/C/GEO/4-5 (2014); U.N. Comm. on the Elimination of Discrimination Against Women, *Consideration of reports submitted by States parties under article 18 of the Convention*, ¶ 43-44, CEDAW/C/UGA/CO/7 (2010); U.N. Comm. on the Elimination of Discrimination Against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Russian Federation*, ¶ 40, CEDAW/C/USR/CO/7 (2010); U.N. Comm. on the Elimination of Discrimination Against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Zimbabwe*, ¶ 23-24, CEDAW/C/ZWE/CO/2-5 (2012).

<sup>160</sup> Holtmaat, *supra* note 73, at 327.

Beyond simply referencing the LGBT community within the Concluding Observations, the Committee also included recommendations for combatting discrimination against LGBT persons. Most often, the Committee did not provide specific recommendations, but instead stated vaguely that women should be able to live without fear of violence.<sup>161</sup> In a still vague, but slightly more specific recommendation, the Committee invited Singapore to put in place “a comprehensive strategy to modify or eliminate patriarchal attitudes and stereotypes that discriminate against women, including those based on sexual orientation and gender identity.”<sup>162</sup> Within the 2012 Concluding Observation for Norway, the Committee called upon Norway to take “specific measures to address difficulties faced by lesbian and transgendered asylum seekers.”<sup>163</sup>

In a few instances, the Committee explicitly stated ways in which states could and should protect the rights of the LGBT community. In Concluding Observations for the Russian Federation, Uganda, South Africa, and Zimbabwe, the Committee gave the identical suggestion for the states to ‘launch a sensitization campaign aimed at the general public, as well as providing appropriate training to law enforcement officials.’<sup>164</sup> Similarly, in an effort to fight

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<sup>161</sup> *Id.* at 329. *See e.g.* U.N. Committee on the Elimination of Discrimination Against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Argentina*, ¶ 44, CEDAW/C/ARG/CO/6 (2010). (The Committee asks the state party to adopt ‘appropriate measures to address the particular needs of disadvantaged groups of women.’)

<sup>162</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women: Singapore*, ¶ 21(a), CEDAW/C/SGP/CO/4 (2012).

<sup>163</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women: Norway*, ¶ 36(d), CEDAW/C/NOR/CO/8 (2012).

<sup>164</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women: Russian Federation*, ¶ 41, CEDAW/C/USR/CO/7 (2010); UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Consideration of reports submitted by States parties under article 18 of the Convention: Uganda*, ¶ 44, CEDAW/C/UGA/CO/7 (2010); UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the*

violence based on sexual orientation and gender identity, the Committee recommended that Panama initiate “awareness-raising programmes in school curricula, the training of teachers and the sensitization of the media and the public at large, including actions specifically targeting men and boys.”<sup>165</sup> Though specific recommendations aimed at ending discrimination on the basis of sexual orientation and gender identity are not yet normal practice for the Committee, these examples are promising steps in the right direction.

In addition to Concluding Observations, human rights treaty bodies also promulgate General Recommendations. Unlike Concluding Observations which are state-specific, General Recommendations may be themed, but are general to all signatories.<sup>166</sup> The CEDAW Committee has made references to the LGBT community generally in General Recommendation 21 and specifically in General Recommendations 27 and 28.<sup>167</sup> Though only explicitly mentioned in two Recommendations, and done so in passing, it is encouraging that the Committee has been in

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*Elimination of Discrimination against Women: South Africa*, ¶ 40, C/ZAF/CO/4 (2011); UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women: Zimbabwe*, ¶ 24, CEDAW/C/ZWE/CO/2-5 (2012).

<sup>165</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women: Panama*, ¶ 22-23, CEDAW/C/PAN/7 (2010).

<sup>166</sup> *Glossary of technical terms related to the treaty bodies*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <https://www.ohchr.org/EN/HRBodies/Pages/TBGlossary.aspx> (last visited May 1, 2018).

<sup>167</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations* ¶ 16, CEDAW/C/GC/21 (1994); UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 27 on Older Women and Protection of Their Human Rights*, ¶ 13, CEDAW/C/GC/27 (Dec. 16, 2010); UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, ¶ 18, CEDAW/C/GC/28 (Dec. 16, 2010).

enough agreement to include any reference to the LGBT community at all. Finally, within the context of the individual complaint mechanism, sexual orientation was only mentioned once.<sup>168</sup>

There is a divide in general consensus as to the binding nature of General Recommendations.<sup>169</sup> Some are of the mind that General Recommendations are the Committee's way of clarifying the application and interpretation of the Convention, and therefore are binding.<sup>170</sup> On the other side of the coin, some believe that General Recommendations are just what their title suggests, recommendations.<sup>171</sup> With all of this in mind, the idea of expanding the scope of the treaty to reach the LGBT community through a specific General Recommendation has strengths and weaknesses.

Expanding the scope of CEDAW to the LGBT community through a specific General Recommendation does have multiple advantages. First, as noted previously, the Committee has already begun to make general references to the LGBT community in General Recommendations.<sup>172</sup> The Committee has been even bolder in its assertions within Concluding Observations.<sup>173</sup> This demonstrates that despite consisting of experts from differing locations and

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<sup>168</sup> In case *Lourdes da Silva Pimentel v. Brazil*, CEDAW.C.49/D/17/2008.

<sup>169</sup> Geir Ulfstein, *Law-Making by Human Rights Treaty Bodies*, in INTERNATIONAL LAW-MAKING: ESSAYS IN HONOUR OF JAN KLABBERS, 249, 259 (Routledge, 2014), available at <https://www.duo.uio.no/bitstream/handle/10852/43310/4/Lawmaking%2Bby%2BHuman%2BRights%2BTreaty%2BBodies.pdf>.

<sup>170</sup> *What is the Purpose of the Human Rights Treaty Bodies General Comments?*, DAG HAMMARSKJOLD LIBRARY, <http://ask.un.org/faq/135547> (last visited Jan. 6, 2017).

<sup>171</sup> *What are General Comments?*, Topics: Deutsches Institut für Menschenrechte, <http://www.institut-fuer-menschenrechte.de/en/topics/development/frequently-asked-questions/9-what-are-general-comments/> (last visited May 1, 2018).

<sup>172</sup> See UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 27 on Older Women and Protection of Their Human Rights*, CEDAW/C/GC/27 (Dec. 16, 2010); UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28 (Dec. 16, 2010).

<sup>173</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women: Russian Federation*, ¶ 41, CEDAW/C/USR/CO/7 (2010); UN Committee on the Elimination of Discrimination Against

backgrounds<sup>174</sup>, the Committee was able to come together and agree on the inclusion of the LGBT community. Finally, because there are a number of states that do view General Recommendations as binding, writing specifically to expand CEDAW to include the LGBT community, will at least mandate that those states not only begin to include statistics of the LGBT community within their state reports, but also take measures to eliminate discrimination against the group.

The most impactful weakness of using a General Recommendation to expand the scope of CEDAW centers around the validity of the binding nature of Recommendations. Those that view General Recommendations as non-binding can choose to either incorporate the recommendations of the Committee or simply ignore them. However, for those state parties that view General Recommendations as binding and also don't agree with expanding the scope of CEDAW to include gender, sexual identity, and gender identity, the implications could be harsh. At best, those state parties could treat that General Recommendation as non-binding, potentially leading to the general view that all General Recommendations are non-binding on that state party. At worst, the state could withdraw from the Convention all together, and potentially band together with other like-minded nation states to delegitimize the process as a whole. Even though

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Women (CEDAW), *Consideration of reports submitted by States parties under article 18 of the Convention*: Uganda, ¶ 44, CEDAW/C/UGA/CO/7 (2010); UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women*: South Africa, ¶ 40, C/ZAF/CO/4 (2011); UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women*: Zimbabwe, ¶ 24, CEDAW/C/ZWE/CO/2-5 (2012); UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women*: Panama, ¶¶ 22-23, CEDAW/C/PAN/7 (2010).

<sup>174</sup> *Committee on the Elimination of Discrimination Against Women: Membership*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, available at <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Membership.aspx> (Last visited April 30, 2018).

this option runs the risk of losing signatories to the Convention, it is the least invasive of all of the proposals.

Though the creation of an LGBT specific General Recommendation is the least invasive, and therefore most likely to pass, method of expanding the reach of CEDAW, it is also the method with the least teeth. Because there is still an ongoing debate over the binding nature of General Recommendations, I am suggesting that this method does not fully utilize the power of one of the most widely ratified treaties and does not go far enough to protect the LGBT community.

### *C. Optional Protocol to CEDAW*

As discussed in the previous sections, the protection of the rights of the LGBT community is inherent in the core human rights treaties due to their classification as humans.<sup>175</sup> However, the fact still remains that people who identify as LGBT are suffering human rights abuses on a daily basis.<sup>176</sup> Even the introduction of LGBT specific United Nations resolutions have failed to adequately protect the foundational rights of this vulnerable population. For that reason, I believe the adoption of a second optional protocol to CEDAW comprised of the Yogyakarta Principles is the best device to ensure the recognition and preservation of the LGBT community while still maintaining the historic impact of the Convention.

It has become commonplace for international human rights law treaties to be followed by the adoption of an optional protocol.<sup>177</sup> Treaties in their own right, these protocols exist to

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<sup>175</sup> The Yogyakarta Principles, *supra* note 56.

<sup>176</sup> Kristina Mastropasqua, *Global Discrimination Against LGBT Persons: 2015 United Nations Report*, JOURNALIST'S RESOURCE (last updated June, 8, 2015), <https://journalistsresource.org/studies/international/human-rights/global-discrimination-against-lgbt-persons-2015-united-nations-report>.

<sup>177</sup> See United Nations General Assembly, *Optional Protocol to the Covenant on Economic, Social and Cultural Rights*, A/RES/63/117 (Dec. 10, 2008); *Optional Protocol to the International Covenant on Civil and Political Rights*, United Nations Treaty Series, vol. 999, No. 14668 (Dec. 16, 1966); United Nations

facilitate the proper implementation of the goals of the underlying convention.<sup>178</sup> As such, they are only open for signature and ratification by member states to the original treaty.<sup>179</sup> There are two types of optional protocols, substantive and procedural.<sup>180</sup> Substantive protocols are those that address topics that were not included in the original text of the treaty.<sup>181</sup> Procedural protocols, on the other hand, address issues that may affect the way in which a treaty operates<sup>182</sup>, such as the inclusion of an individual complaint procedure of Optional Protocol to CEDAW.<sup>183</sup> Individual complaint procedures are especially useful for treaties that have seen slow realization of the rights demanded within the body of the text, and provide for a way to elaborate on the meaning of the treaty and expand the jurisprudence on the subject.<sup>184</sup>

A second optional protocol to CEDAW expanding the scope of the Convention to include gender, gender identity, and sexual preference through the adoption of the Yogyakarta

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General Assembly, *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, A/RES/44/128 (Dec. 15, 1989); United Nations General Assembly, *Optional Protocol to the Convention on the Elimination of Discrimination against Women*, A/54/4 (Oct. 6, 1999); United Nations General Assembly, *Optional protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, A/RES/54/263 (May 25, 2000); United Nations General Assembly, *Optional protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, A/RES/54/263 (March 16, 2001); United National Human Rights Council, *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, A/HRC/RES/17/18 (July 14, 2011); United Nations General Assembly, *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/RES/57/199 (Jan. 9, 2003); United Nations General Assembly, *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, A/RES/61/106 (Dec. 13, 2006).

<sup>178</sup> *Section 2: Improving Supervision of the ICESCR: What is an Optional Protocol?*, ESCR-NET, <https://www.escr-net.org/resources/section-2-improving-supervision-icescr-optional-protocol> (last visited Nov. 7, 2017).

<sup>179</sup> *What is an Optional Protocol?*, UN WOMEN, <http://www.un.org/womenwatch/daw/cedaw/protocol/whatis.htm> (last visited Nov. 19, 2018).

<sup>180</sup> *What is the Purpose of the Human Rights Treaty Bodies General Comments?*, *supra*, note 174.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> United Nations General Assembly, *Optional Protocol to the Convention on the Elimination of Discrimination against Women*, A/54/4 (Oct. 6, 1999).

<sup>184</sup> *Section 2: Improving Supervision of the ICESCR: What is an Optional Protocol*, ESCR-NET, <https://www.escr-net.org/resources/section-2-improving-supervision-icescr-optional-protocol> (last visited Nov. 7, 2017).

Principles, would ameliorate many of the issues identified with expanding protection through a General Recommendation or by completely reworking the Treaty.

As we have seen previously, the CEDAW Committee has already begun addressing LGBT rights within Concluding Observations, General Recommendations, and an individual complaint.<sup>185</sup> This signals the Committees willingness to extend CEDAW to include sex and gender, even if only in a limited scope. Since the Yogyakarta Principles already parallel many of the same rights and protections included within CEDAW such as: “equality and non-discrimination, personhood, like, security, privacy, trafficking, work, education, housing, health, family, and culture”,<sup>186</sup> their inclusion into an option protocol would be seamless.

As opposed to outright changing the wording of the Treaty as proposed by Rosenblum, creating an Optional Protocol permits the positive women-centric outcomes of the Convention to continue while allowing state parties the opportunity to choose to extend the Convention’s reach to other similarly situated populations. Additionally, all of the symbolic and historic reasons for naming the Convention in terms of women to begin with will likely derail future attempts to change its name.<sup>187</sup> Further, due to the legally binding nature of optional protocols, this method would put more teeth behind the protections for the LGBT community than a General Recommendation could. All of these factors combine to further bolster the conclusion that the adoption of a second optional protocol to CEDAW is the best option for extending much needed protections to the LGBT community.

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<sup>185</sup> Holtmaat, *supra* note 73, at 326-29.

<sup>186</sup> *Id.* at 222.

<sup>187</sup> Hernández-Truyo, *supra* note 73, at 219.

#### D. Conclusion

Despite growing international consensus that members of the LGBT community deserve recognition and protection, there is still not a binding legal mechanism specific to the community.<sup>188</sup> As has been explored throughout this paper, the universal rights established in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Culture Rights do in theory provide protections to the LGBT community.<sup>189</sup> However, violence and discrimination based on sexual orientation and gender identity is still rampant.<sup>190</sup>

At first glance, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) is not entirely applicable for protecting the LGBT community. However, changes in the interpretation of ‘sex’, the similar discrimination faced by both women and members of the LGBT community, and the CEDAW Committee’s willingness to inch closer to extending protections, begs the question: why not extend CEDAW to protect the LGBT community?

Broadening the interpretation of the Convention to include sexual orientation and gender identity within its protection by way of General Recommendation and complete redrafting of the Convention have been suggested.<sup>191</sup> However, each of those options are accompanied by

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<sup>188</sup> Aengus Carroll & Lucas Ramon Mendos, *Strengthening SOGIESC Protection and Unpacking Intersectionality at the United Nations in 2016*, STATE SPONSORED HOMOPHOBIA: A WORLD SURVEY OF SEXUAL ORIENTATION LAWS, May 2017, at 13, available at [http://ilga.org/downloads/2017/ILGA\\_State\\_Sponsored\\_Homophobia\\_2017\\_WEB.pdf](http://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf).

<sup>189</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967); International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967).

<sup>190</sup> U.N. Office of the High Comm. for Human Rights, Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity, ¶ 3, U.N. Doc. A/HRC/29/23 (May 4, 2015).

<sup>191</sup> See Holtmaat, *supra* note 73; Rosenblum, *supra* note 13.

consequences that far outweigh their worth. Instead, I have suggested the adoption of a second Optional Protocol to CEDAW incorporating the Yogyakarta Principles as a means of expanding the scope of the Convention to include members of the LGBT community. This option utilizes the most compelling arguments from promulgating a Concluding Observation and completely reworking the Convention to substitute 'women' for 'sex and gender' while side stepping many of the obstacles. Though the international community has made incredible strides in recognizing and accepting those who do not conform to traditional notions of gender or sexual preference, the continued human rights violations perpetrated against this population makes it clear that a more definite step is necessary.