

ADVANCING SEXUAL RIGHTS FOR ALL



PREPARED BY: The Sexual Rights Initiative

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EXECUTIVE SUMMARY

The Sexual Rights Initiative (SRI) is a coalition of organizations from Canada, Poland, India, Egypt, Argentina and South Africa that have been advocating together for the advancement of human rights related to gender, sexuality and reproduction at the UN Human Rights Council since 2006. We are committed to and strongly in support of rights related to sexual orientation, gender identity and expression. Many of us are directly affected as people who are non-conforming in terms of our gender identity and expression and our sexual orientation.

We work together to encourage the UN and Member States to protect and promote the **human rights of all people to bodily integrity and autonomy, and the rights to have full control over and to decide freely upon all matters related to our sexual lives, reproductive lives, sexual and reproductive health, gender expression and identity and our bodies, free from coercion, violence or discrimination.** These rights affect everyone, everywhere. Failure to protect these rights has grave consequences for those of us who are criminalised or subject to other forms of punitive regulation based on our sexuality and gender.

Presently, a number of UN Member States and NGOs are advocating for the Human Rights Council to create a new Special Rapporteur on Sexual Orientation and Gender Identity (SOGI). From the perspective of the SRI, the proposed mechanism would be limited in its ability to protect the fundamental rights of people most in need and risks neglecting a range of sexuality and gender related abuses that demand the UN's attention. Further, it could create false dichotomies and siloes within the interpretation and application of human rights related to sexuality and gender that could set back decades of hard work and progress made on these issues by diverse social movements.

The SRI believes the violations, abuses, discrimination and oppression faced by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons would be most effectively addressed through a political and legal framing that recognizes the full range of sexual rights as inherent to the constellation of human rights to which every person is entitled. Furthermore, the SRI believes that the articulation of this position at the UN and within various movements is important so that States and civil society actors have an opportunity to consider alternate analyses and viewpoints. This articulation is not intended to and should not be seen to diminish the areas of agreement between progressive movements working on gender and sexuality issues, rather it is healthy part of movement building that seeks to include the experiences of different people, many of whom will be directly impacted by the establishment of any new UN special mechanism.

The Sexual Rights Initiative therefore makes the following recommendations to continue the political and social momentum to effectively integrate human rights related to sexuality orientation and gender identity into the work of the Council:

1. The Human Rights Council should build on and strengthen the existing thematic resolution on sexual orientation and gender identity by expanding its scope and to guide existing mechanisms in their continuing work on bodily integrity and autonomy for all people, including LGBTI persons and those who are non-conforming in terms of their sexual orientation and gender identity and expression.
2. The resolution should mandate the OHCHR to investigate the root causes of discrimination, violence and other violations based on sexual orientation and gender identity and expression, and expand the analysis to include legal and social practices that empower as well as laws and policies restricting bodily integrity and autonomy for a range of people, including sex workers, members of LGBTI communities, women seeking abortion, adolescents, HIV-positive persons and transgender persons, and others stigmatised because of their sexual and gender expressions or behaviours.
3. Progressive states from across all regions of the world should envision and plan for a Working Group or similar mechanism on “Human Rights related to Sexuality and Gender”, or a variation thereof, that approaches sexuality and gender from a holistic and intersectional perspective. This would be best advanced through a cross-regional core group led by states already working on some of the most complex sexual rights issues.

I. INTRODUCTION

This paper is prepared by the Sexual Rights Initiative (SRI), a coalition of organizations from Canada, Poland, India, Egypt, Argentina and South Africa that have been advocating together for the advancement of human rights related to gender, sexuality and reproduction at the UN Human Rights Council (the Council) since 2006. It is intended to support and inform the work of the Council as Member States consider the next steps for a resolution focused on human rights, sexual orientation and gender identity. We present a series of arguments and analyses on the risks of establishing a Special Rapporteur focused exclusively on Sexual Orientation and Gender Identity (SOGI) and the benefits of working towards establishing a mechanism with a broad sexual rights and/or bodily autonomy mandate.

The SRI supports and works for the advancement of rights related to sexuality, reproduction and gender, including rights related to sexual orientation and gender identity and expression and the human rights of lesbian, gay, bisexual, transdiverse/transgender and intersex (LGBTI) persons. We, along with many others, believe that if violence and discrimination based on sexual orientation and gender identity and expression is to be addressed effectively by the UN, a broad mandate that seeks to advance the rights of all persons to bodily autonomy and supported by diverse civil society movements and a geographical range of States, is required.

We recognize and affirm the political momentum on rights related to SOGI at the Council in recent years. This has been due to the work done separately and collectively as States and social movements participating in the work of the Council and elsewhere. There has been agreement that discrimination and violence as well as other violations are widespread and must be addressed through local, national, regional and global efforts. Further, there has been agreement that the range of interventions needed are both legal and social and require sustained political commitment both in intergovernmental spaces, by civil society and movements at all levels and in all countries.

Alongside this agreement, there are divergent views on a medium term goal for this work. Recently, a number of UN Member States and NGOs have been advocating for a SOGI-specific mandate at the Council. It is important to recognize that many in civil society who work to advance these issues do not support this goal. Any attempt to claim a consensus on this is inaccurate and deeply problematic as it masks the range and scope of the analysis of the many groups that have organized locally and globally on sexual rights, including sexual and reproductive health and rights, at the UN for more than 20 years and have consistently envisioned a broader mandate to enable effective and inclusive protection for the full range of these rights. The SRI believes that the articulation of our position at the Council and within various movements is important so that States and civil society actors have an opportunity to consider alternate analyses and viewpoints. This articulation is not intended to and should not be seen to diminish

the areas of agreement between progressive movements working on gender and sexuality issues, rather it is healthy part of movement building that seeks to include the experiences of different people, many of whom will be directly impacted by the establishment of any new UN special mechanism.

II. ADDRESSING SEXUALITY AND GENDER RELATED HUMAN RIGHTS VIOLATIONS REQUIRE A HOLISTIC AND INTERSECTIONAL APPROACH

i. Intersectionality is the key

The World Health Organization defines sexuality as “a central aspect of being human throughout life; it encompasses sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction. Sexuality is experienced and expressed in thoughts, fantasies, desires, beliefs, attitudes, values, behaviours, practices, roles and relationships. While sexuality can include all of these dimensions, not all of them are always experienced or expressed. Sexuality is influenced by the interaction of biological, psychological, social, economic, political, cultural, legal, historical, religious and spiritual factors.”¹

More simply put by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health “sexuality is a characteristic of all human beings. It is a fundamental aspect of an individual’s identity. It helps to define who a person is.” Sexuality is protected by the abiding principles that have shaped international human rights law since 1945 including privacy, equality, and the integrity, autonomy, dignity and well-being of the individual. In these circumstances, the Special Rapporteur has no doubt that the correct understanding of fundamental human rights principles, as well as existing human rights norms, leads ineluctably to the recognition of sexual rights as human rights.²

Gender identity and gender expression are social constructs which are deeply embedded in society as a basis for making decisions on social, economic and political inclusion and participation on the one hand and on exclusion and marginalization on the other. The existence and operation of dominant gender norms within society insist upon not only a binary definition of gender, but also contain rules or expectations as to how “men” and “women” should behave, especially with respect to their sexual and reproductive behavior and gender expression. This creates inequality between those

¹ World Health Organization, *Sexual health, human rights and the law*. Geneva, 2015.

² *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt*, Commission on Human Rights, 16 February 2004, UN Doc. E/CN.4/2004/49, at 54.

born in female, male and intersex bodies as well as possibilities of making gender expression and identity choices.

For the purposes of this paper and the current discourse advocating for a Special Rapporteur on SOGI issues, it is important to note that human sexuality includes SOGI and is firmly linked to other aspects of a person's life. SOGI are important elements of human sexuality in which all human beings share. All people have an orientation in terms of their sexuality and have some form of expressing and/or identifying in terms of their gender, however, neither aspect stands alone.

Because gender and sexuality are deeply symbolic, culturally meaningful concepts, they affect and are affected by many other aspects of human life. The lens of *intersectionality* is crucial to understanding how sexuality and gender work, in life and, overwhelmingly, in law. To defend people effectively from abuses targeting their sexuality and gender requires thinking about their lives and bodies as a whole because race, ethnicity, class, faith and geography shape how people experience their sexualities and genders. Sexuality and gender, in turn, shape how individuals, communities and states interpret their environments, laws and policies.

From the perspective of the SRI and our many partners and allies, a political platform and movement is needed that recognizes sexuality and gender politics as also a politics of race, economics, class, religion, and more. We urgently need a UN protection system that acknowledges and works with these connections. Rights protections related to gender and sexuality must be organized within a framework of multiple oppressions to ensure the genuine commitment of states and civil society to advancing rights related to sexuality and gender are advanced for all. Within this framework, there would then be a need to more urgently address those aspects of sexuality and gender where people are criminalized and where serious risk to certain groups and communities exists.

ii. Intersectionality in practice

Everyone has multiple identities, statuses, expressions and ways of being in the world as well as sets of lived realities. These may be personal and individual, emerging from a deeply felt sense of self, or from social, communal and relational positioning -- or both. For example, a racial identity or status is first and foremost relational and social, though an individual's self-identity may absorb it through force or affirm it for political reasons. Alternatively, one's economic status may not be part of an individual's self-identity at all, but may nevertheless identify her to others, and may shape her ability to access rights or belong to communities.

Many people face intersecting forms of discrimination, exclusion, marginalisation or oppression as a result of their identities, status, expressions and ways of being in the world. Our experiences are seldom the effect of one separable aspect of our multifarious selves. For some people, most of their characteristics place them in a

dominant social position, leaving only one or two aspects of their lives in which they experience marginalisation or discrimination. By definition, they have relative or significant privilege, are able to articulate a politics specifically around the restricted aspects where they experience inequality and are often hegemonic voices in some social movements. However, for many people in the world, their experiences of violence and violation result from several intersecting factors, characteristics and identities that render their struggles invisible, their voices unheard and their rights unfulfilled.

Multiple discrimination, where people are discriminated against on two or more different grounds, can be understood in two ways. Understood as *additive*, multiple forms of discrimination are seen as independent, and each is treated separately; thus, a black woman is seen as suffering from two separate sets of discrimination — race and gender — and each is seen as having no relation to the other except to quantitatively increase the amount of discrimination she faces. With this understanding, anti-race measures would not deem it necessary to address gender-related concerns, and vice versa. Ultimately, an additive approach fails to understand the complex, holistic, and integrated nature of people's experiences, or the roots of oppression and discrimination. Understood as *intersectional*, all the grounds on which people face discrimination are seen to reinforce and worsen one another. The classic example is a labor market or organization where white women (benefiting from race privilege) and black men (benefiting from gender privilege) are often hired and promoted – but black women are not. *Race* and *gender* together inhibit black women's advancement to a degree that either factor separately might not.³

Understanding discrimination as intersectional allows us to link different issues within the arenas of sexuality, race and gender. For instance, in the United States -- where disparities in health have been widely studied – there has been a catastrophic two-decade rise in maternal-mortality rates (from 12 per 100,000 live births in 1990 to 28 per 100,000 live births in 2013)⁴. However, the increase in maternal mortality rates in the United States has been highest among women of color; it is *four* times higher among Afro-descendant women than among white women.⁵ The former face both gendered lack of access to healthcare and lethal inequalities based on race and socioeconomic status. Further, Lesbian women face much higher rates of breast cancer and lower

³ Paola Uccellari, "Multiple Discrimination: How Law can Reflect Reality," *Equal Rights Review*, vol. 1 (2008), 24-46.

⁴ Sister Song, National Latina Institute for Reproductive Health, and Center for Reproductive Rights, *Reproductive Injustice: Racial and Gender Inequalities in Health Care*, 2014, at http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/CERD_Shadow_US_6.30.14_Web.pdf

⁵ US Center for Disease Control and Prevention, "Pregnancy Mortality Surveillance System," January 21, 2016, at <http://www.cdc.gov/reproductivehealth/maternalinfanthealth/pmss.html>.

rates of mammogram screening than heterosexual women indicating fatal information gaps specific to sexuality⁶.

Similarly, discrimination in health care affects transgender people overwhelmingly in country after country, yet trans people of color suffer from the reinforcing effects of multiple inequalities. A 2011 US study found that while trans people in general reported four times the national average for HIV infection, trans Afro-descendants were forty times more likely to be HIV-positive than the national average – and ten times more likely than other Afro-descendants.⁷

These inequalities cannot be understood simply as isolated SOGI issues. The roots of the various oppressions share commonalities with all those who face rights violations related to sexuality, gender and bodily autonomy such as pregnant women, adolescents, sex workers and many others. A special mandate or mechanism for SOGI related protection would be limited in its analysis of these rights violations and shrink the space for protections linked with multiple oppressions. These inequalities can only be fully highlighted, understood and recognized if investigated through an analysis that takes into account the multitude of factors involved that seem unrelated but are in fact intricately linked.

We recognize that there is no single State whose laws and policies offer full protection on all issues related to sexuality, gender or reproduction. Furthermore, there is a lack of consensus in all regions on different aspects of sexual rights. Working towards the creation of a broad mandate that would incorporate all of these issues and more, would help address the underlying determinants of violence and discrimination that is so prevalent in each region of the world and is not restricted to one identity.

iii. Intersectionality is hard. That's why it's important.

“The idea of ‘intersectionality’ seeks to capture both the structural and dynamic consequences of the interaction between two or more forms of discrimination or systems of subordination. It specifically addresses the manner in which racism, patriarchy, economic disadvantages and other discriminatory systems contribute to create layers of inequality that structures the relative positions of women and men, races and other groups. Moreover, it addresses the way that specific acts and policies create burdens that flow along these intersecting axes contributing actively to create a dynamic of disempowerment.”⁸

⁶ Katherine O’Hanlan, MD, et. al., “Editorial: Advocacy for Women’s Health Should Include Lesbian Health,” *Journal of Women’s Health*, vol. 13, no. 2 (2004), pp. 227-234.

⁷ Jaime M. Grant, Lisa A. Mottet, and Justin Tanis, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, National Center for Transgender Equality and National Gay and Lesbian Task Force (US), 2011.

⁸ UNDAW, OHCHR, UNIFEM, *Report of the Expert Group Meeting on gender and racial discrimination, 2000, Zagreb, Croatia*, at <http://www.un.org/womenwatch/daw/csw/genrac/report.htm>.

Intersectional approaches encounter resistance because of the breadth of issues it asks us to consider and reminds us to include and encompass in our approach.

Isn't it easier – necessary, even – to slice off one issue at a time for independent analysis and action?

No.

Certainly some of the most successful, broad thematic mandates at the Council (such as the Special Rapporteurs on the right of everyone to the enjoyment of the highest attainable standard of health and on violence against women, its causes and consequences) have taken up specific issues or identities in planned series of annual reports. This has always been in a context provided by the scope of the mandate, and usually issue based, so that, for example, right to health violations based on SOGI can be understood in relation to other forms of discrimination the mandate addresses and within the framework of the universality of human rights. An identity-based mandate will lose that context and the connections between the lived realities of LGBTI persons and of those who do not identify as such.

Intersectional perspectives are also at odds with the long-standing habits of identity politics that have been particularly powerful in sexual rights debates. While on the surface identity politics seem to serve a just purpose by highlighting the rights and needs of a particular group, however, in reality this create static social categories in which one belongs or one doesn't, with membership usually defined by those with relative or significant privilege and inevitably leaving many people behind.

Addressing the full range of sexual rights does not have to be about expanding a mandate or a field of UN action. Rather, the work must lead to the elimination of protection gaps by the UN, enable States to recognize inextricable interconnections both conceptually and practically, and make its work reflect the realities of people's lives. This is not about rendering the UN's agenda massive, unwieldy, or complex. It's about strengthening its agenda by rooting it more deeply in the connections that political movements are already building.

There is no question that intersectional approaches have immensely strengthened many social movements -- especially, though hardly exclusively, in the global South. The movement of *domésticas* – domestic workers – in Brazil, for instance, has drawn on “the intersecting identities that they encounter within the public sphere,” as predominantly poor or working class women of color. “The multiple points of identity within the conceptual sphere occupied by the *domésticas* shows clearly the impossibility of finding

one fixed center for subjectivity.”⁹ The sexual rights movement is comparatively young, but is positioned to draw on similar alliances and commonalities in creating a broad, international front. The UN’s work will be strengthened by these connections as well.

Here Kimberle Crenshaw’s words from an important 1989 article that helped breach the question of intersectionality are useful. It is interesting to see what happens when one substitutes “the UN” for “the law”:

“What the law has done does not necessarily tell us what the law can do. ... We can talk about what the law has not yet been robust enough to do. It is clearly the case that complexity is challenging for law, however, I would point out that what is at the core of the issue is how the law interacts with power, not so much complexity. A white male identity is a complex identity but the law has worked out how to reproduce those power relationships. ... [I]t is more important to talk about how the law insulates power and privilege rather than how it causes difficulty when dealing with complexity”.¹⁰

iv. Intersectional approaches help us understand how all sexuality and gender related violations, abuses, oppressions and discrimination are connected. UN mechanisms need this framework.

“Neatly compartmentalising sexual rights issues impedes discussion of how rights can contribute to the dynamic interaction between ideas, identities and practices which generate the diversity of sexual orientation. Such reporting highlights ‘special rights claims’ but precludes politically coherent analysis of the many social, material and legal conditions in which meaningful sexual decisions and life choices are made.”¹¹

At least since the Cairo ICPD in 1994 and the Beijing Fourth World Conference on Women in 1995¹², policy-makers and advocates have articulated a broad conception of sexual rights. “Sexual rights enable ... us to address the intersections between sexual-orientation discrimination and other sexuality issues—such as restrictions on all sexual expression outside marriage or abuses against sex workers—and to identify root causes

⁹ Kristen Leith Nash, “The Triumvirate of Intersectionality: A Case Study on the Mobilization of *Domésticas* in Brazil,” January 2015, at

<http://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=6948&context=etd>. See also Keisha Khan, *Black Women against the Land Grab: The Fight for Racial Justice in Brazil*, University of Minnesota, 2013.

¹⁰ Crenshaw, Kimberle, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,” *The University of Chicago Legal Forum*, No. 140 (1989), pp. 139-167.

¹¹ Alice Miller, *Sexuality and Human Rights, A Discussion Paper*, International Council on Human Rights Policy, 2009, p. 34, at <http://www.ichrp.org/en/projects/137>.

¹² See the *Programme of Action* of the International Conference on Population and Development, Cairo, 5–13 September 1994, and the *Platform for Action* of the United Nations Fourth World Conference on Women, Beijing, September 1995, especially para. 95.

of different forms of oppression.”¹³

Important work by NGOs in diverse regions of the world has furthered this approach.¹⁴ It has also repeatedly shaped the work of UN mechanisms. An increasing number of UN treaty monitoring bodies, including the Committees for CEDAW, CERD, CRC and CESCR, address multiple or intersectional discrimination within their work and identify various oppressions related to sexual rights that share commonality in their root causes. As two legal scholars write, “It appears that awareness of the need to counter the “single-axis thinking” and essentialism that characterise the formulation of the non-discrimination provisions within most of the international human rights instruments is steadily growing.”¹⁵

For example, the Human Rights Committee states that discrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁶

In *Kell v. Canada*, a case decided under the Optional Protocol to the Women’s Convention, the CEDAW Committee found that the plaintiff – an aboriginal woman who had survived domestic violence – was the victim of “an act of intersectional discrimination,” and specifically held that “the State Party is obliged to ensure the effective elimination of intersectional discrimination,” by providing effective access to justice for women facing multiple inequalities.¹⁷

The CESCR General Comment 14 affirms that the right to health include[s] the right to control one’s health and body, including sexual and reproductive freedom.¹⁸ The CESCR Committee recently expanded on this in its General Comment 22, on sexual and reproductive health:

“The realization of the right to sexual and reproductive health requires that States parties also meet their obligations under other provisions of the Covenant. For example, the right to sexual and reproductive health, combined with the right to education (articles 13 and 14) and the right to non-discrimination and equality between men and

¹³ Ignacio Saiz, “Bracketing Sexuality: Human Rights and Sexual Orientation—A Decade of Development and Denial at the UN,” 7 HEALTH & HUM. RTS. 48, 64 (2004).

¹⁴ See International Planned Parenthood Federation (IPPF), *Sexual Rights: An IPPF Declaration*, 2008, at <http://www.ippf.org/resource/Sexual-Rights-IPPF-declaration>.

¹⁵ I. Truscan and J. Bourke-Martignoni, “International Human Rights Law and Intersectional Discrimination,” *The Equal Rights Review*, Vol. 16 (2016)

¹⁶ UNHRC, General Comment 28: Equality of Rights between Men and Women, Article 31, UN Doc CCPR/C/21/Rev.1/Add.10, 29 March 2000, at 30.

¹⁷ *Cecilia Kell v Canada*, UN Doc CEDAW/C/51/D/19/2008 (26 April 2012).

¹⁸ UN CESCR. General Comment 14: The Right to the Highest Attainable Standard of Health, Article 12, UN Doc. E/C.12/2000/4, 11 August 2000, at 8.

women (articles 2.2 and 3), entail a right to education on sexuality and reproduction that is comprehensive, non-discriminatory, evidence-based, scientifically accurate and age appropriate. The right to sexual and reproductive health, combined with the right to work (article 6) and just and favourable working conditions (article 7), as well as the right to non-discrimination and equality between men and women again, requires States to ensure employment with maternity protection and parental leave for workers, including vulnerable workers such as migrant workers or women with disability, as well as protection from sexual harassment at the workplace and prohibition of discrimination based on pregnancy, childbirth, parenthood, or sexual orientation, gender identity or intersex status.

The right to sexual and reproductive health is also indivisible from and interdependent with other human rights. It is intimately linked to civil and political rights underpinning the physical and mental integrity of individuals and their autonomy, such as the right to life; liberty and security of person; freedom from torture and other cruel, inhuman or degrading treatment; privacy and respect for family life; and non-discrimination and equality. For example, lack of emergency obstetric care services or denial of abortion often lead to maternal mortality and morbidity, which in turn constitutes a violation of the right to life or security, and in certain circumstances can amount to torture or cruel, inhuman or degrading treatment”.¹⁹

This is work on which the UN must build upon to advance human rights related sexuality and gender.

III. A SPECIAL RAPPORTEUR WITH A LIMITED MANDATE ON SEXUAL ORIENTATION AND GENDER IDENTITY WILL NOT PROVIDE ADEQUATE PROTECTION

i. An exclusive focus on SOGI ignores intersections and will not address root causes and systemic abuses.

We cannot afford to keep SOGI issues in a segregated silo. Doing so can cause harm and separation within communities and struggles that are firmly linked. We congratulate ourselves rightly when “sodomy” laws are eliminated. Yet more LGBTI people are jailed, abused, and tortured daily under laws targeting sex work than are arrested worldwide under sodomy laws. These include not just LGBTI sex workers but other people arrested for loitering, “cruising,” or “walking while trans.” A 2009 study of sex workers in 12 Central Asian countries, for instance, showed that 42 percent of sex workers in the region reported having experienced physical violence by the police and 36 percent having experienced sexual violence. Male sex workers reported lower levels of sexual

¹⁹ UN CESCR, General Comment 22: The Right to Sexual and Reproductive Health, Article 12, UN Doc E/C.12/GC/22, 4 March 2016, at 9 and 10.

violence than their female peers, but higher levels of physical violence. All transgender sex workers who responded said police had physically and sexually abused them.²⁰

These provisions, however, are not applied uniformly. They are mainly used against the poor, people of color, migrants, transgender people, and other subaltern and marginal groups. As a result, they attract far less attention and condemnation.

Consider as well the way that advocacy against women's reproductive rights, in countries such as the United States, has moved in rhetorical and political unison with opposition to rights related to sexual orientation and gender identity and expression. The two causes share resources, borrow arguments from one another, and animate the same publics and politicians in a battle against sexual and bodily autonomy. To understand anti-LGBTI movements in North America in isolation from movements opposing women's rights is to miss a crucial political context. Moreover, it is vital to analyze how some states in Latin America and Europe have committed to LGBTI rights while at the same time systematically retreating on reproductive rights, especially abortion.

These are dominant trends of contemporary sexual politics. A narrowly defined mechanism will be unable to capture these ongoing dynamics. Moreover, it carries a high risk of unnecessarily setting up progressive actors in competition for space and legitimacy on a range of critical issues related to sexuality and gender by creating an artificial and dangerous hierarchy of sexuality related rights, privileging LGBTI rights.

ii. We need to build on, not compartmentalize, the vital work already being done by thematic mechanisms.

The strongest advances for LGBTI persons and others who are non-conforming in terms of their sexual orientation and gender identity and expressions in the UN system have been achieved by thematic mechanisms. They "mainstream" issues that are still contentious. For example, a major victory for intersex people and for other LGBT victims of medical abuses came through the Special Rapporteur on torture and other cruel, inhuman or degrading treatment's 2013 report, which called upon all States to repeal any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery, involuntary sterilization, unethical experimentation, medical display, "reparative therapies" or "conversion therapies", when enforced or administered without the free and informed consent of the person concerned.²¹

²⁰ Sex Workers' Rights Advocacy Network (SWAN), *Arrest the Violence. Human rights abuses against sex workers In Central and Eastern Europe and Central Asia*, 2009.

²¹ *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Méndez, Human Rights Council, 1 February 2013, UN Doc. A/HRC/22/53, at 88.

It is vital to assert SOGI issues, not as a stand-alone concern, but as part of a call for bodily autonomy and integrity as part of the constellation of human rights. A special rapporteur splitting off SOGI will not advance ideas of freedom, the rights of consenting adults and the ideas of bodily autonomy and integrity for all human beings. It would be a missed opportunity to further these issues across communities, groups and identities and would deny many the recognition of their rights. Further, such a mechanism will not make SOGI issues more mainstream – it will make them less intrinsic to other human rights work and enable opponents to relegate them to a ghetto that carries no legitimacy in places where it is needed most. The perception of “special protections” and “special rights” for LGBTI people has been a devastating argument in country after country with very real negative consequences to people’s lives.

iii. A SOGI-specific mandate would be ineffective against many of the worst abuses.

The work of the existing thematic mandates, being grounded in broad human rights principles rather than identity claims, carries authority in countries and cultures that don’t recognize “sexual orientation” or “gender identity.” In Egypt and Tunisia in the last 18 months, coordinated approaches by thematic rapporteurs have helped lead to the acquittal and release of people who are non-conforming in terms of their sexual orientation and gender identity and expression who faced draconian prison terms. A solitary approach by SOGI-specific rapporteur, or even adding such a title to the roster of signatories to an appeal, would make the appeal vastly easier for repressive authorities to ignore. Courts and governments could refuse to entertain any intervention from a mandate holder for which they do not recognize and further entrench positions that are detrimental to the rights of LGBTI persons.

Governments vehemently opposed to recognizing LGBTI persons’ rights would simply refuse to cooperate with a SOGI-specific rapporteur. States and NGOs in regions that would welcome a Special Rapporteur on SOGI tend to dismiss these concerns of non-cooperation by States. However, this dismissal is borne out of privileged positioning and fails to recognize that these are the countries in which violations related to sexuality and gender most urgently require attention. A broader mandate linked to sexuality and gender and with cross regional representation would have a greater chance of accessing a much larger range of countries than a SOGI rapporteur could ever hope to attain.

The global divide on SOGI related rights would obstruct the work of any SOGI-specific rapporteur far more than the limited precedents set within, for example, the Inter-American Commission on Human Rights (IACHR) might suggest. Latin America has seen a relative consensus by states on SOGI related rights; such a consensus has not been built or consistently and incrementally invested in at the Council. Moreover, IACHR mandate holders, as commissioners themselves, have the protection and power which is not available to independent experts advising the Council. The IAHR’s work with a rapporteur on SOGI cannot therefore be argued to be replicable at Council. Finally, and perhaps most importantly, the relative advancement on SOGI related rights in Latin

America has failed to advance broader sexual and reproductive rights, most notably in relation to abortion.

A Working Group on human rights related to sexuality and gender or a variation thereof, would be situated in a frame of universal protections, without isolating any particular group. As such, it would have a better chance of enlisting State cooperation on an ongoing and sustained basis, and could more effectively amplify the thematic mechanisms' work.

iv. A SOGI-specific mandate could contribute to creating or enforcing certain identities as the only acceptable bases for rights claims.

A special mechanism on SOGI can serve to erase indigenous identities around sexuality and gender in favor of “gay” or “transgender” identities more readily recognizable to Western activists and law. In other contexts, it may solidify identities where people in fact experience them as fluid or variable, for the categories through which people contest oppression are often not fixed identities but political standpoints they take in an ongoing struggle for dignity, freedom and equality. In all these ways, it may make rights claimants more vulnerable; may make them look more “foreign” and less rooted in their own cultures, and in the process more othered and exposed.

Speaking of sexuality only in terms of identities promotes a view that sexuality can be fitted into mutually exclusive categories, binaries of man and woman, homosexual and heterosexual, being the most common. “...This biopolitical move has at least two pernicious effects. First, it filters gender variation “through the lens of sexuality” ... so that travestis get perceived in relation to sexual orientation rather than gender variation, and transgender (T) and intersex (I) people get cooked into a homonormative alphabet soup ... Second, the reproduction of fixed identity and body categories flies in the face of the instability and variability of sexual desire and gender expression, not only among individuals but also across the life cycle. ... The process of asserting identities is always, inevitably, one of exclusion.”²²

Sometimes these arguments appear to be like simple quibbling over words. But words have consequences. It is important to recall what happened in India from the 1990s on, in the competition to access vital funding for HIV and AIDS. Funders first concentrated on supporting “gay” identities, then shifted their support to an “MSM” category, then showed more interest in “traditional” identities such as hijras or kothis. In the process, these communities were pitted against each other in increasingly divisive battles over who should receive support. The movements suffered.²³ What happened over funding

²² Rosalind Petchesky with Sonia Corrêa, Ignacio Saiz and Hossam Bahgat, “The Language of ‘Sexual Minorities’ and the Politics of Identity: A Position Paper,” Sexuality Policy Watch, 2008.

²³ See Lawrence Cohen, “The Kothi Wars: AIDS Cosmopolitanism and the Morality of Classification,” in Vincanne Adams and Stacy Leigh Pigg, eds., *Sex in Development: Science, Sexuality, and Morality in Global Perspective*, pp. 269-303

can equally easily happen over rights, if certain kinds of rights claimants are perceived as preferred, privileged, or more readily legible to the law.

For example, in 2014, as part of its “Free and Equal” campaign, the OHCHR released a “Bollywood-style” video for distribution in India, showing a gay man bringing his boyfriend home to meet his parents.²⁴ The video was expressly pitched, with the best intentions, to the sensibilities of a middle-class Indian audience. It raised some of the same questions as the “Kothi wars” of the 1990s: who is the subject of LGBTI related rights? Is it, as increasingly seems to be the case in the USA and Europe, a “respectable” couple concerned with marriage equality? What happens then to poor, lower-caste or lower-class, transgender, or otherwise subaltern rights claimants? How well will their claims be heard? The video suggests ways that a SOGI-centered approach, by normalizing certain kinds of rights issues and claims, keeps others marginal and defeats the ends it was geared towards.

v. There are no quick fixes or easy solutions

It is dangerous to assume that quick fixes will further the goal of broad protections for sexual and bodily autonomy. It is not clear that a Special Rapporteur on SOGI would be able to contribute substantially to the complex work existing mechanisms are already undertaking on abuses against LGBTI persons. Further and perhaps most harmful is the reality that, establishing a special mechanism on sexual orientation and gender identity and expression at this point will make it even harder to establish a future mechanism with a broad, inclusive mandate. States will not have the appetite to lead or support such an initiative and these issue would be erroneously seen to have already been dealt with through the establishment of a SOGI mandate.

It is clear that for a wide range of protections related to human sexuality and gender diversity, additional work and significant political and economic investments are necessary. This will enable the international community to scale up the work on sexual rights and foster resilience to ensure a continuous forward momentum. Progressive States and civil society must lead this process and not seek short-cuts by endorsing narrow and identity based mandates and protections. Genuine commitment to advancing equality, dignity and freedom linked with human sexuality and gender demands more of us all.

vi. Human Rights mechanisms gain strength and credibility from the support of a broad range of social movements.

The momentum on SOGI related issues at the Council over the last decade was preceded and informed by work on sexual and reproductive rights, and bodily autonomy

²⁴ See <https://www.unfe.org/en/actions/the-welcome>.

more broadly, with a focus on women's rights and including issues of sexual orientation and gender identity and expression, and spanning more than two decades.

The world needs a mandate that will carry a connected analysis more deeply and effectively into the Council's work. A SOGI mandate will emphasize some sexual rights issues over others and will provide protections for one group based on the right to bodily integrity and autonomy whilst failing to recognize and even denying attention to the same rights to autonomy of other groups such as sex workers, women seeking abortion services and those providing abortion services, young people, people living with HIV and others. In fact, some states promoting a SOGI-specific mandate expressly reject these linkages and their commonality of oppression, supporting, for example, various punitive measures to suppress sex work and women seeking abortion as well as those providing these services. It is not unthinkable that these states' support for a SOGI specific mandate carries the risk that the mandate be deployed to also question or oppose these areas of rights protection.

The recent report of the Global Commission on HIV and the Law is an excellent example of an intersectional approach to sexual rights and health that recognizes these linkages. It calls on states, inter alia, to decriminalise private and consensual adult sexual behaviours, including same-sex sexual acts and voluntary sex work.²⁵ Together with similar calls from the WHO, UNDP, UNFPA and UNAIDS,²⁶ it significantly advances understandings of sex workers' human rights, and sexual rights more broadly.

It is important that the UN's human rights mechanisms support rather than back away from these advances. The UN must continue to produce contextualized analyses of sexuality and gender and to find mechanisms for protection that expand the range of people and groups which are able to access protections under a single mandate. As the SR on VAW wrote in 2011, "Violence against women cannot be analysed on a case-by-case basis in isolation of the individual, institutional and structural factors that govern and shape the lives of women."²⁷

Full support for ongoing thematic work, and for the long-term goal of a broadly conceived sexual rights mandate, can guarantee that the UN's work on sexuality and gender continues to move forward. The UN must provide the maximum protection possible given the deeply hostile context globally as well as the context of what is possible at the Council..

²⁵ UNDP, Global Commission on HIV and the Law, *HIV and the Law: Risks, Rights and Health*, final report, 9 July 2012, p. 10.

²⁶ UNDP Asia-Pacific Regional Centre and UNFPA Asia-Pacific Regional Office, in partnership with UNAIDS and the Asia Pacific Network of Sex Workers (APNSW), *Sex Work and the Law in Asia and the Pacific: Laws, HIV and human rights in the context of sex work*, October 2012.

²⁷ *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo*, Human Rights Council, 28 May 2014, UN Doc. A/HRC/26/38, at 61.

The process that led up to the 1994 creation of the Special Rapporteur on Violence Against Women offers an instructive contrast to the present conditions. Questions about that mechanism – its focus, its scope, and its possible holders – were debated extensively by the international women’s movement. Discussions took place both within organizations and at open regional and international fora, especially the meetings leading up to the 1993 Vienna World Conference on Human Rights. The campaign was not dominated by a few international groups. Regional and domestic women’s movements shared leadership or took the lead in facilitating debate, making decisions, and carrying out advocacy. A broad consensus surrounded the eventual shape of the mandate; and names of possible mandate-holders emerged from the women’s movement itself. At the State level, the no country dominated the process, and global South governments were partners in the push for majority support.

As a result – in the words of one well-known movement leader interviewed by SRI – the mandate “came from the movement, governments never could feel they own it. Radhika Coomaraswamy” – the first mandate-holder -- always said: ‘I am your mechanism.’”

IV. CONCLUSION

States, movements and the UN should carefully weigh the implications of establishing an exclusive special mechanism in the face of the widespread and deep oppressions faced by so many groups and communities also linked to sexuality and gender related violations and exclusions. In this regard, the SRI encourages all to consider the following questions when considering their support for a SOGI specific mechanism

- What are our obligations to recognize and address the crisis faced by so many in relation to sexuality and gender?
- What is a principled position to advance protections for all who are criminalised based on sexuality and gender?
- How can we remedy protection gaps related to sexuality and gender?
- How can we avoid further entrenching these protection gaps?
- What will it take and what strategies should we employ to build broad support among States from across the regions of the world for a comprehensive understanding of sexual and bodily autonomy?
- How can we create an articulation of sexuality and gender politics that helps strengthen existing movements and broaden these so that there is solidarity for the range of interconnected and linked struggles in which the interests of those

marginalized because of their socioeconomic status, ethnic or racial or religious identities, refugee or migrant status, geography or class, as well as gender and sexuality, will be of paramount importance?

In response to these questions, the SRI recommends that States, the UN and civil society work towards establishing a mechanism such as a Working Group with a broad and mandate which offer a more holistic approach to sexuality and gender than a single Special Rapporteur devoted to a specific identity.

A Working Group would offer:

- Cross-regional participation, ownership, and leadership. It would enable all regions to bring their own expertise, best practices, knowledge and skill to the protection work
- Multi-disciplinary expertise. Sexuality and gender are nuanced, complex and multi-layered. They are issues cutting across civil and political rights and economic, social and cultural rights. In addition to a legal dimension, a full understanding of their cultural context and meanings may draw on psychology, ethnography, history, sociology, and other disciplines. Multiple theoretical lenses and disciplinary frameworks may be needed. A Working Group holds the best potential to bring together a relevant range of expertise.
- Refutation of accusations of bias. In both form and function, a Working Group would acknowledge that challenges are faced by all countries in all regions of the world. It would avoid the selectivity of denunciations that have tended to prevail in recent human right work related to gender and sexuality, and show that no region or country is unilaterally setting standards on the full range of sexual rights issues.

The Sexual Rights Initiative therefore makes the following recommendations to continue the political and social momentum to effectively integrate human rights related to sexuality orientation and gender identity into the work of the Council:

1. The Human Rights Council should build on and strengthen the existing thematic resolution on sexual orientation and gender identity by expanding its scope and to guide existing mechanisms in their continuing work on bodily integrity and autonomy for all people, including LGBTI persons and those who are non-conforming in terms of their sexual orientation and gender identity and expression.
2. The resolution should mandate the OHCHR to investigate the root causes of discrimination, violence and other violations based on sexual orientation and gender identity and expression, and expand the analysis to include legal and social practices that empower as well as laws and policies restricting bodily integrity and autonomy for a range of people, including sex workers, members of LGBTI communities, women seeking abortion, adolescents, HIV-positive persons and transgender

persons, and others stigmatised because of their sexual and gender expressions or behaviours.

3. Progressive states from across all regions of the world should envision and plan for a Working Group or similar mechanism on “Human Rights related to Sexuality and Gender”, or a variation thereof, that approaches sexuality and gender from a holistic and intersectional perspective. This would be best advanced through a cross-regional core group led by states already working on some of the most complex sexual rights issues.

-ENDS-