

GENDER WARS I AND II AT THE UNITED NATIONS: AN OVERVIEW

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This paper gives an overview of key debates concerning the use of the expressions “gender,” “sexual orientation,” and “gender identity,” within the context of the United Nations [U.N] system. - Part I gives a brief summary of the U.N. system and foundational principles contained in the Universal Declaration of Human Rights. - Part II discusses key debates concerning the term “gender” from 1990 to 2011. - Part III gives an account of important discussions regarding the concepts of “gender identity” and “sexual orientation” from 2011 to 2016. - Part IV offers some reflections on future challenges and possible approaches.

INTRODUCTION

Multilateral negotiations within the United Nations system, especially in the field of international human rights, frequently involve heated debates among member States over the use of certain terminology.¹ This paper will explore key discussions within this system concerning “gender”, “gender identity” and “sexual orientation” with a view to underscoring certain concerns regarding the usage of these terms. It is not the purpose of this paper to combat persons or institutions that promote such terminology internationally or nationally, but rather to stimulate dialogue about the usage of ambiguous terminology and its related implications for international human rights law. The paper is divided into three parts. Part I gives a brief summary of the U.N. system and legal anthropology contained in the *Universal Declaration of Human Rights*. Part II discusses key debates concerning the term “gender” from 1990 to 2011. Part III recounts important discussions concerning “gender identity”

¹ See e.g., Marguerite A. Peeters, *The Globalization of the Western Cultural Revolution: Key Concepts, Operational Mechanisms* (Institute for Intercultural Dialogue Dynamics:2012); Pontifical Council for the Family, *Lexicon: Ambiguous and Debatable Terms regarding Family Life and Ethical Questions* (Human Life International: 2006); Aguirre, Maria Sophia and Ann Wolfgram, United Nations Policy and the Family: Redefining the Ties that Bind, *Journal of Public Law*, Winter Issue, 20:2, 2002; For a critique of the term values, see: Iain Benson, 2017 Acton Lecture on Religion and Civil Society: Civic Virtues and the Politics of ‘Full Drift Ahead’

< <https://www.cis.org.au/events/2017-acton-lecture-on-religion-and-civil-society/> >

and “sexual orientation” from 2011 to 2016. Part IV offers some reflections on future challenges and possible approaches.

I. THE UNITED NATIONS SYSTEM AND INTERNATIONAL HUMAN RIGHTS LAW

A. The United Nations System: General Considerations

The 1945 *Charter of the United Nations* [*Charter*]² created the United Nations Organization. It is founded on six main organs: General Assembly, Security Council, Economic and Social Council, Trusteeship Council, International Court of Justice, and Secretariat, which, in turn, has led to the development of a myriad of subsidiary bodies as well as affiliated funds, programmes and special agencies.³

The purposes of the U.N. are fourfold: to maintain international peace and security; to develop friendly relations between States; to achieve international cooperation in resolving problems as well as promoting and encouraging respect for human rights and fundamental freedoms; and to be a center for the harmonization of State actions in the attainment of these ends (*Charter*, art.1). In pursuit of these purposes, the U.N. system is based on a number of principles, including the sovereign equality and independence of all States; fulfillment in good faith of obligations assumed; respect for peaceful resolution of disputes; State assistance in any U.N. action take pursuant to the *Charter*; prohibition of the threat or use of force; and non-interference in the domestic affairs of other States (*Charter*, art. 2).

One might describe the international legal system as being comprised of a body of norms that govern relations between sovereign subjects, most notably, States. It differs from the legal framework frequently found on the national level based on a formal, legislative parliamentary process, administrated under law by an executive branch and reviewed, interpreted and enforced by a judicial branch. It necessarily follows that the sources of international law are not the same as national jurisdictions (e.g., constitutions, codes, contracts, case law), but rather are comprised of other sources: treaties, customary international law (State practice considered by them as legally binding) and general

² The *Charter of the United Nations and Statute of the International Court of Justice*, original copy signed June 26, 1945 in San Francisco, California and deposited in the archives of the Governments of the United States of America <<https://treaties.un.org/doc/publication/ctc/uncharter.pdf>> [*Charter of the United Nations*]

³ See eg, A Chart of the United Nations System

<http://www.un.org/en/aboutun/structure/pdfs/17-00023e_UN%20System%20Chart_8.5x11_4c_EN_web.pdf>

principles of law, while the opinions of scholars and decisions of international courts do not create international law, but assist in determining it (*Statute of the International Court of Justice*, art. 38).⁴

Within this system, it is also important to distinguish between binding and non-binding instruments.⁵ At the risk of oversimplification, as a general rule, the names of certain documents may assist one in distinguishing between the two. For example, treaties, covenants, optional protocols, charters, statutes negotiated and ratified by member States are generally binding, while resolutions, declarations, guidelines, compacts, action plans and agendas negotiated by member States and/or produced by the U.N. bureaucracy are non-binding. There are many exceptions, of course. For example, the 1948 Universal Declaration of Human Rights [*UDHR*] was not originally intended as a binding document, but many international scholars and jurists consider most, if not all of its provisions, to be binding on States as customary international human rights law.⁶

B. The Universal Declaration of Human Rights

The *UDHR* fleshes out the notion of human rights and fundamental freedoms embedded in the *Charter*.⁷ The preamble of the *Charter* calls on States Parties ‘to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.’⁸ Article 1 reinforces this idea by stating that one of the purposes of the United Nations includes the encouragement for respect of ‘human rights’ and ‘fundamental freedoms,’⁹ while in Article 56 of the *Charter*, State parties pledge to promote these rights and freedoms.¹⁰

⁴ *Charter of the United Nations and Statute of the International Court of Justice*, above n 2 .

⁵ On the international level binding instruments are often referred to as “hard law,” while non-binding documents are frequently referred to as soft law: See e.g., Prosper Weil, Prosper. ‘Towards Relative Normativity in International Law?’ *American Journal of International Law* 77 (1983): 413–442 (Weil warns against blurring the distinction between normative and non-normative rules in international law). For a contrary view see Richard R. Baxter, ‘International Law in “Her Infinite Variety.”’ *International and Comparative Law Quarterly* 29.4 (1980) 549–566 (Baxter argues that soft law is one of the many varieties of international law).

⁶ United Nations General Assembly, *Universal Declaration of Human Rights*, U.N. Doc. Resolution 217 [III] A, 10 December 1948, Paris.

⁷ For an historical study, see: Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, 1st ed, 2001) (*Glendon A World Made New*). See also, Mary Ann Glendon, ‘Knowing the Universal Declaration of Human Rights’ (1998) 73(5) *Notre Dame Law Review* 1153. (*Glendon Knowing the Declaration*). For a commentary on the working papers, see: Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, 1999).

⁸ *Charter of the United Nations and Statute of the International Court of Justice*, above n 2, preamble, para. 2.

⁹ *Ibid*, art 1.

¹⁰ *Ibid*, art 56.

The delineation of human rights and fundamental freedoms was the task of the United Nations Commission on Human Rights, whose original idea was to draft a non-binding declaration that would be followed by one covenant with binding legal force; however, it took a number of years to establish legal obligations and the same were recognized in two agreements, not just one. The end result was the 1948 *UDHR* and the 1966 *Covenant on Civil and Political Rights*¹¹ and the 1966 *Covenant on Economic, Social and Cultural Rights*,¹² which have become known collectively as the *International Bill of Human Rights*.

The *UDHR*, in particular, has foundational significance for international human rights law (binding international instruments). It was the first international document of its kind, and is cited in most preambles of international human rights instruments, and considered by many to be a binding document. Most importantly, it sets the foundation for the subsequent binding instruments within the international human rights system, comprised of charter bodies and treaty bodies. The author has discussed the history and importance of the *UDHR*, elsewhere,¹³ and will not repeat what has been previously written except to underline that a “good faith” interpretation in light of the “ordinary meaning” of the words in the written text taking into consideration a certain common-sense understanding of humanity and society reveals the following points.¹⁶

- The *UDHR* recognizes the inherent human dignity of all human beings, male and female, and the rights that derive from this dignity. Preambular paragraphs one and five of the *UDHR*, respectively, refer to the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family” and “faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women.”

- Article 1 of the *UDHR*, the only article of its kind in international human rights law, provides an anchor for inherent human dignity. “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” In other words, by the mere fact of being human, a human being is a person, that is,

¹¹ International Covenant on Civil and Political Rights, G.A. Res.2200 (XXI) A, U.N. Doc. A/6316 (Dec. 16, 1966) (*ICCPR*).

¹² International Covenant on Economic, Social and Cultural Rights, G.A. Res.2200 (XXI) A, U.N. Doc. A/6316 (Dec. 16, 1966) (*ICESCR*).

¹³ See, eg. Jane Adolphe, “New Rights” in Public International Family Law? What International Law Actually Says’ (2011) 10(1) *Ave Maria Law Review*, 149-168; Jane Adolphe, ‘The Holy See and the Universal Declaration of Human Rights: Working Toward a Legal Anthropology of Human Rights and the Family’ (2006) 4(2) *Ave Maria Law Review*, 343-384.

by nature “free...endowed with reason and conscience” and relational, with rights and duties to the other. It follows that every human person ought to respect the “inherent dignity” or innate value of every other person as someone, rather than something, which includes all, both males and females, who are equal in inherent human dignity and equally possess the rights that derive from this inherent dignity.

- In the *UDHR*, States pledge to promote universal respect for human rights and fundamental freedoms based on a common understanding of them in the text, which, in turn, constitutes a common standard of achievement. For example, U.N. member States “pledged themselves to achieve...the promotion of universal respect for and observance of human rights and fundamental freedoms” (art. 6). For the full realization of this pledge they acknowledged that a “common understanding of these rights and freedoms [was] of the greatest importance.” (art. 7). Then proclaimed that the *UDHR* was a “common standard of achievement” (art.8).

The provisions above, in turn, give rise to “specific moral requirements,” that is, certain things ought not to be done to any human person (e.g., slavery..., torture...) and certain other things ought to be done for every human person (e.g., recognition as a person before the law...).¹⁴ This last point implies that a human person acquires human dignity when he or she acts in accordance with right reason; that is, in doing those things he or she ought to do and refraining from other things he or she ought not to do (e.g., Tom has inherent dignity as a human person, which must be respected, but not his act of rape, which is wrong and criminal).

Respect for the inherent dignity of every human person, for the rights that derive therefrom, and for the correlative responsibility to act rightly towards others is deeply united with the rights of the natural family and the greater community, which, in turn, means that rights are not absolute, but correlative with duties, and have limits.

- Article 16 of the *UDHR* recognizes that the family based on marriage between a woman and man (female and male) is “the natural and fundamental group unit of society and is entitled to protection by society and the State.” In addition, article 25 of the *UDHR* recognizes that “motherhood and childhood are entitled to special care and assistance,” while article 26 of the *UDHR* provides: “Parents have a prior right to choose the kind of education that shall be given to their children.”

¹⁴ Michael J. Perry, *The Idea of Human Rights: Four Inquiries* 13 (1998).

- Article 29 acknowledges that “[e]veryone has duties to the community in which alone the free and full development of his personality is possible,” and that rights and freedoms may be limited “by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.” Finally, there is a prohibition in the *UDHR* of certain interpretations, in article 30, namely as “implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth” therein.

In sum, Part I provides the frame of reference to understand certain concerns raised by U.N. member States about the terms “gender,” “gender identity” and “sexual orientation,” and how their inclusion in various binding and non-binding instruments could call into question the foundation of human rights, namely the universal understanding of humanity as comprised of human persons, male and female, by nature “free...endowed with reason and conscience” and relational, with rights and duties to other. Many States have also expressed their objections to what they view as the consequences of the elimination of this foundation, namely the redefinition of such terms as: “marriage,” “family,” “motherhood,” and “parents.” In addition, these same States foresee an eradication of the universal and common understanding of human rights and fundamental freedoms set out in the *UDHR*, and of any common standard of achievement.¹⁵

II. GENDER WARS I: 1990 TO 2011

In 2012, the author published a paper entitled “‘Gender’ Wars at the United Nations’ that explored the controversy surrounding the meaning of the term “gender” within the U.N. system.¹⁶ The paper studied the various uses of the term in an historical review of initiatives for women within the U.N., underlining when the term “gender” had been gradually introduced into nonbinding international documents on the topic of women in the early 1990s, without much discussion about the meaning of the term. Since the word was generally included in paragraphs devoted to women and girls, many U.N. member States assumed that gender was a synonym for sex or for women and girls. During the same period, however, certain organs of the bureaucracy of the United Nations began to use the term in its

¹⁵ A question arises as to whether the promotion of any change that reinterprets the foundation of human rights and important provisions pertaining to the family, parents, motherhood is a violation of article 30 of the *UDHR* in that it constitutes activity aimed at the destruction of rights and freedoms in the *UDHR*.

¹⁶ Jane Adolphe, “‘Gender’ Wars at the United Nations’ (2012) 11(1) *Ave Maria Law Review* 1-30.

non-binding documents (e.g., reports).¹⁷ In these documents, gender was defined as a social construct, that is, a set of social assumptions, expectations, and attitudes about masculinity and femininity and/or roles of males and females in society assigned to children from birth by parents or social institutions.

The turning point came at the 1995 *Fourth World Conference on Women*, in Beijing, where the term “gender” assumed prominence—being used 233 times in the final document. At this juncture, certain delegates at the conference demanded that the term be defined. During the discussions, concerned delegates learned that that feminist philosopher Judith Butler had defined the term as a social construct. In her 1990 book, *Gender Trouble: Feminism and the Subversion of Identity*, Butler describes “gender” as a:

constructed status...radically independent from sex...a free floating artifice, with the consequence that man and masculine might just as easily signify a female body as a male one, and a woman and feminine a male body as easily as a female one.¹⁸

Many State delegates and lobbyists challenged the view of “gender” as a social construct, while others supported this meaning.¹⁹ Gender feminist Hilary Charlesworth described the overall debate during the conference in the following manner: while gender feminists feared that the imprecise use of the word would allow gender to be associated with “women” and “sex,” delegates from several States, including Honduras and the Holy See, were ‘concerned that [gender] might be understood as including homosexuality and even bestiality.’²⁰

¹⁷ See eg, United Nations, *Women, Peace and Security: Study submitted by the UN Secretary General pursuant to Security Council Resolution 1325* (2002), 12 (wherein gender is defined as “the socially constructed roles as ascribed to women and men, as opposed to biological and physical characteristics”).

<<http://www.un.org/womenwatch/daw/public/eWPS.pdf>>; See also the discussion in Jane Adolphe, *The Pope’s Peace and Security Council 1325, 5 Ave Maria Law Review* 429-468 (2007) 457-458.

¹⁸ Adolphe, ‘*Gender Wars at the United Nations*,’ above n 16, 15-19 (Cf. Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity*, (Routledge:1990) 88; Cf. Martha Lorena de Casco, ‘The Battle at Beijing’ in Michael Cook (ed.) *Empowering Women: Critical Views of the Beijing Conference* (Little Hills Press: 1995), 16); See also Judith Butler, ‘The Phantom of Gender: Reflections on Freedom and Violence,’ *Folha de S. Paulo*, 21 November 2017 (wherein she reflects on the meaning of gender in her book *Gender Trouble*).

<<http://www1.folha.uol.com.br/internacional/en/culture/2017/11/1936921-the-phantom-of-gender-reflections-on-freedom-and-violence.shtml>>

¹⁹ *Ibid*, 15-19 (Cf. De Casco, *supra* note 18; See also, Dale O’Leary, *The Gender Agenda: Redefining Equality* (Vital Issues Press: 1997).

²⁰ *Ibid*, 18 (Cf. Hilary Charlesworth, ‘Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations,’ 18 *Harv. Hum. Rights. J.*, 1-18 (2005) 16 [hereinafter ‘Charlesworth, Gender Mainstreaming’]).

This is not entirely accurate. The concerns of the Holy See, a sovereign subject of international law and full participant at the Beijing Conference, were much broader. In 1985, Cardinal Joseph Ratzinger, Prefect of the Congregation for the Doctrine of the Faith, who later became Pope Benedict XVI, had in a private interview spoken about the “trivialization of sexual specificity” promoted by radical feminism. He did not use the word “gender.”²¹ In particular, Ratzinger had argued that it was:

‘necessary to get to the bottom of the demand that radical feminism draws from the widespread modern culture, namely the ‘trivialization’ of sexual specificity that makes every role interchangeable between man and woman...Detached from the bond with fecundity, sex no longer appears to be a determined characteristic, as a radical and pristine orientation of the person. Male? Female? They are questions that for some are now viewed as obsolete, senseless, if not racist. The answer of current conformism is foreseeable: ‘whether one is male or female has little interest for us, we are simply humans’ This in reality has grave consequences even if at first appears very beautiful and generous.’²²

To resolve the controversy at the Beijing Conference, a working group composed of sixty State representatives gathered to consider the meaning of gender in the Beijing outcome document. Their opinion was set out in Annex IV to the *Report of the Fourth World Conference on Women*, wherein it states that the word ‘gender’ is ‘to be interpreted and understood as it was in ordinary, generally accepted usage.’²³ The author argued that this meant gender was a synonym for sex or women and girls, something lamented by some gender feminists, including Charlesworth, who stated that ‘[g]ender ha[d]been defanged,’ that is stripped of any “radical or political potential.”²⁴ The non-definitional approach was not acceptable to the Holy See. It entered reservations and included a very nuanced interpretation of the term “gender.” The Holy See stated the following:

‘In accepting that the word “gender” in this document is to be understood according to ordinary usage in the United Nations context, the Holy See associates itself with the common meaning of that word, in languages where it exists. The term “gender” is understood by the Holy See as grounded in biological sexual identity, male or female. Furthermore, the Platform for Action itself clearly uses the

²¹ Mary Anne Case, ‘The Role of the Popes in the Invention of Complementarity and the Vatican’s Anathematization of Gender,’ *Religion & Gender*, Vol. 6, no.2 (2016) 155-172, at 166 (cf. Cardinal Joseph Ratzinger, and Vittorio Messori Joseph, *The Ratzinger Report: An Exclusive Interview on the State of the Church* (Ignatius Press: 1985), at 95).

²² Ibid.

²³ The United Nations Entity for Gender Equality and the Empowerment of Women *Report of the Fourth World Conference on Women*, U.N. Doc. A/CONF.177/20/Rev.1 (4-15 September 1996).

²⁴ Adolphe, ‘Gender Wars at the United Nations,’ above n 16 (Cf. Charlesworth, ‘Gender Mainstreaming,’ *supra* note 20, 13).

term “Both genders.” The Holy See thus excludes dubious interpretations based on world views which assert that sexual identity can be adapted indefinitely to suit new and different purposes. It also dissociates itself from the biological determinist notion that all the roles and relations of the two sexes are fixed in a single, static pattern.²⁵

In brief, the Holy See understood the term gender as grounded in biological sex differences, which were relevant in society (e.g., mother, father), but it did not mean that all roles and relations were fixed in a static pattern (e.g., being born a woman does not mean that she cannot study, work, or drive). From this perspective, the Holy See presented a middle ground between two extremes namely that of gender feminists, who minimized or negated the relevance of biological sex differences in favour cultural, social or subjective elements, and that of biological determinists, who opined that biology determined all roles and relations in society.

A few years later, in 1998, the term “gender” returned as an issue for debate during negotiations of the *Rome Statute*.²⁶ It was defined in a way that grounds gender in biological sex.²⁷ It read: ‘For the purposes of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society.’²⁸ This definition constituted the only one in international law, at the time, that bound State Parties, who had signed and ratified the *Rome Statute of the International Criminal Court* (*‘Rome Statute’*). Since 2005, some gender feminists have been promoting an interpretation of this definition to render “context of society” as equivalent to “socially constructed” to take into consideration “sexual orientation,” “gender identities.”²⁹

In 2006, the non-binding report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while countering Terrorism stated that gender was ‘not synonymous with women but encompassed] the social constructions that underlie how women’s and

²⁵

Ibid (Cf. Fourth World Conference on Women, Beijing, China, Sept. 1–15, 1995, *Report of the Fourth World Conference on Women, Reservations and Interpretative Statements on the Beijing Declaration and Platform for Action*, at 162, U.N. Doc. A/CONF.177/20/Rev.1 (1996) [‘Report on Beijing Conference’] (recording the Holy See’s statement of interpretation on the word “gender”).

²⁶*Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

²⁷ Ibid, art. 7(3).

²⁸ Ibid.

²⁹ Adolphe, ‘Gender Wars at the United Nations,’ above note 16, 26–28 (Cf. Oosterveld, ‘Gender, Persecution, and the International Criminal Court: Refugee Law’s Relevance to the crime Against Humanity of Gender-Based Persecution,’ 17 *Duke J. Comp & Int’l. L.* 49 (2006) 51).

men's roles, functions and responsibilities, including in relation to sexual orientation and gender identity, [were] defined and understood'.³⁰ Then latter in the Report within the context of "gender inequality" the Special Rapporteur stated that it included 'women and lesbian, gay, bisexual, transgender and intersex individuals.'³¹ The Report, however, was greatly criticized by States Parties on the grounds that it promoted a new and radical definition of gender.³²

In 2011, there was a very lively discussion about the term "gender" during the 55th Session of the Commission on the Status of Women, when the European Union advocated for the inclusion of "gender studies" in the key document called the "Agreed Conclusions".³³ It was defined by the European Union as a field of interdisciplinary study based on the views of Simone de Beauvoir and Judith Butler.³⁴ The Holy See together with the African Group blocked the inclusion of every reference to "gender" until the term "gender studies was dropped from the document, and then many delegates reaffirmed the meaning of gender as referring to women and men, or male and female, namely its ordinary usage 'before, during and after negotiations' at the Beijing Conference.³⁵

In sum, from 1998 to 2011, the majority of State parties consistently rejected the concept of "gender" promoted by gender feminists as a social construct or social assignment imposed on children from birth. This is evidenced by the failed attempts to integrate a more radical definition of the term "gender" into various U.N. instruments negotiated by State parties. However, this does not mean that there was or is today agreement among States as to its usage. During the period under consideration, four understandings of the term were discernible within the U.N. system: (1) gender as synonymous for women and sex, or women and children, the common usage of the majority of States; (2) gender meaning the two sexes, male and female, within the context of society as defined in the *Rome Statute*; (3) gender as a social construct as promoted by gender feminists, a minority of States and the UN bureaucracy; (4) gender as a cultural aspect of femininity and masculinity, but based on the biological sexes, male and female as defined by the Holy See. It is noteworthy that some proponents of the term

³⁰ Ibid., 29 (Cf. *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, transmitted by Note of the Secretary-General, U.N. Doc. A/64/211 (Aug. 3, 2009), by Martin Scheinin, paras.20, 33).

³¹ Ibid.

³² Ibid. (Cf. General Assembly Department of Public Information, Political Affairs Head Says UN Efforts to Assist Elections in High Demand as Third Committee's Debate on Promotion of Human Rights continues, UN Doc.GA/SHC/3959 (Oct. 26, 2009) (detailing the discussion of UN member States during the question following presentation of the report).

³³ Ibid. (Cf. UN ESCOR, 55th Sess., Supp. No. 7. Para. 14, U.N. Doc. E/CN.6/2011/12, March 12, 2010).

³⁴ Ibid.

³⁵ Ibid., 30.

have admitted that the word gender is “not an easily transmissible technical concept”³⁶ and that the “basic content” of the term admits of no agreement within the feminist community.³⁷ To date, the debate continues and is currently related to the terminology discussed in Part III, *infra*.

III. GENDER WARS II: 2011 TO 2016

In 2016, a second paper by the author returned to the debate in “Gender Wars II at the United Nations: The Continuing Saga.”³⁸ It explored efforts to secure a human rights resolution devoted to the topic of “sexual orientation” and “gender identity” (SOGI), underlining the importance of the United Nations Human Rights Council in advancing the same, when it was established in 2006. That paper described efforts to create a human rights’ resolution by the self-defined lobbying group Lesbian, Gay, Bisexual, Transgender, and Intersexed (LGBTI), and its supporters within the UN system. The irony is that what the gender feminists were unable to achieve in twenty years, under the umbrella of women’s rights, males self-defining as homosexuals were able to achieve in just five years, under the auspices of “LGBTI” rights.

In 2011, despite opposition by many member UN Member States, “sexual orientation” and “gender identity” (SOGI) became the subject matter of a non-binding Resolution of the U.N. Human Rights Council (HRC). The Resolution commissioned a study from the U.N. High Commissioner for Human Rights [UNHCHR] “documenting discriminatory, laws and practices and acts of violence against individuals based on their sexual orientation and gender identity.”³⁹ The HRC Resolution also envisioned a “Panel Discussion” that would be convened during the 19th Sessions to inform U.N. Member States “about the facts” of the UNHCHR’s Report and “to have a constructive, informed and transparent dialogue”⁴⁰

The UNHCHR finished the Report on “*Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity* [‘The Report’].”⁴¹ The Report

³⁶ Ibid, 21 (Cf Charlesworth, ‘Gender mainstreaming,’ above n 20, 57).

³⁷ Ibid. (Cf Valerie Oosterveld, ‘The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice,’ 18 *Harv. Hum. Rts. J.*, 55-84 (2005) 83).

³⁸ Jane Adolphe, ‘Gender Wars II at the United Nations: The Continuing Saga’ (publication forthcoming, paper on file with author).

³⁹ General Assembly, Human Rights Council, 70th Sess., Agenda item 8, Follow-up and implementation of the Vienna Declaration and Programme of Action, *Resolution adopted by the Human Rights Council Human rights, sexual orientation and gender identity* U.N. Doc. A/HRC/RES/17/19, 14 July 2011.

⁴⁰ Ibid.

⁴¹ General Assembly, Human Rights Council 19th Sess. Agenda items 2 and 8, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, Follow-up

was 25 pages long and divided into seven sections: introduction, applicable international standards and obligations; violence; discriminatory laws; discriminatory practices; emerging responses; conclusions and recommendations. It offered no definition of SOGI, but in a type of bait and switch, the mandate was changed to introduce another topic namely “new rights” pertaining to personal sexual interests of a lobbying group which self-identifies as LBGTI. The Report rippled with new and undefined expressions: “homophobic”, “transphobic,” “sexual minorities” “State-sponsored homophobia,” “heteronormative gender identity,” “perception of homosexuality” or “perception of transgender identity.” In addition, the term “gender” commonly used on the international level to refer to sex or women and girls was indirectly re-defined, when “homophobic” and “transphobic” were included as forms of gender-based violence.⁴²

The Report contended that the application of international human rights law was guided by principles of “universality, equality and non-discrimination” but later, contradicted itself, and opined that discrimination was a right, not a principle.⁴³ In support of these three principles or two principles and a right, whatever the case may be, the Report cited article 1 of the *UDHR*, but only in part: “all human beings are born free and equal in dignity and rights.”

The Report rightly acknowledged that the terms: “sexual orientation” or “gender identity” or “perception of homosexuality” or “transgender identity” were not protected categories in international law.⁴⁴ However, it contended that such categories were “derived from various international human rights instruments,”⁴⁵ something many States do not accept, not an irrelevant point, given the fact that they are the final interpreters of the instruments to which they have ratified or acceded to and/or otherwise bound.⁴⁶

The “Panel Discussion” on the UNHCHR Report required by the HRC Resolution 17/19 was held on 7 March 2012 during the 19th Session of the HRC. While the dialogue was to be transparent and open, the head of the Permanent Observer Mission of the Holy See to the U.N. in Geneva noted:

and implementation of the Vienna Declaration and Programme of Action, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity Report of the United Nations High Commissioner for Human Rights A/HRC/19/41*, 17 November 2011.

⁴² Ibid. para. 20.

⁴³ Ibid. para. 15.

⁴⁴ Ibid. para. 7-8.

⁴⁵ Ibid. para.8.

⁴⁶ Cf *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), arts. 31-33.

It was evident, however, many States and organizations promoting the Panel Discussion also had an agenda to advocate for “special rights”... Some States, in fact, insisted that all speakers ...follow the same ideological line and refused suggestions, proposed by other States, to include panellists who held divergent view concerning efforts to promote “new rights”.⁴⁷

The panellists riddled the participants with the following terms and expressions, offering no definitions or clarifications: “sexual orientation,” “gender identity,” “homophobia,” “homophobic attitudes” “negative social attitudes towards LGBT people,” “negative stereotyping,” “discriminatory attitudes,” “hate speech,” “bias-motivated violence against LGBT”, and “anti-LGBT bias.”⁴⁸ In addition, the panellists expressed concerns going well beyond stopping violence and discrimination, drifting into a number of new issues: “training, sensitization and public anti-homophobia campaigns,” “recognition of same-sex relations” (including same sex marriage and same-sex adoption). The term gender was indirectly redefined when “gender recognition” was said to include transgender persons).

According to the U.N. Summary of the event, “a number of States signalled their opposition to any discussion of [SOGI] by leaving the Council chamber at the start of the meeting.”⁴⁹ A number who remained, “voiced their opposition on cultural or religious grounds or argued that [SOGI] were new concepts that law outside the framework of international human Rights law....Some delegations argued “that concepts of [SOGI] had no foundation in international human rights law because they had not been sufficiently well defined and were not mentioned in any international human rights instruments.”⁵⁰ Consequently, States could not be compelled to recognize [SOGI] as a prohibited ground for discrimination, since this would threaten principles of universality, cultural pluralism and common ownership of international human rights law.⁵¹ Others argued that national and religious particularities had to be raised in the context of any discussion of human rights since homosexual acts were against the teachings of world religions, as well as cultural and traditional values of many communities.⁵²

⁴⁷ Permanent Observer Mission of the Holy See, *Preserving the Universality of Human Rights*, (Libreria Editrice Vaticana:2012), 9; See also *Human Rights Council Panel on ending violence and discrimination against individuals based on their sexual orientation and gender identity*, Geneva, Summary of Discussion, 7 March 2012 <<http://www.ohchr.org/Documents/Issues/Discrimination/LGBT/SummaryHRC19Panel.pdf>>

⁴⁸ See also *Human Rights Council Panel on ending violence and discrimination against individuals based on their sexual orientation and gender identity*, Geneva, Summary of Discussion, 7 March 2012 <<http://www.ohchr.org/Documents/Issues/Discrimination/LGBT/SummaryHRC19Panel.pdf>>

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

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The Holy See held a parallel event two days later on 9 March 2012 called “Preserving the Universality of Human Rights: in the context of discussions on Sexual Orientation and Gender Identity at the United Nations.”⁵³ It “convened 150 participants including representations from 30 Permanent Missions to the UN in Geneva”⁵⁴ There was a panel of experts, then a lively discussion, followed by responses from the panellists, and distribution of non-papers to encourage full debate. The consensus reached by the panellists was that no human person should be subjected to violence or discrimination. However, what was needed was the implementation, at the local level, of existing international obligations. “New rights” were not necessary and could result in a “deterioration of the universality of human rights and pose a risk to time-honored and recognized protection of marriage between husband and wife, [of] the natural family, and [of] freedom of conscience and religion.”⁵⁵

The U.N. Human Rights Office of High Commissioner issued a non-binding Report ‘Born Free and Equal’ which built on its Report produced pursuant to HRC resolution 17/19.⁵⁶ The new Report contended that “the case for extending the same rights to...LGBT persons as those enjoyed by everyone else [was] neither radical nor complicated. It rested on two fundamental principles that underpin international human rights law: equality and non-discrimination.”⁵⁷ In support, the Report cited art. 1 of the UDHR, in part: “All human beings are born free and equal in dignity and in rights,” excluding any reference to the human person, by “nature endowed with reason and conscience having a duty to act towards one another in a spirit of brotherhood.” The Report promoted five core obligations of States toward persons self-identifying as LGBT, which rendered the report less about the two categories of non-discrimination “sexual orientation” or “gender identity,” and more about LGBT group rights *per se*.

In 2015, pursuant to the resolution 27/32 of the Human Rights Council, the U.N. Human Rights Office of High Commissioner submitted an update to its earlier report on violence and discrimination against individuals based on their sexual orientation and gender identity.⁵⁸ The 2015 Report was

⁵³ Preserving the Universality of Human Rights, above n. 48.

⁵⁴ Ibid. 10.

⁵⁵ Ibid.

⁵⁶ United Nations Human Rights Office of High Commissioner, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, (New York and Geneva: 2012).

⁵⁷ Ibid, 7

⁵⁸ General Assembly, Human Rights Council 29th Sess. Twenty-ninth session, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, Report of the United Nations Human Rights Office of High Commissioner A/HRC/29/23 (15 May 2015) [‘2015 UNHCHR Report’]

divided into six parts: introduction, recent developments, applicable international standards and obligations; homophobic and transphobic violence; discrimination; conclusions and recommendations. It included controversial assertions about the obligations of U.N. member States and unsupported assertions about children. For example, the report opined that “conversion therapies...have been found to be unethical, unscientific and ineffective and, in some instances, tantamount to torture” and were particularly troublesome for “intersex children” and any other “treatment” as concerns aligning their physical appearance “with binary sex stereotypes.”⁵⁹ In addition, the Report promoted “comprehensive sexuality education,” as forming a part of the right to education, a term that had not been accepted by the majority of States on the ground that it could be used to sexualize children and introduce them to alternative sexual lifestyles.⁶⁰

Needless to say, many U.N. member States were concerned with the assertions in the 2015 Report and its tenor, which appeared to conflict with the rights and duties of parents to educate their child according to their moral and religious beliefs. Indeed, the freedom of religious and conscience could be severely limited because the Report spoke about diminishing certain attitudes and justifications for laws on the grounds of public health or morals.⁶¹ The Holy See, in particular, was singled out for chastisement, when it states: “The Committee on the Rights of the Child has criticized

⁵⁹ Ibid., para. 52-53. For a contrary position See: American College of Pediatricians, ‘Gender Ideology Harms Children,’ (September 2017) <<https://www.acpeds.org/the-college-speaks/position-statements/gender-ideology-harms-children>> (The College is comprised of ‘pediatricians and other healthcare professionals who provide care primarily for infants, children, or adolescents.’ American College of Pediatricians, Become a Member <<https://www.acpeds.org/become-a-member>> It emphasizes that according to the Diagnostic and Statistical Manual of Mental Disorders, (fifth ed.) “as many as 98% of gender confused boys and 88% of gender confused girls eventually accept their biological sex after naturally passing through puberty.’ Cf. American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition, Arlington, VA, American Psychiatric Association, 2013, 451-459, at 455 regarding rates of persistence of gender dysphoria. It urges ‘healthcare professionals, educators and legislators to reject all policies that condition children to accept as normal a life of chemical and surgical impersonation of the opposite sex.’). See also Richard Fitzgibbons, M.D., Philip Sutton Ph.D., and Dale O’Leary, ‘The Psychopathology of “Sex Reassignment Surgery”: Assessing its Medical, Psychological and Ethical Appropriateness,’ *The National Catholic Bioethics Center Quarterly*, Spring (2009) 97-125 (They argue that “Sexual Reassignment Surgery” [SRS] violates basic medical and ethical principles and is consequently neither ethically nor medically appropriate. They contend, among other things, that ‘SRS is a “permanent,” effectively unchangeable, and often unsatisfying surgical attempt to change what may be only a temporary (i.e., psychotherapeutically changeable) psychological/psychiatric condition.’)

⁶⁰ For a contrary position See: John D. Shea, Majel E. Braden, ‘The UNESCO’s Program For Sexuality Education in Light of a Proper Understanding of International Human Rights,’ *1 Ave Maria Int’l L. J.*, 199-230 (2012); See also ‘Stop Comprehensive Sexuality Education’ website <<https://www.comprehensivesexualityeducation.org/>> (It was created to warn parents and policy makers of the serious harms of explicit comprehensive sexuality education programs.

This project is a joint effort of Family Watch International, the UN Family Rights Caucus, the Stop the Kinsey Institute coalition and concerned parents worldwide). <<http://www.avemarialaw.edu/ilj>>; See also Richard P. Fitzgibbons, M.D., Dale O’Leary, ‘An Evaluation of the American Psychological Association’s Task Force Report on the Sexualization of Girls,’ *1 Ave Maria Int’l L. J.*, 349-377 (2012) <<http://www.avemarialaw.edu/ilj>>

⁶¹ 2015 UNHCHR Report, above n 58, 15-16.

statements by the Holy See as contributing to the stigmatization of, and violence against LGBTI adolescents and children raised by same-sex couples.”⁶² The Holy See has denied any such claims, lamenting that certain concluding observations could provoke intolerance of, and discrimination against, members of the Catholic religion.⁶³

In 2016, the LGBTI lobbying efforts were rewarded with the establishment by the U.N. Human Rights Council (comprised of 47 UN member States) of an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, with 23 votes in favor, 18 against, and 6 abstentions.⁶⁴ The event was extraordinary because this Independent Expert was established in the absence of any agreement on the definition of the pertinent terms of its mandate, in particular, “sexual orientation” and “gender identity.”⁶⁵ To date, the terms have not been included or defined in international human rights law, comprised largely of treaties. Nor could one persuasively argue that the expressions exist in the two additional sources of international law, namely international custom or general principles of international law.⁶⁶

To appreciate the controversial nature of the proposed resolution, it is worth mentioning the response of the Organization of Islamic Cooperation (OIC) comprised of 57 member States with a collective population of about 1.6 billion people from Africa, Asia, Europe and South America.⁶⁷ Over the course of a long debate, seventeen votes were required due to the following actions brought on behalf of the OIC, with the exception of Albania: 1) a vote on a no-action motion brought by Saudi Arabia; 2) eleven votes on OIC amendments brought by Pakistan; 3) four votes on separate parts of the resolution brought by Qatar and Maldives; and 4) one vote on the resolution, as amended.⁶⁸ The counter

⁶² Ibid., 33.

⁶³ See ‘The Comments of the Holy See to the Concluding Observations of the Committee on the Rights of the Child,’ filed with the Committee in 2014.

⁶⁴ <http://www.vatican.va/roman_curia/secretariat_state/2014/documents/rc-seg-st-20140205_concluding-observations-right-s-child_en.html> United Nations Human Rights Council, *Protection against Violence and Discrimination on the basis of Sexual Orientation and Gender Identity*, U.N. Doc A/HRC/32/L.2/Rev.1 (June 28, 2016).

⁶⁵ The terms are found in previous human rights resolutions of the Human Rights Council, but the resolutions are not binding. See, eg, *Human rights, sexual orientation and gender identity*, GA Res 17/19, 17th Sess, Agenda Item 8, U.N. Doc A/HRC/RES/17/19 (14 July 2011); and *Human rights, sexual orientation and gender identity*, GA Res 27/32, 27th Sess, Agenda Item 8, U.N. Doc. A/HRC/RES/27/32 (2 October 2014).

⁶⁶ See, eg, *Charter of the United Nations and Statute of the International Court of Justice*, art. 38 of the Statute of the International Court of Justice, above n 2.

⁶⁷ See eg, the website of the Organization of Islamic Cooperation (OIC) <<https://www.oic-oci.org/home/?lan=en>>

⁶⁸ See the webcast of the voting procedure available on the United Nations website regarding U.N. Doc. A/HRC/32/L.2/Rev.1 Vote Item 3 - 41st Mtg. 32nd Regular Sess. of Human Rights Council, <<http://webtv.un.org/meetings-events/human-rights-council/watch/ahrc32l2rev.1-vote-item3-41st-meeting-32nd-regular-session-of-human-rights-council/5009164455001>>. See also ARC INTERNATIONAL AND ILGA, (UNOFFICIAL) COMPILATION OF THE

arguments were led by Mexico, the only member of the core group that was a member of the HRC, at the time. The two sharply contrasting positions in the debate on the SOGI expression were readably discernible. In brief, supporters of the resolution urged that persons falling under the umbrella of SOGI challenged current notions of human nature and human relations therefore they required protection as a separate ground of non-discrimination, while those against the resolution contended that persons with current notions of the same supported by common sense, cultural traditions and religious beliefs required protection from those promoting SOGI as a distinct ground of non-discrimination. In such circumstances, the definition of SOGI and related terms would have described and circumscribed for States the essence of what it was they were talking about. Without a clear and agreed upon definition a genuine discussion leading to problem solving was unattainable.

After a protracted debate, the annual *Report of the Human Rights Council*, which included the SOGI resolution,⁶⁹ was later recommended by the Third Committee on Social, Humanitarian and Cultural of the General Assembly⁷⁰ to the Plenary Session of the General Assembly (193 member States) and adopted, 106 member States in favor, 77 against, and 2 abstentions.⁷¹ During the lengthy debate preceding the vote, Botswana's representative, on behalf of the African Group, had submitted the original draft proposing to defer consideration of and action on that decision to the General Assembly's seventy-second session to allow for more time for consultations. Noting that the terms [SOGI] were not enshrined in international law, he said the independent expert mandate lacked the required specificity to be carried out fairly.⁷²

ADOPTION OF THE 2016 SOGI RESOLUTION, 30 June 2016, including an Unofficial Transcription of the Adoption of the Resolution available at

<<http://arc-international.net/wp-content/uploads/2016/08/SOGI-Resolution-Vote-compilation-FINAL.pdf>>.

⁶⁹United Nations General Assembly, *Report of the Human Rights Council*, 3rd Comm, 71st Sess, Agenda Item 63, U.N. Doc A/71/479 (5 December 2016). [‘Report of the Human Rights Council, 2016’]

⁷⁰ See, United Nations General Assembly of the United Nations: Social, Humanitarian & Cultural – Third Committee, *Voting records of the Committee*, (11 November 2016) <<http://www.un.org/en/ga/third/71/votingsheets.shtml>> The Third Committee vote U.N. Doc. A/C.3/71/L.46 on the “Report of the Human Rights Council” passed 94 in favor, 80 abstentions, 3 against.

⁷¹ United Nations ‘General Assembly Adopts 50 Third Committee Resolutions, as Diverging Views on Sexual Orientation, Gender Identity Animate Voting’ (Meetings Coverage and Press Releases), 19 December 2016 <<https://www.un.org/press/en/2016/ga11879.doc.htm>>

⁷² United Nations ‘Intense Debate, Close Voting as Gender Identity, Sexual Orientation, Digital-age Privacy Take Centre Stage in Third Committee,’ (Meetings Coverage and Press Releases), 21 November 2016. <<https://www.un.org/press/en/2016/gashc4191.doc.htm>>

Botswana had tabled the resolution and included an operative paragraph that sought to defer consideration of the controversial HRC resolution 32/2 to appoint an Independent Expert on SOGI, with a view to allowing time for further consultations to determine the legal basis of the mandate, since SOGI had not been enshrined in international law.⁷³ Pakistan, Qatar, the Russian Federation, Saudi Arabia, the United Arab Emirates and Yemen had joined in sponsoring the resolution.⁷⁴ In brief, the issue for the African group and supporters was not about whether the HRC had the mandate to establish such an office, but rather about establishing the international legal basis for the resolution. Latin American countries and Western States had opposed the deferral paragraph, which, in turn, had provoked a debate “on the protection against violence and discrimination based on sexual orientation and gender identity, as well as on the potential procedural consequences of reopening a Human Rights Council decision.”⁷⁵

The Independent Expert, Vitit Muntarbhorn, appointed for a renewable three year term used his first speech to delineate five aims: ‘decriminalization, depathologization, status recognition, cultural liberalization, and empathization through a human rights sensitive educational and socialization process from childhood onwards, on the basis that prevention is better than cure.’⁷⁶ It is difficult to imagine how such a plan could be carried out in a way not contrary to particular preambular paragraphs of HRC resolution 32/2, which affirm: historical, cultural and religious backgrounds of countries; the consideration of human rights in an objective and non-confrontational manner; respect for relevant domestic debates in regard to historical, cultural, social and religious sensitivities; the deplorable use of external pressure and coercive measures against States; and imposing concepts and notions pertaining to social matters, including private individual conduct, that fall outside of internationally agreed human rights; and respect for the sovereign rights of each country.⁷⁷

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Vitit Muntarbhorn, *Statement by Vitit Muntarbhorn, Independent Expert on sexual orientation and gender identity, at the European Governmental LGBTI Focal Point Network Roundtable, Council of Europe* (17 November 2016) United Nations Human Rights Office of the High Commissioner

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20912&LangID=E>

⁷⁷ United Nations General Assembly, Human Rights Council, *Protection against violence and discrimination based on sexual orientation and gender identity*, U.N. Doc. A/HRC/RES/32/L.2/Rev.1, July 28, 2016, preamble para. 1.

IV. FUTURE CHALLENGES AND A WAY FORWARD

One wonders whether the two debates regarding the term “gender,” on the one hand, and the term “SOGI” on the other, have really merged into one. The radical definition of gender promoted by gender feminists, which would have included SOGI and related expressions back in the nineties, was defeated only to resurface twenty years later under the efforts of the LGBTI lobbying group.

Of course debates continue about the use and meaning of the terms, and with specific regard to SOGI, it is difficult to imagine how these new categories of discrimination can be reconciled with one’s freedom to express the conviction, for example, that homosexual acts are sinful (based on one’s religious beliefs), or otherwise immoral (based on right reason or common sense). Indeed, in Canada there have been a number of cases where freedom of religion and religious expression have been restricted and limited, when certain religious and moral heritages could not accept promoting these sexual practices even as they respected the inherent dignity of the persons, who engaged in them.⁷⁸ In addition, despite the fact that freedoms of religion, thought, conscience and expression find fundamental protection in many international and regional legal human rights instruments, the application of the two new grounds of discrimination has provoked criminal actions under hate speech laws or civil actions under equality laws, especially against religious believers.⁷⁹

The way forward for the Holy See and others has been to educate the public about “gender ideology,” with reference to reason illumined by faith and scientific evidence. It is beyond the scope of this paper to delve into this topic, except to say that the teachings of Pope John Paul II,⁸⁰ Pope Emeritus

⁷⁸Cf Chris Kempling, Religious Freedom in Canada, *Catholic Education Resource Center*

<<https://www.catholiceducation.org/en/uncategorized-articles/religious-freedom-in-canada.html>>(wherein the author discusses his tangle with the law and a number of other cases in Canada involving religious ministers who have preached that homosexual behaviour is unacceptable according to religious precepts; State marriage commissioners originally licensed to grant marriages to opposite sex couples, who have refused to perform a ceremony between two persons of the same-sex after the legal change in the definition of marriage; religious men’s service group who refused to rent a hall for the wedding reception of two women, in accordance with the groups religious beliefs and so forth).

⁷⁹See eg, Paul Coleman, *Censored: How European Hate Speech Laws are Threatening Freedom of Speech* (Kairos Publications: June 2016).

⁸⁰ See, eg, Pope St. John Paul II, *Catechism of the Catholic Church*, (Doubleday: 1995) [2333], [2393], [364], [2521-2523], [1907], [2297]; Sacred Congregation for the Doctrine of the Faith, *Persona Humana: Declaration on Certain Questions Concerning Sexual Ethics* (29 December 1975)

<http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19751229_persona-humana_en.html>; Pope John Paul II, *Letter to Families* (2 February 1994) The Holy See, [6], [19].

<https://w2.vatican.va/content/john-paul-ii/en/letters/1994/documents/hf_jp-ii_let_02021994_families.html>; Pope John Paul II, *Man and Woman He Created Them: A Theology of the Body* (Michael Waldstein trans, Pauline Books & Media, 2006), [9.3], [9.5], [10.1], [14.4]; Sacred Congregation for the Doctrine of the Faith, *Letter on the Collaboration of Men and Women in the Church and in the World* (31 May 2004), The Holy See, [2], [12].

Benedict XVI,⁸¹ and Pope Francis are particularly pertinent.⁸² This position, in turn, has been opposed,

<http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20040731_collaboration_en.html>

; Pontifical Council for the Family, *Family, Marriage and "De Facto" Unions* (Catholic Truth Society, 2000) [8]; Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* (Continuum International Publis, 2006) [224]

⁸¹ See, eg, Pope Benedict XVI, *Encyclical Letter Deus Caritas Est* (25 December 2005) The Holy See, [5], [11].

<http://w2.vatican.va/content/benedict-xvi/en/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est.html>; Pope Benedict XVI, 'Address Of His Holiness Pope Benedict XVI To Participants In The Plenary Meeting Of The Pontifical Council "Cor Unum"' (Speech delivered at The Plenary Meeting of the Pontifical Council, Consistory Hall, 19 January 2013)

<https://w2.vatican.va/content/benedict-xvi/en/speeches/2013/january/documents/hf_ben-xvi_spe_20130119_pc-corunum.html>;

Pope Benedict XVI, 'Address Of His Holiness Benedict Xvi On The Occasion Of Christmas Greetings To The Roman Curia' (Speech delivered at Clementine Hall, 21 December 2012)

<http://w2.vatican.va/content/benedict-xvi/en/speeches/2012/december/documents/hf_ben-xvi_spe_20121221_auguri-curia.html>; Pope Benedict XVI, 'The Listening Heart: Reflections on the Foundations of Law' (Speech delivered during Apostolic Journey to Germany, Reichstag Building, 22 September 2011).

<https://w2.vatican.va/content/benedict-xvi/en/speeches/2011/september/documents/hf_ben-xvi_spe_20110922_reichstag-berlin.html>

⁸² See, eg, Pope Francis, 'Address to Members of the International Catholic Child Bureau (BICE)' (Speech delivered at meeting with the BICE, 11 April 11 2014).

<https://w2.vatican.va/content/francesco/en/speeches/2014/april/documents/papa-francesco_20140411_ufficio-cattolico-infanzia.html>; Pope Francis, *Encyclical Letter Laudato Si' Of The Holy Father Francis On Care For Our Common Home* (24 May 2015) The Holy See, [155]

<http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html>; Pope Francis, 'Address Of His Holiness Pope Francis To Participants In The Meeting Sponsored By The Teams Of Our Lady (Equipes Notre-Dame)' (Speech delivered at meeting with the Teams of Our Lady, Clementine Hall, 10 September 2015)

<https://w2.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco_20150910_equipes-notre-dame.html>; Pope Francis, 'Address Of His Holiness Pope Francis To The Bishops Of The Episcopal Conference Of Puerto Rico On Their "Ad Limina" Visit' (Speech delivered at Domus Sanctae Marthae, 8 June 2015).

<https://w2.vatican.va/content/francesco/en/speeches/2015/june/documents/papa-francesco_20150608_adlimina-porto-rico.html>; Pope Francis, 'The family - 10. Male and female (I)' (Speech delivered at Saint Peter's Square to the General Audience, 15 April 2015)

<https://w2.vatican.va/content/francesco/en/audiences/2015/documents/papa-francesco_20150415_udienza-generale.html>; Pope Francis, 'Meeting with Families: Address of His Holiness Pope Francis' (Speech delivered during the Apostolic Journey of his Holiness Pope Francis to Sri Lanka and the Philippines, Mall of Asia Arena Manila, 16 January 2015)

<https://w2.vatican.va/content/francesco/en/speeches/2015/january/documents/papa-francesco_20150116_srilanka-filippine-incontro-famiglie.html>; Pope Francis, 'Address of His Holiness Pope Francis Meeting with the Polish Bishops' (Speech delivered at the XXXI World Youth Day, Cathedral of Kraków, 27 July 2016)

<https://w2.vatican.va/content/francesco/en/speeches/2016/july/documents/papa-francesco_20160727_polonia-vescovi.html>; Pope Francis, *Post-Synodal Apostolic Exhortation Amoris Laetitia Of The Holy Father Francis To Bishops, Priests And Deacons Consecrated Persons Christian Married Couples And All The Lay Faithful On Love In The Family* (19 March 2016) The Holy See, [251], [285].

<https://w2.vatican.va/content/francesco/en/apost_exhortations/documents/papa-francesco_esortazione-ap_20160319_amoris-laetitia.html>

especially by those in favor of the term “gender theory.”⁸³ Still others are avoiding the term “gender ideology” all together and have directed their efforts to promoting the freedom of religion and a proper interpretation of equality and non-discrimination provisions and laws, which raise their own definitional problems.

V. CONCLUSIONS

This paper explored key debates among U.N. member States concerning the controversial terms “gender”, “gender identity,” and “sexual orientation.” In particular regard to SOGI, for years, many States have opposed any sort of resolution on the SOGI theme while at the same time declaring clear opposition to violence and unjust discrimination against all persons, including persons with same-sex attractions or feelings or tendencies or those experiencing ambiguity about their biological sex or who maintain that sexual identity can be adapted to one’s desires indefinitely.⁸⁴ The Holy See has included a call to prohibit stigmatization and unjust discrimination of persons expressing their moral beliefs, religious convictions and/or citing scientific evidence about basic principles pertaining to human nature, which includes those suffering with unwanted sexual desires who have sought professional assistance or have renounced either self-identifying with their sexual desires or have discontinued their participation in certain lobbies.⁸⁵

Generally, some of the most persuasive claims in opposition to SOGI have been grounded on various aspects pertaining to the rule of law, including the notion of ‘fair, stable and predictable legal frameworks’ a point promoted within the UN system.⁸⁶ However, due to the nature of multilateral negotiations *per se*, including the fluid nature of discussions, States are not always able to articulate

⁸³ See eg, Mary Anne Case, The Role of the Popes in the Invention of Complementarity and the Vatican’s Anathematization of Gender, above n 21; See also Ana Campoy, ‘A Conspiracy Theory about Sex and Gender is being Peddled Around the World by the Far Right,’ *Quartz*, 4 November 2016

<<https://qz.com/807743/conservatives-have-created-a-fake-ideology-to-combat-the-global-movement-for-lgbti-rights/>>

⁸⁴ See eg, Permanent Observer Mission of the Holy See to the United Nations, in New York, *Explanation of Position on the General Assembly Resolution “Extrajudicial, summary or arbitrary executions” (A/RES/65/ L.56)*, 65th Session Of The United Nations General Assembly, New York, 21 December 2010

<<https://holyseemission.org/contents//statements/55e34d329a59b4.14288404.php>>

⁸⁵ See eg, Permanent Observer Mission of the Holy See to the United Nations and Other International Organizations, in Geneva, Address at the 16th Sess. of the Human Rights Council, General Debate on Sexual Orientation, Geneva, 22 March 2011.

⁸⁶ *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, GA Res 67/1, 67th sess, Agenda Item 83, U.N. Doc. A/RES67/1 (30 November 2012), para 8.

their positions with lucid clarity, however, the overall position opposing the inclusion of SOGI by States might be summarized as follows.

Legal systems have long recognised the critical difference between feelings, thoughts and inclinations, on the one hand, and conduct or behaviour, on the other. In brief, behaviour and conduct is something the law is able to judge, while feelings and thoughts remain, necessarily, *praeter ius* (outside the law). Moreover, legal systems have long recognized the need for ‘fair, stable and predictable legal frameworks,’ and to this end, have often relied upon the basic principle of *ius certum* (legal certainty) and the promotion of the principle *ius strictum* (the clear meaning of a legal text).⁸⁷

With these principles in mind, many States have opposed the inclusion of “sexual orientation” and “gender identity” because the terms have not been defined or recognised in international law, nor does it appear that suitable definitions could be devised and agreed to by all States.⁸⁸ Many proponents of the terminology reject the relevancy of objective evidence of two biological sexes – male and female – in favor of a subjective and personal choice of sexual behaviour and identity divorced from biology, rendering them constantly subject to revision like any other inclination or feeling, intrinsically ill-suited to legislative definition, fundamentally lacking any empirically verifiable, objective quantifier. All of which renders them susceptible to interpretation that would be difficult to predict, leading to uncertainty in the law.⁸⁹ Lastly, sexual identity - male or female - of the human species to which a person belongs has long been recognized as a scientific matter of biological sex, constituting a universal differential, verifiable in reality, and recognized as such as the foundation of international

⁸⁷ Cf *Vienna Convention on the Law of Treaties*, above n 47, arts 31(1) and (4).

⁸⁸ Statement of the Permanent Observer Mission of the Holy See at the 63rd Sess. of the United Nations General Assembly concerning the statement proposed by France involving a proposal for a declaration on sexual orientation and gender identity, in New York, 18 December 2008

<http://www.vatican.va/roman_curia/secretariat_state/2008/documents/rc_seg-st_20081218_statement-sexual-orientation_en.html>

In particular, the categories ‘sexual orientation’ and ‘gender identity’, used in the text, find no recognition or clear and agreed definition in international law. If they had to be taken into consideration in the proclaiming and implementing of fundamental rights, these would create serious uncertainty in the law as well as undermine the ability of States to enter into and enforce new and existing human rights conventions and standards.

⁸⁹Cf U.N. GAOR, 63rd sess, 70th plen mtg, U.N. Doc. A/63/PV.70 (18 December 2008) 30-32. The Syrian Arab Republic on behalf of 60 member States of the United Nations: The notion of orientation spans a wide range of personal choices...ushering in the social normalization and possibly the legitimization of many deplorable acts, including paedophilia. ...particular sexual interests or behaviours [are often attributed] to genetic factors, a matter that has repeatedly been scientifically rebuffed.

human rights law.⁹⁰ The adoption of the terms would amount to an unprecedented departure from the universal and objective foundation of the *International Bill of Human Rights*.

⁹⁰ Cf *Charter of the United Nations and Statute of the International Court of Justice*, above n 2, preamble; *UDHR*, above n 6, art 2.