

# OUTSIDE THE CIS-TEM:

Legal [Non] Recognition for Gender-  
Nonconforming People in International Human  
Rights Law

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## Abstract

This essay explores how the lack of explicit legal recognition for gender-nonconforming individuals leads to a precarious state of human rights for these individuals, who often exist outside of the system of international human rights law (IHRL). Human rights rely on the principle of universality and their equal and inalienable applicability. Yet foundational instruments, like the ICCPR, ICESCR, and CEDAW, contain provisions for non-discrimination in order to protect various groups of people from the discriminatory application or violation of human rights. This includes discrimination based on “sex” or “other status,”; however, instead of being inclusionary, these demonstrate IHRL’s reliance on the gender binary which categorizes all human beings as either men or women. Consequently, this legal invisibility for gender-nonconforming people functions as a catalyst for systemic violations, discrimination, and dehumanization of individuals.

My analysis begins by outlining two recent court cases which deal with the rights of gender-nonconforming people: *Y v. France* in the European Court of Human Rights and *United States v. Skrametti* in the United States Supreme Court. Next, the paper problematizes the UN’s reliance on affirmative recognition in its jurisprudence, which seeks to address inequitable outcomes without disturbing the underlying patriarchal framework that generates them. Then, by leveraging human rights principles of non-discrimination, indivisibility, as well as the Yogyakarta Principles, this paper argues for a reconceptualization of the human subject within IHRL. It advocates for transformative recognition, which acts to destabilize rigid gender categories to ensure IHRL serves as a truly universal tool for protecting self-determined personhood

## Introduction

Human rights exist precariously: they claim universal applicability, yet in practice, societies continually determine which people and groups are fully included. For example, non-discrimination provisions in international human rights law (IHRL) make broad statements to refer to the bases on which people may not be excluded from enjoying rights. Explicitly and legally-binding are the categories of race, colour, sex, language, religion, political and/or other opinion, national or social origin, property, birth, *or other status*.<sup>1</sup> This ‘other status,’ while seemingly inclusive, has led to “conditional recognition, or the complete absence of legal recognition,” human rights, and social security, for gender-nonconforming people—or any person whose gender identity, or deeply felt internal and personal experience of gender, is at odds with what is perceived as the gender norm—who do not identify with the sex categories nor the gender binary dictated by international human rights treaties.<sup>2</sup>

When the United Nations adopted the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) in 1979, not only did it make a conscious and impassioned decision to define “the equal rights of men and women,” and reaffirm “that all human beings are born free and equal in dignity [...] without distinction based on sex,” it also officially declared the bounds of “all human beings”: men and women.<sup>3</sup> It is important to remember that categories of rights are not empty signifiers, but instead presuppose a universal categorization and regulate non-conforming identities.<sup>4</sup> For many gender-nonconforming people, although no human rights doctrines explicitly list protections for gender-nonconforming people, their human rights still exist. However, this has not prevented States and other actors from using

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<sup>1</sup> UN General Assembly, *Universal Declaration of Human Rights*; UN General Assembly, *International Covenant on Civil and Political Rights*; UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*.

<sup>2</sup> O’Connor et al., “Transcending the Gender Binary under International Law,” 410.

<sup>3</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 1.

<sup>4</sup> Güner, “Critically Queer Yet Politically Affirmative Engagements with Human Rights.”

this lack of recognition as justification to commit certain human rights violations. Despite clear and constant documentation of these abuses by civil society and the UN, IHRL faces a foundational challenge: no international human rights treaty explicitly recognizes gender-nonconforming people as holders of human rights, meaning they may remain legally invisible, vulnerable to further discrimination, and far from obtaining justice in places with narrow interpretations of pre-existing human rights law.

For the purposes of this paper, “gender-nonconforming” will be used to describe individuals whose gender identity does not reflect either male or female gender norms, while the term “trans” also refers to people who identify with a different sex than the one assigned to them at birth.<sup>5</sup> It is important to note, however, that many people who identify as trans identify as male/man or female/woman, thus, within the gender binary. Judith Lorber proclaims that “as a social institution, gender is a process of creating distinguishable social statuses for the assignment of rights and responsibilities.”<sup>6</sup> As individuals decide their identities within gendered institutions (work, school, family), these institutions also produce the very differences we assume are the decisions of individuals.<sup>7</sup> Therefore, while human rights are universal to human beings, human beings must conform to gender in order to have rights assigned.<sup>8</sup>

In addition, gender-nonconforming people are also part of the larger umbrella of lesbian, gay, bisexual, transgender, queer, intersex, asexual, nonbinary, and all other gender identities and sexualities that cannot be fully defined by terms and letters (LGBTQIA+); as well as anyone who identifies differently than the gender and sex which they were given at birth (cisgender) or is not sexually and romantically attracted to those of the opposite gender and sex as them

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<sup>5</sup> UN General Assembly, *Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity in Relation to Legal Recognition of Gender Identity and Depathologization*.

<sup>6</sup> Lorber, “‘Night to His Day’: The Social Construction of Gender,” 51.

<sup>7</sup> Kimmel, “The Social Construction of Gender Relations.”

<sup>8</sup> Güner, “Critically Queer Yet Politically Affirmative Engagements with Human Rights.”

(heterosexual). While gender-nonconforming people are considered part of the larger umbrella of LGBTQIA+, this paper is choosing to look specifically at gender-nonconforming people for two main reasons. First, this paper seeks to problematize affirmative recognition by the UN of people of diverse sexual orientation and gender identity (SOGI). However, sexual orientation has been addressed for more time and more in-depth by the UN than gender identity.<sup>9</sup> This disparity is in part because gay, lesbian, and bisexual identities can more easily be accommodated within a dominant, standardized understanding of sexuality that still assumes “all human beings” are men and women.<sup>10</sup> However, because gender-nonconforming people are often categorized with other members of the LGBTQIA+ community, this paper uses jurisprudence and sources that reference both—adjusting language where sexual orientation is mentioned exclusively.

Secondly, people do more to perform their gender—e.g. choices in clothing, mannerism, hairstyle—than to perform their human rights—e.g. protest unjust laws, access social security or welfare, join a union—implying that the gender binary is more inherent to human beings than are human rights. As a functioning institution, Michael Kimmel explains that gender as a functioning institution is maintained and reproduced through consistent performance of roles and conformance to certain prescribed identities—for example, by using sex-differentiated facilities.<sup>11</sup> The gender norm preconceives that humans must be classified in reference to male/female binary and fall cleanly into that system based on sex assigned at birth, leading people to “adopt the roles, feelings, forms of expression and behaviors that are considered inherently ‘masculine’ or ‘feminine.’”<sup>12</sup> Gender is not simply a marker on identification; it is a subconscious agreement of norms. Thus, gender-nonconforming people are positioned not only

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<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Kimmel, “The Social Construction of Gender Relations.”

<sup>12</sup> UN General Assembly, *Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity in Relation to Legal Recognition of Gender Identity and Depathologization*, 3.

as particularities to be assessed by existing laws, but also as subjects which do not presuppose or perform a patriarchal order.

The UN system has documented human rights violations against gender-nonconforming people, including killings, torture, arbitrary detention, and discrimination in employment, health, education, and political life.<sup>13</sup> For example, the UN reveals restrictions on reproductive healthcare eligibility—and leads gender-nonconforming people to be altogether left out of the applicability of rights.<sup>14</sup> Not only does direct discrimination dehumanize gender-nonconforming people and lead to fear, and self-censorship, but many legal apparatuses that are meant to remain neutral instead unfairly restrict the exercise of certain rights UN officials, researchers, and journalists have declared that “if you’re not getting accurate representation, you’re being dehumanized.”<sup>15</sup> Indeed, “when States deny legal access to trans identities, what they are actually doing is messaging a sense of what is a proper citizen,” and invalidating gender-nonconforming peoples’ identities as human beings who are equally deserving of rights.<sup>16</sup>

The framework of IHRL upholds a dominant cisgender binary as an ordering principle, classifying human beings, human rights, and the applicability of law.<sup>17</sup> Additionally, using terms like “sex,” “gender,” “gender identity,” and “gender expression” has both strengthened and harmed the universal application of rights.<sup>18</sup> Nancy Fraser quotes Charles Taylor’s claim that “nonrecognition or misrecognition... can be a form of oppression, imprisoning someone in a false, distorted, reduced mode of being.”<sup>19</sup> However, the politics of recognition are difficult to

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<sup>13</sup> UN Human Rights Council, *Discriminatory Laws and Practices and Acts of Violence against Individuals Based on Their Sexual Orientation and Gender Identity*.

<sup>14</sup> UN Human Rights Council, *Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity in Relation to the Human Rights to Freedom of Expression, Peaceful Assembly and Association*; UN Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, 4.

<sup>15</sup> UN Women, “UN Women Hosts First High-Level Event on Gender Diversity and Non-Binary Identities at UN Headquarters.”

<sup>16</sup> UN General Assembly, *Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity in Relation to Legal Recognition of Gender Identity and Depathologization*, 8.

<sup>17</sup> Güner, “Critically Queer Yet Politically Affirmative Engagements with Human Rights.”

<sup>18</sup> UN General Assembly, *Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity in Relation to Legal Recognition of Gender Identity and Depathologization*, 3.

<sup>19</sup> Fraser, “From Redistribution to Recognition? Dilemmas of Justice in a ‘Post-Socialist’ Age,” 71.

## Outside the Cis-tem: Legal [Non] Recognition for Gender-Nonconforming People in International Human Rights Law – Madison Plemens-Schunk

navigate: for example, affirmative recognition by the UN tends to promote existing group differentiations when “legitimacy and the pursuit of equal rights necessitate clearly defined group identities... to gain legal recognition.”<sup>20</sup> Since gender is a process of learning, performing, and resisting, not only can individuals and groups modify themselves or vary in their identities, but there is also room for institutionalized change. In fact, many scholars assert that “the human rights framework must be reconceptualized, transcending the gender binary under international law,” in order to advance the human rights of gender diverse people.<sup>21</sup>

Human rights abuses and discrimination facing gender-nonconforming people are happening in part because IHRL isn't structured to adequately respond to them. This paper asks how the UN's reliance on affirmative remedies for recognition of gender-nonconforming people fails both to protect them from discrimination and to formally recognize their human rights. Affirmative remedies like the creation of the UN independent expert on sexual orientation and gender identity (UNIESOGI) aim to correct “inequitable outcomes of social arrangements without disturbing the underlying framework which generates them.”<sup>22</sup> In other words, IESOGI responds, like CEDAW and other UN bodies, to inadequacies in the ‘foundational’ human rights documents, rather than reassessing the current relevance and applicability of those documents to gender-nonconforming people and amending to account for all human beings. Core principles of IHRL, including indivisibility and non-discrimination, provide a basis on which to explicitly redefine who is recognized as fully human in law and practice, and must be leveraged for transformative recognition and critical affirmation of the identities and rights of gender-nonconforming people.

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<sup>20</sup> Güner, “Critically Queer Yet Politically Affirmative Engagements with Human Rights,” 4.

<sup>21</sup> O'Connor et al., “Transcending the Gender Binary under International Law,” 419. 419.

<sup>22</sup> Fraser, “From Redistribution to Recognition? Dilemmas of Justice in a ‘Post-Socialist’ Age,” 82.

This analysis begins by briefly identifying court decisions that violate the human rights of gender-nonconforming people as a result of a lack of formal legal recognition. It then explores the existing IHRL framework more in-depth, examining how non-discrimination and the indivisibility of rights are currently interpreted and applied by UN mechanisms. The paper will subsequently problematize the structural limits of this framework, arguing that the lack of transformative recognition—which aims to correct harms and inequities by reconstituting the underlying legal framework<sup>23</sup>—for identities beyond the man/woman binary has led to an inevitable denial of rights and justice. Finally, this essay concludes by queering traditional conceptions of identity-based human rights in pursuit of recognition for all gender-nonconforming people.

### **The Issue: Legal Invisibility of Gender-Nonconforming People**

The absence of legal recognition is not the sole human rights violation that gender-nonconforming people face, but instead serves as a catalyst to further commit acts of discrimination and violence. Bodily harm (including death in severe cases), restrictions of basic freedoms and liberties, and violations of gender-nonconforming persons' economic, social, and cultural rights occur at the hands of state and non-state actors.<sup>24</sup> How identity is defined in law and policy has a significant impact on the extent to which human rights are seen as universal in recognition and protection.<sup>25</sup> Many states have policies aimed at maintaining rigid gender roles and stereotypes, while using vague language in the law to limit accountability.<sup>26</sup> Two recent court

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<sup>23</sup> Ibid.

<sup>24</sup> Brown, "Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles," 830.

<sup>25</sup> UN General Assembly, *Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity in Relation to Legal Recognition of Gender Identity and Depathologization*.

<sup>26</sup> Ibid.

## Outside the Cis-tem: Legal [Non] Recognition for Gender-Nonconforming People in International Human Rights Law – Madison Plemens-Schunk

cases exemplify how the nonrecognition of gender-nonconforming people makes them legally vulnerable to the purposeful restriction of their rights.

The first case was *Y v. France*, which was decided by the European Court of Human Rights in 2023, and determined that a French judge’s refusal to change an intersex individual’s gender marker on their birth certificate from “male” to “neutral” did not violate Article 8 of the European Convention on Human Rights (ECHR) on the right to respect for private and family life.<sup>27</sup> The Court affirmed arguments concerning “respect for the principle of the inalienability of civil status and the need to preserve the consistency and reliability of civil status records and of the social and legal arrangements in place in France.”<sup>28</sup> While other courts have upheld that Article 8 protects gender-nonconforming individuals from having their gender assigned by others, they concluded that this case did not necessitate France to take the positive step of changing categories of identification.<sup>29</sup> The Court also added that it would be difficult for the French government to coordinate legislative accommodations for a ‘neutral’ gender in law that is constructed on the basis of two genders.<sup>30</sup> While the Court emphasized the essential nature of self-determination, scholars have maintained that courts must ensure that gender-nonconforming people can “be recognized before the law as they recognize themselves.”<sup>31</sup>

The second case, *United States v. Skrmetti*, took place in July 2025 where the United States Supreme Court case ruled that a Tennessee law banning the use of puberty blockers, hormone therapy, and surgery for minors—specifically for those seeking to validate their gender identity when inconsistent with their biological sex—was not subject to heightened scrutiny

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<sup>27</sup> *Y v. France*, App. No. 76888/17.

<sup>28</sup> *Ibid.*, 3.

<sup>29</sup> *Ibid.*

<sup>30</sup> OII Europe, “Comment on *Y v. France* ECHR Decision.”

<sup>31</sup> Franklin and Lyons, “‘I Have a Family’: Relational Witnessing and the Evidentiary Power of Grief in the Gwen Araujo Case,” 444.

under the Equal Protection Clause.<sup>32</sup> Six out of nine judges concurred that transgender individuals do not constitute a suspect class under the Equal Protection Clause due to a lack of distinguishable characteristics, history of legal and private discrimination, and political powerlessness; therefore, Tennessee’s law, which only contains classifications of age and medical use, did not warrant a review.<sup>33</sup> Choosing to exclude gender-nonconforming people from equal protections because they do not conform to the institution of gender is choosing to subject them to the violence and dehumanization that comes with a lack of legal protections: states and private actors can refuse necessary medical care, refuse correct identification, and refuse justice and reparations for violence towards certain groups and individuals.<sup>34</sup> Indeed, given that human rights abuses harm gender-nonconforming people’s collective sense of purpose, it is court decisions like this that render them politically powerless and create vulnerability.<sup>35</sup> These examples further demonstrate the everyday legal obstacles and discrimination towards gender-nonconforming people, which undermines the principle that all people are equal in dignity and rights. IHRL is put in a position to respond when existing legal measures fail to prevent discrimination against gender-nonconforming people.

### **IHRL Framework, Principles, Jurisprudence: How the UN Views the Problem**

The IHRL system, specifically the UN, has spoken on human rights abuses against gender-nonconforming people increasingly more since the turn of the century. Largely a product of reporting mechanisms, independent experts, and treaty interpretations, IHRL draws largely on principles of non-discrimination and the indivisibility of rights when assessing violence against

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<sup>32</sup> Oyez, “United States v. Skrametti.”

<sup>33</sup> Ibid.

<sup>34</sup> O’Connor et al., “Transcending the Gender Binary under International Law.”

<sup>35</sup> Franklin and Lyons, “‘I Have a Family’: Relational Witnessing and the Evidentiary Power of Grief in the Gwen Araujo Case,” 446.

## Outside the Cis-tem: Legal [Non] Recognition for Gender-Nonconforming People in International Human Rights Law – Madison Plemens-Schunk

gender-nonconforming people. The International Bill of Human Rights, which refers to the Universal Declaration of Human Rights (UDHR), and the legally-binding International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), contains a non-discrimination provision in Article 2 of each document. These provisions describe the bases on which discrimination or distinction of any kind is prohibited; accordingly, all three list “sex” and “other status.”<sup>36</sup>

While there is widespread interpretation of “other status” to include LGBTQIA+ people, both the UN Human Rights Committee (HRCtee) and the Committee on Economic, Social and Cultural Rights (CESCR) have written specific interpretations of “non-discrimination” in their respective treaties. The HRCtee affirms in General Comment No. 18 that “non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.”<sup>37</sup> They reference other binding human rights laws that protect specific groups—all of which are groups listed in Article 2—from discrimination. This includes the ICCPR Article 26, as well as CEDAW and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which protect the specific rights of historically-discriminated groups through legally binding treaties. The Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities (CRPD), and the International Convention on the Protection of the Rights of All Migrant Workers work similarly through protecting the rights of other historically-discriminated groups. Still, General Comment No. 18 does not specify the meaning of “other status,” leaving its interpretation vulnerable to state abuse, nor has it been updated to reflect other contested bases for discrimination not explicitly listed in the ICCPR. Notably, the

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<sup>36</sup> UN General Assembly, *Universal Declaration of Human Rights*; UN General Assembly, *International Covenant on Civil and Political Rights*; UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*.

<sup>37</sup> UN Human Rights Committee, *General Comment No. 18: Non-Discrimination*, 1.

HRCtee has stated that States should “respond appropriately to patterns of violence against categories of victims such as... sexual orientation and gender identity.”<sup>38</sup> However, the HRCtee only refers to transgender people in their interpretation of the term “everyone” in Article 9 of the ICCPR on liberty and security of persons.<sup>39</sup>

Conversely, CESCR’s General Comment No. 20 on Article 2 speaks about non-discrimination to ensure the equality in the rights of men and women, while also affirming that “other status” includes diverse gender identities. Noting the evolving nature of “sex” as grounds for discrimination, they state that new obstacles for equal fulfilment of rights should be given particular attention.<sup>40</sup> CESCR reaffirmed this distinction in General Comment No. 22: “non-discrimination, in the context of the right to sexual and reproductive health, also encompasses the right of all persons, including lesbian, gay, bisexual, transgender, and intersex persons, to be fully respected for their sexual orientation, gender identity and intersex status.”<sup>41</sup> Unfortunately, however, a later section titled “Equality between women and men, and gender perspective” fails to address gender identity outside of the woman/man binary and overlooks the necessity of gender-affirming care as part of the right to sexual and reproductive health.<sup>42</sup>

Along with non-discrimination, the principle of indivisibility (or interdependence/interrelatedness) of human rights has been employed by the UN to assess the rights of other marginalized identities. The indivisibility of human rights refers to their ability to support and be supported by the realization of one another.<sup>43</sup> Upholding the interdependence of rights is part of the commitment to “recognizing the ‘inherent dignity’ and the ‘equal and inalienable rights of all

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<sup>38</sup> UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of Person)*, 2.

<sup>39</sup> *Ibid.*, 1.

<sup>40</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*.

<sup>41</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 22 on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 6.

<sup>42</sup> *Ibid.*, 7.

<sup>43</sup> Porter, “Interdependence of Human Rights.”

## Outside the Cis-tem: Legal [Non] Recognition for Gender-Nonconforming People in International Human Rights Law – Madison Plemens-Schunk

members of the human family,” which is “indispensable for dignity and the free development of [personhood].”<sup>44</sup> To understand how the principle of indivisibility could be used to protect gender-nonconforming people, the views adopted by the HRCtee on the case of *Touissant v. Canada* provides a helpful example.

In this case, Nell Touissant argued that her rights to life and non-discrimination were violated by Canada when they did not provide her with state-sponsored healthcare for her illness because of her status as an undocumented immigrant.<sup>45</sup> Canada proclaimed that the right to life can not be interpreted as including a positive obligation to provide healthcare to unlawful foreign nationals.<sup>46</sup> The HRCtee found that both rights were violated, and cited that “the distinction drawn by the State party [...] between those with [and without] legal status in the country... constituted discrimination under article 26” and a violation of her right to life due to the inability to access preventative care.<sup>47</sup> *Touissant v. Canada* shows the importance of recognition under IHRL in order to uphold our universal identities as humans with rights worthy of protection.

Furthermore, in 2011, the UN Human Rights Council (HRC) brought a successful SOGI resolution request to the UN Office of the High Commissioner for Human Rights “to examine how [IHRL] could be used to end human rights violations on the basis of both sexual orientation and gender identity.”<sup>48</sup> The subsequent report was released in November of that year, however, it wasn’t until 2016 that the Human Rights Council (HRC) finally established a mandate for the establishment of an Independent Expert on protection against violence and discrimination against lesbian, gay, bisexual, trans and gender diverse persons (IESOGI).<sup>49</sup> IESOGI is mandated to

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<sup>44</sup> Ibid., 301–2.

<sup>45</sup> UN Human Rights Committee, *Touissant v. Canada*.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid., 15.

<sup>48</sup> O’Connor et al., “Transcending the Gender Binary under International Law,” 414.

<sup>49</sup> UN Human Rights Council, *Discriminatory Laws and Practices and Acts of Violence against Individuals Based on Their Sexual Orientation and Gender Identity*; UN Human Rights Council, *Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity*.

## Outside the Cis-tem: Legal [Non] Recognition for Gender-Nonconforming People in International Human Rights Law – Madison Plemens-Schunk

assess and strengthen the implementation of existing IHRL with regard to and on the basis of SOGI, raise awareness of SOGI-based violence and discrimination, and identify root causes through cross-stakeholder dialogue, assistance, and cooperation.<sup>50</sup> IESOGI's mandate was reauthorized by the HRC in July of 2025, and in its almost-decade-long history, it has worked toward ending SOGI-based violence and discrimination using the existing IHRL framework. However, since the IHRL framework does not legally recognize gender-nonconforming people, the extent of emancipatory possibilities for gender-nonconforming people is therefore limited.<sup>51</sup>

Paying particular attention to CEDAW uncovers the limitations of the UN system in recognizing gender-nonconforming people. CEDAW provides a revolutionary example of what can be accomplished when certain groups of people establish identity-based claims to rights. Still, even though the women's movement has been crucial in ensuring liberation and participation in the realm of IHRL, "they have also contributed to the formation of regulatory norms and the production of their own others."<sup>52</sup> Therein lies CEDAW's limited inapplicability for gender-nonconforming people: it is a fundamentally gendered document, crafted in a system which recognizes all human beings as man or woman.<sup>53</sup> In only eight of its General Recommendations does CEDAW's treaty-body reference gender identity, defining gender as the constructed identities of man or woman and only referring to gender-identity as a compounding and intersectional form of discrimination against women.<sup>54</sup> In other words, if *women* do not align with gender norms, they are vulnerable to additional forms of discrimination. Recognizing the rights of gender-nonconforming people under CEDAW would not be conducive to change, but

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<sup>50</sup> UN Human Rights Council, *Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity*.

<sup>51</sup> ImpACT International, "Why the UN's SOGI Mandate Renewal Matters for Global Human Rights Progress."

<sup>52</sup> Güner, "Critically Queer Yet Politically Affirmative Engagements with Human Rights," 12.

<sup>53</sup> *Ibid.*

<sup>54</sup> Kirichenko, "General Comments (Recommendations) by United Nations Treaty Bodies: References to LGBTI and SOGI/ESG." 18

rather work to homogenize these identities.<sup>55</sup> Thus, gender-nonconforming people will continue to remain, outside of the IHRL ‘cis-tem.’

### **Problematizing IHRL: Affirmative v. Transformative Recognition**

Whereas affirmative recognition works to solve political, social, and economic inequities within dominant legal and political systems, transformative recognition seeks to restructure the underlying framework in order to correct power inequities.<sup>56</sup> Acknowledging the UN’s recent efforts to address violence and discrimination against gender-nonconforming people, the IHRL system ultimately employs affirmative measures to do so, such as creating temporary, non-legally binding mechanisms (special procedures, e.g. IESOGI). However, IHRL fails to separate itself from the patriarchal framework that causes the discrimination in the first place—i.e. it does not restructure the treaties that do not account for gender-nonconforming people as human beings deserving of rights. This becomes clear when non-conforming bodies are regulated in accordance with predefined categories: “from a queer perspective, any attempt to define the boundaries of the human and establish what it means to be human inevitably leads to exclusion and the suppression of difference.”<sup>57</sup> Rather than fitting these identities into gendered frameworks, the UN should see and hear from gender-nonconforming people in all spaces and issues, from hearing their interpretations of law and policies, to ensuring every reference to man and woman in human rights treaties includes ‘gender-nonconforming people’ as well.<sup>58</sup>

The UN’s reliance on affirmative recognition when addressing human rights violations against gender-nonconforming people is due, in part, to a limited understanding of universality, non-discrimination, and indivisibility. Human rights are natural, valid, and common to everyone

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<sup>55</sup> Güner, “Critically Queer Yet Politically Affirmative Engagements with Human Rights.”

<sup>56</sup> Fraser, “From Redistribution to Recognition? Dilemmas of Justice in a ‘Post-Socialist’ Age.”

<sup>57</sup> *Ibid.*, 13.

<sup>58</sup> UN Women, “UN Women Hosts First High-Level Event on Gender Diversity and Non-Binary Identities at UN Headquarters.”

## Outside the Cis-tem: Legal [Non] Recognition for Gender-Nonconforming People in International Human Rights Law – Madison Plemens-Schunk

by virtue of their humanity.<sup>59</sup> However, universality within the UN is gendered.<sup>60</sup> For example, the ICCPR states that “article 3 implies that all human beings should enjoy the rights provided for in the Covenant, on an equal basis and in their totality [...] Consequently, States should ensure to men and women equally the enjoyment of all rights provided for in the Covenant.”<sup>61</sup> “Everyone” in the text of the ICCPR—and the interpretation of the HRCtee—equates to “men and women” and sex is conflated with gender, presenting a limiting and contradictory interpretation of who is considered a human being and therefore, who is equal.<sup>62</sup> The HRCtee took the time to reinterpret what equality between men and women means, and neglected to recognize gender-nonconforming people in the process. Bantekas and Oette define the issue clearly: there is tension between the meaning of universality and “the lack of (a shared) understanding and practical application, or limited recognition, of these rights.”<sup>63</sup> Simply put, the understanding of universality which comes from the UN is not true universality: people are not considered to have rights by virtue of their being human, but by virtue of being a man or woman.

Additionally, the human subject, which serves as the norm that enforces specific subjectivities, is historically characterized by traits like whiteness, Western heritage, able-bodiedness, heterosexuality, cis-maleness, and citizenship.<sup>64</sup> Yet, IHRL in the UN sees the human subject as encompassing any race and heritage (ICERD), any bodily or mental ability (CRPD), and any male or female and man or woman (CEDAW). Citizenship has proved contentious at times, however, the aforementioned *Toussaint v. Canada* decision, as well as the HRCtee’s General Comment No. 18, emphasize that people of all immigration statuses are

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<sup>59</sup> Bantekas and Oette, “International Human Rights Law and Notions of Human Rights: Foundations, Achievements and Challenges.”

<sup>60</sup> Güner, “Critically Queer Yet Politically Affirmative Engagements with Human Rights.”

<sup>61</sup> UN Human Rights Committee, *General Comment No. 28: Article 3 (The Equality of Rights between Men and Women)*, 1.

<sup>62</sup> Güner, “Critically Queer Yet Politically Affirmative Engagements with Human Rights.”

<sup>63</sup> Bantekas and Oette, “International Human Rights Law and Notions of Human Rights: Foundations, Achievements and Challenges,” 37.

<sup>64</sup> Güner, “Critically Queer Yet Politically Affirmative Engagements with Human Rights.”

## Outside the Cis-tem: Legal [Non] Recognition for Gender-Nonconforming People in International Human Rights Law – Madison Plemens-Schunk

human subjects under IHRL.<sup>65</sup> Gender-nonconforming people lack this explicit recognition within the UN system. Alas, “the complexity of [SOGI-based] human rights violations owe to the fact that both society and individuals directly involved are culpable in ways that are difficult to disentangle.”<sup>66</sup> Gender and its associated characteristics are so ingrained in many societies that any deviation is viewed as a pathology; it will take more than temporary and non-enforceable mechanisms to eradicate this notion.<sup>67</sup>

The IESOGI’s Mandate “affirms that all human rights are universal, indivisible and interdependent,” and that human rights must be treated “globally in a fair and equal manner, on the same footing, and with the same emphasis... without distinction of any kind and in a fair and equal manner.”<sup>68</sup> IESOGI upholds this particular aspect of its mandate exceptionally well, as reports and communications consistently refer to the necessity of legal recognition of gender identity as a mechanism not only to uphold the right to equal recognition before the law, but also for ensuring other rights and freedoms.<sup>69</sup> For example, the Mandate’s recent report in relation to the human right to education tactically embeds data underscoring the need for legal recognition of gender-nonconforming individuals (and other people with diverse sexual orientations and gender identities), noting that the exclusion of age-appropriate, accurate, relevant content with SOGI perspectives “harms LGBT learners, who cannot see themselves reflected in their education.”<sup>70</sup> Unfortunately, however, indivisibility of rights in cases like this one relies heavily on the normative status of human rights and a State’s willingness to carry out positive

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<sup>65</sup> UN Human Rights Committee, *Toussaint v. Canada*; UN Human Rights Committee, *General Comment No. 18: Non-Discrimination*.

<sup>66</sup> Franklin and Lyons, “‘I Have a Family’: Relational Witnessing and the Evidentiary Power of Grief in the Gwen Araujo Case,” 454.

<sup>67</sup> UN General Assembly, *Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity in Relation to Legal Recognition of Gender Identity and Depathologization*.

<sup>68</sup> UN Human Rights Council, *Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, 1.

<sup>69</sup> OHCHR, “The Struggle of Trans and Gender-Diverse Persons.”

<sup>70</sup> UN General Assembly, *Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity in Relation to Legal Recognition of Gender Identity and Depathologization*, 3.

## Outside the Cis-tem: Legal [Non] Recognition for Gender-Nonconforming People in International Human Rights Law – Madison Plemens-Schunk

obligations.<sup>71</sup> IESOGI, while a powerful affirmative voice for the rights and recognition of gender-nonconforming people, is tasked with adhering to inhumane standards of making the nonconforming conform to gender binaries.

While the gaps in UN human rights law are evident, efforts have been made to make up for the lack of legal recognition for gender-nonconforming people in IHRL. Originally written in 2006, the Yogyakarta Principles declared gender-nonconforming people to be equally deserving of human rights, detailing how existing IRHL can be reexamined and redeveloped to explicitly include the identities of SOGI-diverse individuals.<sup>72</sup> First, the Principles use “sexual orientation” and “gender identity” rather than “LGBT” because “avoidance of the use of specific labels helps further the Principles’ universality.”<sup>73</sup> Second, the Yogyakarta Principles reaffirm the essential principles of non-discrimination, universality, and indivisibility of human rights in IHRL: the first three principles—the rights to the universal enjoyment of human rights, to equality and non-discrimination, and to recognition before the law—reflect the same foundational rights as IHRL, but extend them to SOGI-diverse people.<sup>74</sup> These principles were strengthened in 2017 with the addition of the right to legal recognition without reference to, or requiring assignment or disclosure of sex or gender identity.<sup>75</sup>

Containing 29 original principles, “in most cases, the drafters simply imported the right wholesale from the [International Bill of Human Rights] and added wording explicitly noting

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<sup>71</sup> Brown, “Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles.”

<sup>72</sup> International Commission of Jurists, *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*.

<sup>73</sup> Brown, “Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles,” 844.

<sup>74</sup> International Commission of Jurists, *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*.

<sup>75</sup> International Commission of Jurists, *The Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*.

that it applies regardless of sexual orientation or gender identity.”<sup>76</sup> Although this enhanced their credibility, the Yogyakarta Principles missed the opportunity to restructure the legally-dominated language of human rights. The Yogyakarta Principles have been employed in various localities with contextualized applications—for example, State constitutions—however, they are not legally-binding, nor have they been endorsed by or integrated into the UN system.<sup>77</sup> While the Yogyakarta Principles have transformative potential, many declare that their legitimacy comes from the fact that they are based on interpretations of preexisting IHRL treaties and frameworks.<sup>78</sup> If the Yogyakarta Principles are to be transformative, they cannot maintain the same language as an institution that systemically limits the rights of some people.

### Conclusion

When reviewing the IESOGI’s reports on legal recognition, the United States Supreme Court and ECHR cases present a more stark reality: it’s the world’s most powerful State-actors that have yet to recognize the human rights of gender-nonconforming people—only a few U.S. states have self-identified gender markers on state I.D.s, and no gender identification outside the gender binary exists in France.<sup>79</sup> Global hegemons, like the U.S. and France, set the underlying framework for IHRL in the UN; the adjustment of norms relies not on affirming global power structures, but disturbing them.<sup>80</sup>

Having problematized affirmative recognition as demonstrated by the UN, it is possible to imagine what productive legal recognition means for gender-nonconforming people in the IHRL system. Transformative recognition—or the remedies that work to destabilize existing

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<sup>76</sup> Brown, “Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles,” 837.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*, 857.

<sup>79</sup> UN General Assembly, *Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity in Relation to Legal Recognition of Gender Identity and Depathologization*.

<sup>80</sup> Fraser, “From Redistribution to Recognition? Dilemmas of Justice in a ‘Post-Socialist’ Age.”

## Outside the Cis-tem: Legal [Non] Recognition for Gender-Nonconforming People in International Human Rights Law – Madison Plemens-Schunk

group differentiations in the long run<sup>81</sup>—seeks to position the human subject as a continually evolving construct, with no set boundaries or definition.<sup>82</sup> Cautioning against the dangers of identity-based rights, a critical queer affirmation of IHRL prevents naturalization of identities, “encouraging a self-reflexive questioning, and urges us not to see ourselves and our relationships through the lens of the normative [patriarchal gender binary].”<sup>83</sup> Transformative recognition of rights and identities of gender-nonconforming people is possible when identities are understood as political facts, rights are considered a performative act with diverse legal and social abilities, and politics of rights is a site where what constitutes a human is contested and always being destabilized.<sup>84</sup>

Where transformative recognition is taking place, human rights are embraced for their *truly* universal categories of identity, ability to be reinterpreted, and diverse translation and deployment.<sup>85</sup> Additionally, destabilizing existing groups and their ‘others’ may also help to account for intersectional identities—like that of Ms. Toussaint, a disabled immigrant woman—that haven’t been adequately prescribed by IHRL categorizations. Through the adoption of more inclusionary legal frameworks, IHRL has an opportunity “to address long-standing inequities and injustice,” and “positively transform [...] not only trans\* communities, but cisgender women and girls, and broader LGBTQI+ communities.”<sup>86</sup> Ensuring legally-recognized, self-determined gender identity requires positively revaluing gender-nonconforming identities and their cultural products, recognizing and valorizing diversity, and transforming societal patterns of

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<sup>81</sup> *Ibid.*, 84.

<sup>82</sup> Güner, “Critically Queer Yet Politically Affirmative Engagements with Human Rights.”

<sup>83</sup> *Ibid.*, 26.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> O’Connor et al., “Transcending the Gender Binary under International Law,” 421.

## Outside the Cis-tem: Legal [Non] Recognition for Gender-Nonconforming People in International Human Rights Law – Madison Plemens-Schunk

representation, interpretation and communication—all in ways that strengthen everyone’s autonomy and self-determination.<sup>87</sup>

Michel Kimmel describes that “what [gender-nonconforming individuals] share is an understanding that the binary sex and gender systems are problematic, limiting, and not aligned with their personal sense of self.”<sup>88</sup> So even though for many, bodies do not equal gender, what bodies do determine is their human-ness. Truly recognizing gender-nonconforming people as human beings that are deserving of rights means unlearning conceptions of human identity that are almost as old as humans themselves, and ensuring the systems which maintain these conceptions are transformed alongside them. The idea that people are born to play specific roles directly opposes human autonomy and freedom.<sup>89</sup> While human rights violations and discrimination against gender-nonconforming people may be the failure of the IHRL system, these failures do not deem human rights to be an inadequate tool with which to reaffirm our personhood. If IHRL can commit to this shift, then recognition becomes more than a legal formality; it becomes a transformative practice capable of disrupting ingrained norms and opening space for every person’s understanding of themselves and their human rights.

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<sup>87</sup> Fraser, “From Redistribution to Recognition? Dilemmas of Justice in a ‘Post-Socialist’ Age.”

<sup>88</sup> Kimmel, “The Social Construction of Gender Relations,” 139.

<sup>89</sup> UN General Assembly, *Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity in Relation to Legal Recognition of Gender Identity and Depathologization*.

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