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DIPLOMACY, CONDITIONALITY AND TRANSNATIONAL LGBTI RIGHTS¹

INTRODUCTION

LGBTI² rights have an increasingly transnational character. This transnationalism has a significant legal aspect, which is particularly evident in the increased recognition of SOGI (sexual orientation and gender identity) at the United Nations and other international legal institutions.³ These legal developments are embedded within a body of political, diplomatic and financial action that helps to shape the parameters and vocabularies through which LGBTI rights are advanced. This means that the operation of law and LGBTI rights within transnational spaces cannot be understood without also addressing the non- and quasi- legal actors that press for legal change. The primary focus of this chapter is therefore the legal effects of diplomatic and financial pressure for LGBTI rights. In particular, it addresses the way that political strategies that rely on dichotomized approaches to transnational LGBTI rights can have lasting and problematic legal consequences.

The chapter is divided into three parts. Part One outlines recent critical approaches to transnational LGBTI rights, focusing on how transnational spaces tend towards overly dichotomous framings of SOGI issues. Part Two examines three forms of transnational pressure for LGBTI rights - quiet diplomacy, public diplomacy and financial conditionalities. Part Three demonstrates some of the complex and uneven effects of transnational pressure within domestic legal spaces by analysing how all of the forms of pressure from Part Two manifested in attempts to combat the Ugandan Anti-Homosexuality Act 2014.

PART ONE – THE DICHOTOMIZATION OF THE LGBTI RIGHTS DEBATE

¹ The research for this chapter was completed during a 2015-2018 Leverhulme Early Fellowship, 'International Relations and LGBTI Rights: Conditionality, Diplomacy and Activism' ECF-2015-612'

² This chapter refers to LGBTI, LGBT and LGB&T rights and groups. In using this terminology, I am guided by the sources and diplomatic literature cited in the chapter. It is important, however, to remain attentive to the way that the dynamics discussed in this chapter often obscure the different needs of different groups that might fall under the LGBTI umbrella.

³ For a summary see 'Learn More' (*UN Free and Equal*) <<https://www.unfe.org/learn-more/>> Accessed 21 December 2017

Postcolonial queer analysis offers significant insight into symbolic and political meanings of LGBTI rights. Most notable is the extent to which, as Puar argues, ““acceptance” and “tolerance” for gay and lesbian subjects have become a barometer by which the right to and capacity for national sovereignty is evaluated’.⁴ Legal recognition of (some forms of) queerness is thus leveraged into particular political goals and symbolic representations of national identity, maturity and progress.⁵ Thus, what Haritaworn, drawing upon Hobsbawm, has termed ‘invented traditions’ of ‘women-and-gay friendliness’ are operationalised towards the production and maintenance of national identity.⁶

It is important to note that the political and symbolic goals into which SOGI is leveraged are not uniform from state to state or region to region. In Europe, for example, the imagination, or invented tradition, of Europe as LGBT-friendly has allowed for the alignment of European values of freedom and democracy with LGBT rights⁷. Yet equally, ‘political homophobia’ has been used to consolidate authority or power. This was the case in Russia in 2012, following the passage of a law regulating NGOs.⁸ This ‘Foreign Agent Law’ requires the registration of any group that receives any foreign funding and engages in ‘political activity’ in the course of its work. The law has been used to target LGBTI groups (among others), and more generally, to increase state surveillance of groups that may be critical of Russian state policy.⁹ In so doing, the law gives legal form to a common assumption – or invented tradition - found in a number of states that any identities or expressions that are not cis or heterosexual are foreign or alien.

What is notable here is the extent to which the figure of the queer, homosexual, intersex or trans person is used in acts of boundary drawing, inclusion and exclusion. The refrain that ‘homosexuality is unAfrican’ is a familiar one to African queer and LGBTI activists and allies.¹⁰ Equally, in other parts

⁴ Jasbir K. Puar, 'Rethinking Homonationalism' (2013) 45 *International Journal of Middle East Studies* 336

⁵ Cynthia Weber, *Queer International Relations: Sovereignty, Sexuality and the Will to Knowledge* (Oxford University Press 2016)

⁶ Jin Haritaworn, *Queer Lovers and Hateful Others: Regenerating Violent Times and Places* (Pluto Press 2015)

⁷ Phillip M. Ayoub and David Paternotte (eds), *LGBT Activism and the Making of Europe: A Rainbow Europe?* (Palgrave MacMillan 2014)

⁸ Federal Law of the Russian Federation of July 20, 2012 N. 121-FZ, “On Amendments to certain Legislative Acts of the Russian Federation with regard to regulating the activities of non-profit organizations that perform functions of a foreign agent”

⁹ Melissa Hooper and Grigory Frolov ‘Russia’s Bad Example’ (Free Russia Foundation, Human Rights First, 2016)

¹⁰ See Stella Nyanzi, 'Knowledge is Requisite Power: Making a Case for Queer African Scholarship' in Theo Sandfort and others (eds), *Boldly Queer: African Perspectives on Same-Sex Sexuality and Gender Diversity* (HIVOS 2015)

of the world, exclusionary actions or rhetoric have been directed towards perceived ‘homophobic’ others’, particularly at politically expedient moments. Notably, the original text of the *Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States*¹¹, colloquially known as the ‘Muslim ban’, states ‘the United States should not admit those who engage in acts of bigotry or hatred...for those who would oppress Americans of any race, gender, or sexual orientation’.¹² This act of boundary drawing that excluded those perceived to be a threat to LGB individuals took place even while the Trump administration began reduce protections for LGB and particularly T Americans.¹³

This boundary drawing contributes to what Weber has termed ‘sexualized orders of international relations’ that is: ‘international orders that are necessarily produced through various codings of sex, gender, and sexuality’¹⁴ The focus of this chapter is the role of diplomatic engagement with transnational discourses of SOGI and LGBTI rights in shaping these sexualised orders. This is particularly significant given Waites observation that these transnational debates have become ‘rather dichotomized’¹⁵, and dominated by binaries – including, but not limited to Global North/Global South, homosexual/heterosexual, progressive/traditional. He has questioned how ‘situations of more subtle power relations’ can be represented beyond simple dichotomizations.¹⁶ In Waites analysis, there is identified a need to pay attention to ‘transnational linkages’, beyond essentialist mappings, in which the global and the local may interpenetrate, and how these interpenetrations are mediated by multiple other inequalities and positionalities. This is essentially a scalar and jurisdiction question that asks where and how rights and responsibilities are determined. Recent events have shown how the scale of the transnational plays a significant role in the determination of rights and responsibilities for SOGI communities, and therefore, the power relations, problematic assumptions and indeed, the ‘invented

¹¹ Executive Order 13769 82 FR 8977 (2017)

¹² Ibid

¹³ Megan McLemore ‘US Congress Should Protect Transgender Rights’ (*Human Rights Watch*, 22 October 2018) <<https://www.hrw.org/news/2018/10/22/us-congress-should-protect-transgender-rights>> Accessed 4 November 2018

¹⁴ Cynthia Weber, ‘Queer Intellectual Curiosity as International Relations Method: Developing Queer International Relations Theoretical and Methodological Frameworks’ (2016) 60 *International Studies Quarterly* 11

¹⁵ Matthew Waites, ‘LGBTI Organisations Navigating Imperial Contexts’ (*The Sociological Review Blog*, 10 July 2017) <<https://www.thesociologicalreview.com/blog/lgbti-organisations-navigating-imperial-contexts.html>> Accessed 21 December 2017

¹⁶ Matthew Waites, ‘LGBTI organizations navigating imperial contexts: the Kaleidoscope Trust, the Commonwealth and the need for a decolonizing, intersectional politics’ (2017) 65 *The Sociological Review* 644, 647

traditions' of transnational spaces, are significant when considering LGBTI rights, diplomacy and SOGI justice.

PART TWO – TRANSNATIONAL DIPLOMATIC AND FINANCIAL APPROACHES TO ADVANCING LGBTI RIGHTS

Traditional and Public Diplomacy

Melissen draws a clear distinction between 'traditional' and 'public' diplomacy:

The basic distinction between traditional diplomacy and public diplomacy is clear: the former is about relationships between the representatives of states, or other international actors; whereas the latter targets the general public in foreign societies and more specific non-official groups, organizations and individuals.¹⁷

In advocating for LGBTI rights overseas, governments and activists have emphasised the importance of 'quiet' or traditional diplomacy. The UK Foreign Office 2016 Human Rights Report notes, 'LGB&T equality remains a sensitive subject for many countries and much of this diplomatic lobbying is carried out behind closed doors and is not reported on'.¹⁸ Quiet diplomatic action can include highlighting issues of SOGI with state authorities, either through private conversations or through the issuing of more formal diplomatic demarches in order to raise specific concerns.¹⁹ Alongside these lobbying activities, embassies have also worked to include LGBTI activists within their activities, providing meeting space, capacity building or networking opportunities.²⁰

Given the private nature of these communications, their effectiveness is difficult to quantify, beyond the observation that quiet diplomacy has often appeared to be the preferred strategy of in-country and

¹⁷ Jan Melissen, 'The New Public Diplomacy: Between Theory and Practice' in Jan Melissen (ed), *The New Public Diplomacy: Soft Power in International Relations* (Palgrave Macmillan 2005) 5

¹⁸ Foreign and Commonwealth Office *Human Rights and Democracy* (Cmd 9487, 2017) 6

¹⁹ 'Diplomacy and Donor Relations Overseas' (*Sexuality and Social Justice: A Toolkit*) <<http://spl.ids.ac.uk/sexuality-and-social-justice-toolkit/3-what-you-can-do/diplomacy-and-donor-relations-overseas>> Accessed 21 December 2017

²⁰ Ibid

grassroots activists.²¹ Transnational pressure for LGBTI rights is delicate and contentious, with a high risk of backlash. Even quiet support can lead to accusations of foreign embassies promoting a 'gay agenda'.²² Such accusations further exacerbate the tenuous position of SOGI minorities and reinforce simplistic framings of SOGI as an issue of the Global South versus the Global North.

The political and cultural sensitivity of SOGI and the possibility of backlash demonstrates why 'lobbying behind closed doors' is often a preferred strategy of activists and diplomats: more overt pressure risks exacerbating already-existing tensions. Yet the question of who speaks, how and when, remains a challenge. De Vos has criticized the South African government for its reliance on quiet LGBTI diplomacy. He points out that South African quiet diplomacy in countries such as Nigeria and Uganda must have been a 'spectacular failure' as both states passed repressive laws.²³ Even within quiet diplomacy therefore, there is a set of scalar and spatial imaginaries of inside/outside, internal/external that mediate questions of power, influence and motive.

These concerns are even more evident in public diplomatic action in which political and foreign policy concerns are often particularly pertinent in decisions to engage with issues of SOGI. This public aspect of diplomacy has grown significantly in recent years, with a strong focus on building relationships and facilitating networks between different governmental and non-governmental partners.²⁴ Public diplomacy thus engages a very different audience to that of private diplomacy may seek to project particular images or political agendas.²⁵ Indeed, in some cases, public diplomatic responses to human rights violations overseas may be as much a response to a state feeling pressure from its own citizens to respond, as an effort to help those whose rights have been abused.²⁶

²¹ Ibid

²² Eg GhanaWeb, "Foreign embassy behind agenda to legalise homosexuality in Ghana - NDC MP" (*GhanaWeb*, 29 November 2017) <<https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Foreign-embassy-behind-agenda-to-legalise-homosexuality-in-Ghana-NDC-MP-605218#>> accessed 21 December 2017; Aeyal Gross, 'Homoglobalism: The emergence of global gay governance' in Dianne Otto (ed), *Queering International Law: Possibilities, Alliances, Complicities, Risks* (Routledge 2017) 156

²³ Pierre de Vos, 'Uganda: why quiet diplomacy is a devastating betrayal of gay men and lesbians on the continent' (*Daily Maverick*, 4 March 2014) <<https://www.dailymaverick.co.za/opinionista/2014-03-04-uganda-why-quiet-diplomacy-is-a-devastating-betrayal-of-gay-men-and-lesbians-on-the-continent/#.WjwKJk27JeV>> Accessed 21 December 2017

²⁴ Melissen, 'The New Public Diplomacy: Between Theory and Practice' 22

²⁵ Rachel Bergenfield and Alice Miller, 'Queering International Development? An Examination of New 'LGBT Rights' Rhetoric, Policy, and Programming among International Development Agencies' (2014) March 2014 LGBTQ Policy Journal

²⁶ Amar Wahab, 'Homosexuality/Homophobia is Un-African?: Un-Mapping Transnational Discourses in the Context of Uganda's Anti-Homosexuality Bill/Act' (2016) 63 *Journal of Homosexuality* 685

In short, public diplomacy becomes a kind of national branding. This branding may link closely with the ‘invented traditions’ and national imaginaries discussed above, but it is also tied to questions of power and politics – meaning that national imaginaries will be deployed in the most strategically valuable way. This makes public diplomatic language and underlying structural assumptions upon which this language rests particularly significant. In this regard, modern public diplomacy for LGBTI rights has often used languages of ‘progress’:

We have made great progress in protecting gender and sexual minorities. By continuing to promote human rights overseas and sharing our march towards equality with other countries, we can continue to encourage other countries to live up to their international human rights obligations.²⁷

This language allows the creation of a spatio-temporal contrast between those states which have already *made* progress and those who have yet to advance. LGBTI rights align with a specific vision of how a ‘modern’ state should act and a specific understanding of where that progressive state is most likely to be found in the world.²⁸ Consequently, the ‘branding’ of states as LGBTI friendly can often rest on the demarcation of other states as intolerant or backwards. Thus, on a very public stage, problematic imaginaries that dichotomise Global North and Global South are reproduced and embedded in political discourse.

In this way, public diplomatic support for LGBTI rights can become a form of pinkwashing, in which LGBTI rights can be integrated into diplomatic messaging where a state emphasises modern brand and identity, and diverts attention from its less progressive actions. This simultaneously ties LGBTI or queer liberation closely to state power by allowing the state and legal authorities to dictate the – often narrow and legally defined – parameters through which SOGI justice is seen to progress.²⁹ Rights become the main – or even the only – form through which SOGI justice can come to be known.³⁰

²⁷ Victor Garcia-Rivera, ‘Promoting LGBTI Rights Overseas’ (*Dipnote*, June 9 2015) <<http://2007-2017-blogs.state.gov/stories/2015/06/09/promoting-lgbti-rights-overseas.html>> Accessed 21 December 2017.

²⁸ Weber, *Queer International Relations: Sovereignty, Sexuality and the Will to Knowledge*

²⁹ Katherine Franke, ‘Dating the State: The Moral Hazards of Winning Gay Rights’ (2012) 44 *Colum.Hum.Rts.L.Rev.*, 46

³⁰ *Ibid*

Public diplomacy as national branding thus encompasses a set of underpinning assumptions about which publics a state needs to engage with or placate, and a set of assumptions about how the state, law and political action should *work* to protect SOGI individuals. The problem here is the narrowness of these assumptions – they take on a universal character when they are in fact limited patterns of action, norms and law. This does little to undermine the dichotomised relations identified by Waites above, and may in fact exacerbate these tensions. Indeed, Wahab has discussed the phenomenon of ‘countermobilisation’ in which different ‘sides’ of a debate ramp up actions for or against SOGI rights in response to each other.³¹ This can lead to situations in which even quiet diplomacy, or more nuanced approaches to public diplomacy, are enfolded into already existing transnational narratives of identity, invented traditions, belonging and law.

Indeed these patterns of action and reaction become a kind of governance: in which, ‘LGBT advocacy and ideas get incorporated into state, state-like and state-affiliated power’³². Gross has termed this ‘Global Gay Governance’ and his analysis of this phenomenon traces how ‘LGBT advocates and ideas – and sometimes people – in governance itself’.³³ In the context of public diplomacy, these forms of governance have often manifested through a language of ‘partnership’:

I want to emphasize how much we are a part of a global movement - we as the United States are one player, amongst many. We recognize that our efforts must be guided by the work of civil society organizations that push for social change in their own contexts.³⁴

Potential partners are not just local groups and organisations – they can include other governments, civil society and religious groups, NGOs and INGOs, international organisations and increasingly, businesses and multinational corporations.³⁵

³¹ Wahab, ‘Homosexuality/Homophobia is Un-African?: Un-Mapping Transnational Discourses in the Context of Uganda’s Anti-Homosexuality Bill/Act’

³² Gross, ‘Homoglobalism: The emergence of global gay governance’

³³ Ibid 151.

³⁴ Randy Berry, ‘A Year in Review: Advancing the Human Rights of LGBTI Persons Globally’ (*Dipnote*, April 20 2016) <<http://2007-2017-blogs.state.gov/stories/2016/04/20/year-review-advancing-human-rights-lgbti-persons-globally.html>> Accessed 21 December 2017

³⁵ For an example of the US approach to these partnerships during the Obama administration see The White House, ‘FACT SHEET: Promoting and Protecting the Human Rights of LGBT Persons: A United States Government Priority’ (May 16 2015) <<https://obamawhitehouse.archives.gov/the-press-office/2015/05/16/fact-sheet-promoting-and-protecting-human-rights-lgbt-persons-united-sta>> Accessed 21 December 2017

However partnerships are not necessarily a panacea for securing SOGI justice. Research on partnerships within the NGO sector has identified problems with powerful, usually Western, partners and donors dominating and dictating frameworks for action, or ignoring the ‘diverse histories, fractures, fluidity, and nodes of action’ that make up and mediate different communities.³⁶ Language barriers and particular developmental ‘buzzwords’ can inhibit successful communication.³⁷

This does not mean that all partnerships are problematic, but it does suggest that partnerships themselves can be integrated into forms of diplomatic branding, and that they are not free from the political and foreign policy concerns that influence all other forms of diplomatic action. Certainly, for the purposes of this chapter, the emphasis on partnership also demonstrates the way in which a simple dichotomy of Global North/Global South cannot really capture the complexity of transnational organising for SOGI justice – there are multiple interconnections between the transnational, local and domestic. Partnerships demonstrate how civil society actors can be active participants in transnational discourses.³⁸ As Rao notes, in India, ‘international institutions are pushing against something of an open door, collaborating with local actors in co-producing activist narratives and interpellating subjectivities that already enjoy considerable social even if not state recognition.’³⁹ Similarly, NGOs in Europe such as ILGA were able to use the ‘idea of Europe’ to frame LGBT issues as a European norm during the EU expansion period.⁴⁰ As in India, NGOs and other activists were not passive recipients of European diplomatic and legal largesse, but active participants in the shaping of transnational discourses and norms.

Somewhat ironically therefore, the practices of transnational activism both trouble and reinforce notions of dichotomised discourses of LGBT rights. Forms of activism cross facilitate transnational, domestic and local connections, but can also reinforce structures of global gay governance, which are limited at

³⁶ Bergenfield and Miller, 'Queering International Development? An Examination of New 'LGBT Rights' Rhetoric, Policy, and Programming among International Development Agencies' Angela Maria Crack, 'Language, listening and learning: critically reflective accountability for INGOs' (2013) 79 International Review of Administrative Sciences 809

³⁷ Wine Tesseur, 'Listening, languages and the nature of knowledge and evidence: what we can learn from investigating 'listening' in NGOs' in Robert Gibb, Annabel Tremlett and Julien Danero Iglesias (eds), *Learning and Using Languages in Ethnographic Research*, (Multilingual Matters 2017)

³⁸ Chaitanya Lakkimsetti, "Empowered Criminals and Global Subjects": Transnational Norms and Sexual Minorities in India' (2016) 39 Qualitative Sociology 375; Lynnette J. Chua, Chua LJ, 'The Vernacular Mobilization of Human Rights in Myanmar's Sexual Orientation and Gender Identity Movement' (2015) 49 L. & Soc. Rev. 299; See also the case of *Sexual Minorities Uganda v Scott Lively* Civil Action 3:12-CV-30051 (MAP) (US District Court for the District of Massachusetts)

³⁹ Rahul Rao, 'Global homocapitalism' (2015) 194 Radical Philosophy. 38

⁴⁰ Ayoub and Paternotte (eds), *LGBT Activism and the Making of Europe: A Rainbow Europe*

best and dichotomising at worst. In the European context, for example, Ayoub and Patternotte emphasise the extent to which transnational organising has helped to create a hierarchy of LGBT NGOs in which those activists best able to engage with transnational donors and networks – through the ability to speak English, technology, or even youth – tend to be most successful.⁴¹ The danger here is that localised power relations and exclusions, be they along the lines of race, class, gender or other dynamics, will be reproduced with respect to those who are able to access transnational discourses and engage with structures of diplomacy and governance, that are themselves underpinned by the dichotomised language of ‘progress’.

Financial Support and Foreign Aid

Increasingly, financial and developmental agendas have played a role in transnational LGBTI rights. Diplomacy here becomes a matter of commercial practice, financial support and punitive conditionalities. Coalitions of governments, businesses, NGOs and foundations have made significant financial contributions to LGBTI activists both individually and in coalition.⁴²

Resource provision is part of a larger cluster of economic actions for LGBTI rights. The ‘business case’ for LGBTI rights is increasingly emphasised in different international forums, including a recent European Commission Report⁴³ and through the official inclusion of LGBTI issues at the World Economic Forum in 2016.⁴⁴ As Rao notes, ‘temples of global capitalism have become increasingly vociferous of late in their opposition to homophobia,’⁴⁵ apparently motivated by a recognition of the productivity of inclusive workplaces and a sensitivity to potential consumer backlash against companies perceived to be homophobic.⁴⁶

⁴¹ Ibid 15

⁴² Global Equality Fund, ‘Promoting and Protecting the Human Rights of LGBTI Persons around the World’ Annual Report (2015); Kretz Adam J, ‘Aid Conditionality as (Partial) Answer to Antigay Legislation: An Analysis of British and American Foreign Aid Policies Designed to Protect Sexual Minorities’ (2013) 7 Vienna Journal of International Constitutional Law

⁴³ Lisa van Beek, Alessandra Cancedda, Carlien Scheele ‘The Business Case for Diversity in the Workplace: sexual orientation and gender identity Report on good practices’ (2016, Directorate-General for Justice and Consumers, European Commission)

⁴⁴ HRC, ‘HRC Heads to Davos to Amplify LGBTQ Rights at World Economic Forum’ (*Human Rights Campaign*, 22 January 2018) <<https://www.hrc.org/blog/hrc-heads-to-davos-to-amplify-lgbtq-rights-at-world-economic-forum>> Accessed 22, November 2019)

⁴⁵ Rahul Rao, ‘Global homocapitalism’.38

⁴⁶ Beek, Cancedda and Scheele ‘The Business Case for Diversity in the Workplace: sexual orientation and gender identity Report on good practices’

Activists and international organisations have been quick to appeal to these sensitivities.⁴⁷ The UN has developed standards of conduct for businesses in tackling LGBTI discrimination.⁴⁸ The World Bank has undertaken research into the economic costs of homophobia, and in 2016, appointed an advisor on SOGI issues.⁴⁹ Increasingly, states and international institutions have been willing to support these normative developments with financial penalties, including a somewhat sporadic willingness to withdraw or re-direct financial aid money in the wake of the passage of discriminatory laws. The most well-known recent example of this is the re-direction of aid to Uganda following the passage of the Anti-Homosexuality Act 2014, which is discussed below.

Arguments for the protection of LGBTI rights have therefore expanded beyond questions of law. Just as diplomatic or political progress is associated with LGBTI rights protection, so too, economic progress is associated with the inclusion of SOGI minorities. Rao calls this ‘global homocapitalism’, that is, ‘the selective incorporation of some race-, class- and gender-sanitized queers into capitalism’.⁵⁰ What is notable here is the way in which *economic* forces re-inscribe the same dimensions of progress – narrowly and neoliberally defined – as are found in the diplomatic arguments discussed above. States and organisations that have *made* progress, exert financial and political pressure on those who have yet to advance. And as with all of the examples discussed in this chapter, non-legal forms of pressure and discourse intermingle with legal structures and norms.

There is a significant danger here that as powerful actors in transnational legal and diplomatic networks engage in acts of incorporation and branding, they further dichotomise the transitional terrain. A state that uses LGBTI rights to advertise its ‘modern’ credentials, or an International Financial Institution (IFI) that emphasises the power of economic progress to bring about SOGI justice is, in part, communicating with a target audience – be that particular publics, shareholders, or those holding

⁴⁷ See Randy Berry, ‘Remarks: Global State of the Movement’ (March 23 2016) <<https://2009-2017.state.gov/j/drl/rls/rm/2016/255012.htm>> Accessed 21 December 2017

⁴⁸ Salil Tripathi, Charles Radcliffe, Fabrice Houdart, *Tackling Discrimination against Lesbian, Gay, Bi, Trans, & Intersex People: Standards of Conduct for Business* (UN OHCHR, 2017)

⁴⁹ M. V. Lee Badgett, *The Economic Cost of Stigma and the Exclusion of LGBT People: A Case Study of India*, 2014); World Bank, ‘World Bank Announces New Advisor on Sexual Orientation and Gender Identity Issues (27 October 2016) <<http://www.worldbank.org/en/news/press-release/2016/10/27/world-bank-announces-new-advisor-on-sexual-orientation-and-gender-identity-issues>> Accessed 21 December 2017

⁵⁰ Rao, ‘Global homocapitalism’. 47

positions of power. The danger of these kinds of national and transnational branding is that it reinforces problematic trends within transnational terrains: a ‘modern’ state requires a backwards other against which it can define itself. Such framings do little to address underlying power structures of international law, or the multidimensionality of SOGI justice. One example of this multidimensionality is addressed below.

PART THREE – PROBLEMATISING IMAGINARIES OF THE TRANSNATIONAL AND THE DOMESTIC

The focus of this chapter is the operation of transnational quasi- and non-legal dynamics of diplomacy and conditionality. This final section of the paper traces one example of a situation in which the multiple forms of transnational pressure described above manifested in response to domestic legislation – the Ugandan Anti-Homosexuality Act 2014 (AHA). The AHA is not the only example of repressive legislation targeting LGBTI individuals in recent years, but it did attract significant attention.⁵¹ The intention here is not to imply that this is a case that is representative of all transnational responses to LGBTI rights violations, instead it is one possible outline of the complexities that can arise during the course of such responses.

Homosexuality was already illegal in Uganda under s145 of the Ugandan Penal Code, which was first introduced by the British Empire.⁵² The Anti-Homosexuality Bill (AHB), which was tabled in 2009, represented a significant increase in criminal penalties for homosexuality, originally including the death penalty for ‘aggravated homosexuality’ and introducing stringent restrictions on LGBTI organising. The AHB was very popular in Uganda and was repeatedly leveraged by Ugandan politicians to distract from scandals and corruption, and to secure political authority.⁵³ It was strongly opposed by coalitions of transnational activists, politicians and publics.⁵⁴ Despite international condemnation, and domestic

⁵¹ See Adrian Jjuuko, 'International Solidarity and its Role in the Fight Against Uganda's Anti-Homosexuality Bill' in Kay Lalor and others (eds), *Gender, Sexuality and Social Justice: What's law got to do with it?* (Institute of Development Studies 2016) for a discussion of why Uganda may have become a flashpoint.

⁵² Adrian Jjuuko and Fridah Mutesi, 'The multifaceted struggle against the Anti-Homosexuality Act in Uganda' in Nancy Nicol and others (eds), *Envisioning Global LGBT Human Rights: (Neo)colonialism, Neoliberalism, Resistance and Hope* (Institute of Commonwealth Studies 2018) 279

⁵³ Ibid 275

⁵⁴ Jjuuko, 'International Solidarity and its Role in the Fight Against Uganda's Anti-Homosexuality Bill' Wahab,

rhetoric of the un-Africanness of homosexuality, we cannot understand the AHB or AHA as an example of a simplistic transnational dichotomy. Indeed as Nyanzi and Karamagi note:

The question of foreignness within the debate on homosexuality in Uganda is paradoxical because both anti-gay and pro-gay camps partnered with foreign allies sympathetic to their divergent causes.⁵⁵

There is evidence of these pro- and anti-gay partnerships throughout the life of the AHB and AHA. Ugandan activists fighting the legislation consulted with international transnational allies and worked hard to manage the transnational support that they received.⁵⁶ Equally, a US pastor, Scott Lively, was sued in the US under the Alien Tort Statute by Ugandan activists for his anti-gay activism in Uganda.⁵⁷ The case was dismissed on jurisdictional grounds, but the ruling affirmed that Lively's actions against LGBTI people would constitute persecution under international law. The very existence of this case, in which a Ugandan group sued a US citizen in a court in Massachusetts for actions that violated international law, demonstrates the complex entanglements of different jurisdictions and different imaginaries of global, domestic and local that animated discussions of the AHA.

Thus to view the AHA as a manifestation of foreign vs. domestic, Global North vs. Global South is too simplistic. Importantly, it also denies the agency of Ugandan activists who, in pursuing a 'multi-pronged strategy',⁵⁸ to fight the AHA, were deeply sensitive to transnational currents, which they managed with considerable skill.

These transnational currents were significant – public and private diplomacy as well as financial conditionalities followed the AHB's introduction. The bill gained significant international media attention and was the subject of online petitions which targeted the Ugandan government as well as multinational financial corporations that operated in Uganda.⁵⁹ Ambassadors and influential figures

⁵⁵ Nyanzi and Karamagi, 'The social-political dynamics of the anti-homosexuality legislation in Uganda'

⁵⁶ Jjuuko and Mutesi, 'The multifaceted struggle against the Anti-Homosexuality Act in Uganda' 288

⁵⁷ *Sexual Minorities Uganda v Scott Lively* Civil Action 3:12-CV-30051 (MAP) (US District Court for the District of Massachusetts)

⁵⁸ Jjuuko and Mutesi, 'The multifaceted struggle against the Anti-Homosexuality Act in Uganda' 283

⁵⁹ Wahab, 'Homosexuality/Homophobia is Un-African?: Un-Mapping Transnational Discourses in the Context of Uganda's Anti-Homosexuality Bill/Act'

engaged in both quiet and public diplomacy to attempt to sway Ugandan politicians against the AHB as it passed through parliament.⁶⁰ In 2014, after President Museveni signed the AHA into law, a number of states, including Sweden, Denmark, Norway and the US withdrew or otherwise re-directed aid money.⁶¹ The World Bank also delayed and then dropped a US \$90 million loan that had been intended to support maternal healthcare, reportedly with input from members of the US Congress (the US is the largest shareholder in the World Bank).⁶²

Alongside these public actions, some states eschewed imposing financial conditionalities, fearing that such gestures would invite backlash.⁶³ And while the World Bank's withdrawal of the loan was dramatic, it later funded a project that provided vouchers for maternal healthcare.⁶⁴ The US withdrawal of financial aid restricted and redirected some funds, but it continued to deploy US Airforce personnel and planes within Uganda to support African Union actions against the Lord's Resistance Army.⁶⁵ These apparently contradictory actions were justified through a unifying logic of protecting human rights: 'Ensuring justice and accountability for human rights violators like the LRA and protecting LGBT rights aren't mutually exclusive. We can and must do both.'⁶⁶

The response to the AHA demonstrates the extent to which states, IFIs and advocacy coalitions seek to participate in the shaping of legal norms and legal actions in places where they have no jurisdiction. Yet the legal effect of this pressure is difficult to trace: the AHA was annulled by the Ugandan Constitutional Court, but the decision *Oloka-Onyango & 9 Others v Attorney-General*⁶⁷ was narrowly decided, with the Court nullifying the AHA on the basis of lack of quoracy when the AHB was passed.⁶⁸

⁶⁰ Jjuuko and Mutesi, 'The multifaceted struggle against the Anti-Homosexuality Act in Uganda' 275

⁶¹ Wahab, 'Homosexuality/Homophobia is Un-African?: Un-Mapping Transnational Discourses in the Context of Uganda's Anti-Homosexuality Bill/Act' 688

⁶² Feder, J. Lester, 'World Bank Delays \$90 Million Loan to Uganda as Bank President Blasts Anti-Gay Laws *Buzzfeed* (27 February 2014)

⁶³ Jjuuko, 'International Solidarity and its Role in the Fight Against Uganda's Anti-Homosexuality Bill'

⁶⁴ World Bank, 'Uganda Reproductive Health Voucher Project <<http://projects.worldbank.org/P144102/uganda-reproductive-health-voucher-project?lang=en&tab=overview>> Accessed 21 December 2017

⁶⁵ The White House, 'Promoting Regional Security and Protecting Human Rights in Uganda' (24 March 2014) <<https://obamawhitehouse.archives.gov/blog/2014/03/24/promoting-regional-security-and-protecting-human-rights-uganda>> Accessed 21 December 2017

⁶⁶ Ibid

⁶⁷ (Constitutional Petition No 8 of 2014) [2014] UGCC 14

⁶⁸ Ibid

It could be reasonably assumed that the Court was walking a careful line here – the issue of quoracy provided a convenient way to sidestep transnational outrage and domestic enthusiasm for the AHA. This is not to say that international pressure was meaningless: the expedited hearing of the case - three months ahead of schedule - may have been arranged to ensure that President Museveni could avoid diplomatic embarrassment during the US-Africa Leaders Summit in August 2014.⁶⁹ As Jjuuko notes, ‘No other petition had been heard so quickly since the court’s formation in 2005. The court did not state what prompted them to decide the case in such record time, and so the real reason is subject to speculation, but it was quite clear that political forces beyond the judicial process were also at play.’⁷⁰ Following the nullification of the AHA, President Museveni warned parliament that passing a similar Bill would discourage international investment and was thus bad for Uganda.⁷¹

While the *Oloka-Onyango* judgment ‘allowed for a collective sigh of relief among the LGBTI community and their allies’⁷², its legacy is complex. As Khanna comments, ‘The Bill, in other words, already had a social and political life even while it did not, strictly speaking, have the legal status as law in force.’⁷³ This social and political life meant that NGOs, activists and LGBTI Ugandans have faced increased harassment from public authorities and private actors.⁷⁴ An important parallel should be highlighted here: just as the transnational life of LGBTI rights does not always require law to be in force, so much as actors and institutions acting *as if* a set of actions and policies have legal status, so too in Uganda did the potential presence of the AHA inculcate particular forms of action in which the many in the police and elsewhere, acted as if AHB had already passed. In both cases, what is at stake here is not so much a question of a single law, but how norms, assumptions and imaginaries within which those laws are embedded allow for the operation of power.⁷⁵

⁶⁹ Nyanzi and Karamagi, ‘The social-political dynamics of the anti-homosexuality legislation in Uganda’

⁷⁰ Jjuuko and Mutesi, ‘The multifaceted struggle against the Anti-Homosexuality Act in Uganda’ 295

⁷¹ Ibid 298

⁷² Oloka-Onyango, ‘Debating love, human rights and identity politics in East Africa: The case of Uganda and Kenya’ (2015) 15 AHRLJ 28 42

⁷³ Ibid 44

⁷⁴ Jjuuko and Mutesi, ‘The multifaceted struggle against the Anti-Homosexuality Act in Uganda’

⁷⁵ See particularly the discussion of the fading in of legal spaces in Franz von Benda-Beckman and Keebet von Benda-Beckman, ‘Places That Come and Go: A Legal Anthropological Perspective on the Temporalities of Space in Plural Legal Orders’ in Iris Braveman and others (eds), *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford University Press 2014)

It is for this reason that it is important to pay attention to transnational narratives and dynamics of LGBTI diplomacy and conditionality. The effects of these pressures were not negligible, but they were not always clear, or easy to classify according to a singular, dichotomous ordering of international relations. They indicate the extent to which ‘invented traditions’ and national narratives of identity and sovereignty – be they of Western queer-friendliness or homosexuality as un-African – can influence political debates, with legal implications. In the recent case of *Nabagesera Jacqueline Kasha Nabagesera & 3 Others v Attorney-General & Another*⁷⁶, these traditions have found further legal form. *Nabagesera* followed Minister of Ethics, Simon Lokodo’s closure of a workshop organised by the group Sexual Minorities Uganda (SMUG). The organisers sued, arguing that the closure of the workshop was an unjustified interference with constitutionally protected rights of association and expression. They lost on all counts, and the judge chastised the applicants for their reliance on European case law in their submissions:

... Uganda and Europe have different laws and moral values and accordingly define their public interests differently... Therefore its precedents are not binding but must be read in a manner consistent with Ugandan laws and norms.⁷⁷

In this estimation, Uganda and Europe are different, static and fixed as opposites. Here, the dichotomous divide that underpins much transnational diplomatic language of LGBTI rights takes on a vital, and problematic, force.

CONCLUSION – DIPLOMACY, ACTIVISM AND FINANCIAL AID FOR LGBTI RIGHTS: A DOUBLE EDGED SWORD

The presence of LGBTI rights within diplomatic and transnational discourse is not without risk on various fronts: of backlash, of unintended consequences, of transnational or diplomatic supporters acting in ways that conflict with the best interests of those on the ground. Moreover, within the

⁷⁶ Misc Cause 33 of 2012, [2014] UGHC 49

⁷⁷ Ibid

dichotomised and rights focused framework outlined in this chapter, there is a risk that transnational narratives may move elsewhere following ‘victories’ such as the nullification of the AHA, leaving newly visible communities vulnerable.⁷⁸ This does not mean that activists are mute or powerless in the face of changing transnational power relations, but it does demonstrate clearly the ‘double edged sword’ of international solidarity⁷⁹: international support can be a powerful weapon; but it is complex, and it can be dangerous when it reinforces the problematic patterns discussed in this chapter. The challenge is to push back against this cycle and recognise the multifaceted complexity of relationships that exist within transnational spaces and relationships of SOGI activism.

We might conclude then, by quoting from a recent UK House of Commons debate:

This is a tale of two worlds. In one we have seen the near completion of rights for LGBT people. In a 16-year period, 25 countries around the world have passed same-sex marriage legislation, while others have passed legislation recognising civil partnerships... There is another world, too. I am talking about a world in which 75 countries criminalise same-sex activity between consenting adults.⁸⁰

The error here is not the desire to respond to the unjust treatment of SOGI minorities. It is the perspective that frames this response as a matter of just two worlds and envisages a teleological path from one world to the other, guided by the goal of the ‘completion of rights for LGBT people’⁸¹. The vastness of human sexuality, gender and culture requires a great deal more than this. A simple division of the world into ‘us’ and ‘them’ with regard to SOGI justice will never be sufficient. The challenge is instead to locate other worlds, paths and voices in order to challenge and upset the problematic dichotomies that are increasingly being essentialized in law.

⁷⁸ The departure of the Trump administration from some of the policies of the Obama state department might be one example of this. See particularly, Frank Mugisha, ‘Pride Uganda has been crushed. Please don’t look away’ *The Guardian* (London, 21 Aug 2017); Colum Lynch, ‘Trump Administration to Deny Visas to Same-Sex Partners of Diplomats, U.N. Officials’ *Foreign Policy* (Washington, 1 Oct 2018); Julian Borger, ‘Trump administration wants to remove ‘gender’ from UN human rights documents’ *The Guardian* (New York, 25 Oct 2018)

⁷⁹ Jjuuko, ‘International Solidarity and its Role in the Fight Against Uganda’s Anti-Homosexuality Bill’ 134

⁸⁰ HC Deb 26 October 2017, vol 630, col 515-516

⁸¹ *Ibid*