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Lesbian, gay, bisexual and transgender human rights: the search for an international strategy

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Many social and political movements go international at a certain point in their history. The international gay and lesbian movement was rather late in stepping into the international arena. The International Lesbian and Gay Association (ILGA) was founded in 1978, but it was not until the 1990s that the movement gained access to the European Union (EU) and managed to get the issue on the EU agenda. At the United Nations (UN), that fight still continues. This contribution explores and seeks to explain why the international lesbian, gay, bisexual and transgender (LGBT) movement has been more successful in lobbying the EU than the UN. It argues that the LGBT movement appears to use many of the same entrepreneurial tactics as well as the same human rights framing at both the EU and the UN, but differences in the political opportunity structures of the two institutions explain why the demands of LGBT groups have made their way onto the agenda in the EU, but not in the UN.

Keywords: lesbian, gay, bisexual and transgender movement; human rights; European Union; United Nations; agenda-setting

Introduction

Many social and political movements go international at a certain point in their history. International non-governmental organizations (INGOs) are built, and these groups then start knocking on the doors of intergovernmental organizations (IGOs). The gay and lesbian movement was rather late in stepping into the international arena. The International Lesbian and Gay Association (ILGA) was founded in 1978. But it was not until the 1990s that the lesbian, gay, bisexual and transgender (LGBT) movement gained access to the European Union (EU) and managed to get their issues onto the EU agenda. At the United Nations (UN) that fight still continues.

The LGBT movement so far has been much more successful getting its demands onto the EU agenda than onto the UN agenda. At the EU, the fight against sexual orientation discrimination has been given a place in the treaties, and in specific legislation and policies, and is 'mainstreamed' throughout various EU policy areas. At the UN, some LGBT organizations have managed to gain formal access, and their issues have been taken up in specialized 'niches' of the organization, but the UN as such so far has successfully denied that LGBT issues are UN

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issues. I will analyse why these somewhat puzzling outcomes happened the way they did. Why could 'LGBT human rights' become an easy catchword at the EU, even though the EU was originally directed at economic integration? And why did the primary human rights organization of the world, the UN, keep it out?

This contribution relates to the first question put forward by the editors in the introduction to this issue: 'How can recent global developments related to LGBT human rights advocacy and organizing be explained by political and sociological theories?' I will develop an explanation for the different levels of success at the EU and the UN that utilizes agenda-setting and social movement theory. Theories of agenda-setting tell us the steps INGOs must go through to get their issues heard by an IGO, and social movement theory helps explain the circumstances under which INGOs are likely to be successful in accomplishing these steps. In particular, social movement theory points to the importance of political entrepreneurship by social movement actors, the political opportunity structures offered by the institutions they are trying to influence, and how a movement frames its demands. Neo-functionalist theories of European integration explain entrepreneurial moves of policymakers within the European institutions.

In the cases being explored in this analysis, the LGBT movement appears to use many of the same entrepreneurial tactics and the same human rights frames at both the EU and the UN, but differences in the political opportunity structures have meant that LGBT demands have made their way onto the agenda in the EU, but not in the UN. Of particular importance for the success at the EU have been: friendly elites, possibilities for issue linkage, opportunities afforded by the rise of racist incidents in the early 1990s, the greater resonance of human rights rhetoric, and massive institutional expansion in the mid-1990s. At the UN, deeper engagement with LGBT organizations has so far been blocked by the cultural and religious values of some of the organization's main actors. These problems have been compounded by many governments' fierce protection of their national sovereignty and a rejection of what they consider to be interference in their internal affairs.

The paper proceeds as follows. The second section contains a short description of the agenda-setting model that I will use to describe the two case studies of LGBT access to the EU and the UN. I will highlight some contributions from sociologists and political scientists who have studied the factors that lead to social movement success and failure as well as the way in which political agendas are built. The third section analyses the agenda-setting processes and outcomes at the EU, while the fourth does the same for the UN. It will become clear that the demands of the LGBT movement have made a great deal more headway at the EU than at the UN. In section five, I explain these different outcomes, making use of the theories mentioned in section two. Section six contains some concluding remarks, both on the need for further research and analysis as well as on the strategic dilemmas of the international LGBT movement.

Agenda-setting and social movement theory

Social and political movements, such as the LGBT movement, have various stages to go through – or barriers to overcome – in approaching international organizations. They must:

(1) gain *access* to the organization;
(2) define – or 'frame' – the problem in such terms that the international organization they approach can be expected to contribute to its solution; in other words, they must produce *a vision* with some *legitimacy*;
(3) see that the problem is really taken on board by the organization; that is, it is put on the *agenda*;

(4) develop *specific demands*, that is, break down the issue into edible bites and deposit each chunk in the appropriate pigeonhole;
(5) and finally, of course, organize the necessary *political support* to see their demands go through the internal decision-making process and reach the outcome they desire.

This simple, five-point 'model' loosely derives elements from social movement theory and from mainstream political science literature on interest representation, agenda-setting and decision-making processes. At this stage, I use this 'model' only as an organizational device, to bring order to the stories to be told in the third and fourth sections, rather than as an attempt to give explanations. The classic point of departure is Kingdon (1995, pp. 86–99, 196–208), who posits that agenda-setting takes place when three *streams* come together:

(1) the problem stream – definition of unacceptable situations that have to be repaired;
(2) the policy stream – solutions being offered by a specialized policy community;
(3) the political stream – motivations and justifications for political action, following from political events, changes in political climate, etc.

The agenda-setting model used in this paper is also derived in part from work carried out on social movements, in particular this literature's concept of political opportunity structures. Tarrow (1996, p. 54) defines this concept as '*consistent – but not necessarily formal, permanent or national – signals to social or political actors which either encourage or discourage them to use their internal resources to form social movements* [italics in original]'. The 'signals' Tarrow focuses on are the opening up of political access, unstable alignments, influential allies, and dividing elites. Numerous scholars, such as Margaret Keck and Kathryn Sikkink (1998), and Jutta Joachim (2003), have applied these social movement and agenda-setting theories to women's issues in the international arena, as I do here.

According to these and other studies, we may expect that gaining institutional access is determined by the resources (or 'mobilizing structures') of the movement as well as by the elements of the political opportunity structure in which the movement finds itself. The former includes such factors as the availability of information, leadership ('organizational entrepreneurs' and experts), and symbolic and material capital, while the latter refers to factors such as the attitudes of the elites within the target organization and the internal power games they play ('alignments and conflicts') (Joachim 2003, pp. 247–253). Getting a particular issue onto an organization's agenda is also helped when activists 'frame' their issue in such a way that it can be easily linked to issues that are already an accepted part of the official agenda. Bacchi (1999) has shown that policy problems do not exist out there, waiting to be addressed, but that 'problems' are created by the policy community. Help from within the system is useful to get issues on the agenda, but that help does not come out of selflessness. '[J]ust as there is a 'logic' of interest group organization there is also a 'logic of negotiation' (Mazey and Richardson 1996, p. 200). 'This constituency mobilization strategy is consistent with theories of bureaucratic expansion and neo-functionalist models of European integration' (*ibid*., p. 204). The fragmented nature of international organizations may give rise to internal 'venue shopping' to find the point of access with the best chances of success (Baumgartner and Jones 1991, p. 1050). As Peters (1996, p. 70) has pointed out in his study of agenda-setting in the EU: '[t]here is a multiplicity of actors and solutions combined through a loosely-linked process, with solutions seeking problems as much as problems chasing solutions.' Once an issue has reached the agenda, it is broken up into several specific demands, which each have to make their way inside the appropriate parts of the often fragmented organizational structure. What counts at this stage – on top of building alliances – is technical expertise, knowledge of 'the rules of the game' and of the art of 'politicking' (van Schendelen 2002).

The fight for LGBT human rights at the EU

The issue of the rights of gays and lesbians appeared on the EU stage in the early 1980s when the European Parliament, after heated discussion, adopted the Sqarcialupi Report (European Parliament 1984). In this report, the European Commission was asked to table proposals to combat discrimination against homosexuals in employment. Although the European Commissioner responsible, Ivan Richards, was not unsympathetic to the issue, he did not draft such a proposal, because he feared that the Council of Ministers would not be prepared to accept it 'at least in the immediate future' (Bell 2002, p. 91).

It was not until several years later that the European Commission started to consult Stonewall and ILGA and granted some small subsidies for research projects (Bell 2002, p. 92). At the European Commission, it was not only the representatives of the gay and lesbian movement who were knocking on the door, but also the *fonctionnaires* who let them in. They welcomed new competences and new problem areas on which to work. Elsewhere, I have described this political entrepreneurship at the European Commission:

> Officials at the European Commission for whom the issue of gender equality had lost its sex appeal, were looking for new challenges. They lent a sympathetic ear to NGO's [non-governmental organizations] lobbying to get new forms of discrimination on the EU agenda. They did their bit behind the screens and put out a helping hand by also financially supporting these new NGO networks. (Swiebel 2004a, p. 2)

In 1993, the European Commission-funded book, edited by Clapham and Waaldijk (1993), was published with its telltale title: *Homosexuality – a European Community Issue*. Initially, national differences in the treatment of homosexuals were considered an internal market issue; the argument was that such differences would be an obstacle to the free movement of persons within the Community. Later, the increased focus on social issues offered a convenient stepping stone for the rights of gays and lesbians. In the Medium-Term Social Action Programme 1995–7, the European Commission proclaimed its interest in social policy and stressed the role played by the dialogue between member states, employers, trade unions and civil partners (Hantrais 2007, p. 14). Promptly, the newly founded and Commission-funded European branch of the International Lesbian and Gay Association (ILGA)-Europe, presented 'equality for lesbians and gay men' as a relevant issue in the 'civil and social dialogue' (Beger *et al.* 1998).

In this way, in the early 1990s, the LGBT movement gained access to at least two EU institutions, the European Parliament and the European Commission. But in order to get the issue of gay and lesbian rights fully onto the agenda, the problem of the lack of a legal basis from which to act had to be solved. Fighting sexual orientation discrimination was outside the competences conferred upon the Community. Reform of the treaties was needed (Bell 2002). In 1994, the European Parliament adopted a second report on gay and lesbian rights with considerable input from ILGA-Europe. This report, by the German Green MEP Claudia Roth, asked for measures to combat discrimination against gays and lesbians in all spheres of life and even put the issues of marriage and adoption on the table (European Parliament 1994). The Roth Report raised the profile of gay and lesbians rights, and this influenced the then upcoming treaty reform negotiations. The issue was for the first time 'mainstreamed' into general political debates. In 1996, the European Parliament asked for the inclusion in the new treaty of 'the principle of equal treatment and non-discrimination regardless, in particular, of race, gender, sexual orientation, age, religion or handicap' (European Parliament 1996). This clause was the result of the lobbying efforts to add a specific competence to combat racial discrimination and – partly as a bandwagon effect – to combat discrimination on other grounds to the treaties. The ground of 'sexual orientation' was the most controversial of this list. The final result was the now famous Article 13 of the EC Treaty (TEC), adopted by the 1997 Amsterdam European Council, that

enlarged the EU's competence to take measures against discrimination that went beyond the labour market and included five new discrimination grounds – among them sexual orientation. This happy result was finally settled in 1997 at the Summit of Amsterdam.

Under the responsibility of Padraig Flynn, Commissioner for Social Affairs and Employment in the European Commission (1994–1999), the so-called anti-discrimination package was prepared, consisting of (1) a framework directive dealing with all grounds of discrimination in employment; (2) a specific directive on racial discrimination that went beyond the workplace; and (3) an action programme (that is, a subsidy scheme) to promote networking and knowledge in the member states and in civil society (Flynn 1999). The proposals were tabled by the new Commission in November 1999. More remarkably, however, the new legislation was passed in a few months, without many of the controversies and delays that had been predicted. The reasons for this were purely political. The member states – embarrassed by the building of a coalition government in Austria, in which Jörg Haider's xenophobic Freedom Party took part – wanted to show a firm stance against racism. This led to the very swift adoption of the Directive against Race Discrimination in June 2000 (Council Directive 2000/42/EC). The second directive, which dealt with discrimination on the basis of religion or belief, disability, age and sexual orientation, was adopted a few months later in October 2000 (Council Directive 2000/78/43). Nobody wanted to give the impression that these other types of discrimination were considered less important than racial discrimination.

This does not mean that such an imbalance was absent. That imbalance was – and still is – contained in these legal texts themselves. EU legislation offers the most elaborate protection against racial discrimination. The scope of this legislation covers employment, social security, social protection, health care, social advantages, education and access to goods and services, including housing. EU sex equality legislation now covers not only employment but also the access to goods and services. The other 'new' grounds for discrimination (religion or belief, disability, age and sexual orientation) are only covered by the prohibition of discrimination in the labour market. This situation is often called the 'equality hierarchy'. EU anti-discrimination law itself discriminates between the various grounds of discrimination (Swiebel 2004a). Only in July 2008, after strong lobbying from NGOs and the European Parliament, did the Commission propose a new 'broad' anti-discrimination directive to put an end to this hierarchy (Commission 2008). Swift adoption by the Council of Ministers is, however, far from certain.

Notwithstanding these problems, it must be underlined that the Framework Directive is the jewel in the crown of the LGBT movement's work at EU level. It is the only piece of international legislation now in force in the world that prohibits sexual orientation discrimination. It will surely have a serious impact on the legislation in the 27 member states, and therefore on policymaking and social practice (Waaldijk and Bonini-Baraldi 2006).

The EU discourse on the rights of gays and lesbians increasingly has become a matter of human rights, or, in EU speak, 'fundamental rights'. A *Comité des Sages* (1998) said there was 'an urgent need for a human rights policy that is coherent, balanced, substantive and professional' (*Reading by Example*, 1999). In 2000, the European Council decided to approve the Charter of Fundamental Rights. ILGA-Europe took an active part in lobbying the convention that drafted the charter, as did the members of the EP Intergroup for Gay and Lesbian Rights, a lobby group within the European Parliament. Article 21 of the charter contains a general non-discrimination clause, which also incorporates discrimination on the basis of sexual orientation. Should the Lisbon Treaty, which was adopted in late 2007, come into force, it would confirm that the provisions of the charter are legally binding on the member states – that is, in so far as they are implementing community law.

The EU enlargement process became another important policy area into which the notion that gay and lesbian rights are human rights was plugged. In 2001, six of the ten accession

states (Bulgaria, Estonia, Hungary, Cyprus, Lithuania and Romania) still had discriminatory provisions in their penal codes. These codes stipulated different ages of consent for same-sex and different-sex sexual activities, discriminating, in other words, on the basis of sexual orientation (van der Veur 2001). This is not a dusty, merely legal issue. These sorts of provisions tend to legitimize discrimination in daily life, encourage blackmail and often force gays and lesbians to lead double lives. Referring to the famous Copenhagen criteria, which spelled out preconditions for EU accession, the rhetorical question was: 'Aren't gay and lesbian rights human rights?' (Swiebel 2002). The Intergroup on Gay and Lesbian Rights in the Parliament held a hearing on the situation of gays and lesbians in the accession states and assembled a majority in the Parliament demanding the withdrawal of these discriminatory provisions (van der Veur 2001, European Parliament 2002). This brought the Commissioner for Enlargement, Guenther Verheugen, to exert pressure on the relevant accession states to abolish these provisions before accession. By 2004, all six countries had abolished these provisions. In this way, gay and lesbian rights were for the first time formally and practically conceived as human rights in the EU. The LGBT movement achieved this result by coalition building and by neatly inserting their cause into the decision-making process; that is, by following 'the rules of the game'.

Gay and lesbian rights as human rights were also promoted in EU foreign policy, or – as it is officially called – external relations. In 2001, the Parliament had to vote on the Association Agreement with Egypt, when persecution of gays in Egypt hit the headlines. In the Agreement resolution, the European Parliament expressed its 'deep concern at the arrest, detention and trial of 52 men on grounds relating to their homosexuality' and called on the Egyptian government to free those given custodial sentences (European Parliament 2001). The votes counted were not enough to reject the Agreement, but the debate was on.

The so-called issue of free movement was another policy question in which activists and interested MEPs tried to mainstream the human rights of gays and lesbians. The right to free movement – a basic principle of the EU – means that every EU citizen is entitled to travel freely around the member states of the EU and settle anywhere within its territory. This fundamental right in principle also extends to the members of the EU citizen's family – but in 2001 the definition of that concept became a major issue. The Parliament has full co-decision powers in this field (cf. Art. 18 and 251 TEC).

ILGA-Europe and the Parliament's Intergroup for Gay and Lesbian Rights pleaded for widening the definition of the family and demanded 'mutual recognition' of marital and non-marital relationships within the EU. In the first reading, the Parliament, by simple majority, supported this view (European Parliament 2003). The Commission did not take over this amendment. In September 2003, the Council reached political agreement. The right to free movement was to be granted to the EU citizen's spouse (not defined) and to the registered partner on the basis of the 'host country principle'; that is, it would only be obligatory if the receiving country had included a registered partnership in its own national legislation. In addition, member states 'shall facilitate' the free movement rights of partners who do not meet these criteria. Simple political arithmetic induced the Liberal and the Socialist groups to acquiesce in the Council's text (Directive 2004/58/2004). Getting the necessary absolute majority of 314 votes was not feasible. We had to count our blessings. The Council had for the first time recognized registered partnerships in the EU. Moreover, the door to full recognition of all partnerships had been put ajar. Member states must justify any denial of entry or residence, an obligation that can be exploited both before the courts and in future political debates. The movement had attained this result by mobilizing its expert allies outside the system and building a broad coalition (Swiebel 2004b).

LGBT human rights also have been discussed in relation to a number of other EU dossiers: asylum and immigration policies, staff regulations, the human rights debates at large, the making

of a European Constitution, and, more recently, specific debates and resolutions on homophobia (Wintemute and Andenaes 2001, p. 623, Swiebel 2004b, Toner 2004, European Parliament 2006a, 2006b, 2007, International Commission of Jurists 2007a). In other words, LGBT human rights at the EU are no longer one simple demand, but have been broken down into a series of specific demands formulated in the context of a variety of sometimes highly technical policy issues. LGBT human rights are being mainstreamed and have become a part, albeit a still highly controversial one, of the normal policymaking process.

I have used the expression 'LGBT' and 'LGBT human rights', although only the rights of gays and lesbians have made it onto the official EU agenda, that is, were conceived under the sexual orientation clause. For all practical purposes, discrimination based on transsexuality (or gender reassignment) is considered sex discrimination, following the European Court of Justice in the famous case *P.* v. *S.*, case C-13-1994 (Waaldijk and Bonini-Baraldi 2006, p. 33). Bisexuality was simply ignored. Transgender issues have recently been give more attention, especially by ILGA-Europe. Due to the lack of competence, the EU has not been able to take them on board.

The fight for LGBT human rights at the UN

The previous section described how far gay and lesbian issues have come at the EU. At the UN, progress has been more difficult. Right-wing Catholics and fundamentalist Islamic states have formed a formidable alliance that systematically tries to block recognition of LGBT rights as a UN issue.

The first speaker to introduce the issue at a formal UN meeting was the Dutch (junior) minister Annelien Kappeyne van de Coppello, who in her speech to the (third) UN World Conference on Women, in Nairobi in 1985, pleaded for lesbian rights (Kappeyne van de Coppello 1985, Rosenbloom 1995, p. v). This was an important breaking of the silence, foreshadowing the struggle to put sexual orientation on the agenda of the Beijing Conference in 1995. When, in the early 1990s, gay men addressed other UN fora – incorrectly assuming that they were the first to raise the issue at the UN – they stressed their public *coming out* as gays (Sanders 1992, 2007, Fisher n.d.). In contrast, since the Nairobi conference, women activists have defended lesbian rights as an integral part of the human rights of all women, whether they call themselves lesbians or not.

The question of access, formally demanded for the first time in 1992, was settled only in 2006, when ILGA-Europe and two other organizations finally were granted so-called consultative status. In 2007 and 2008, other national organizations followed. ILGA itself still has not obtained this status, however, and the applications of other organizations are still on hold. Gaining consultative status for INGOs means not only moral recognition of LGBT rights issues but also access to the UN premises and speaking rights. In 1994, the consultative status of ILGA was suspended, and new applications in 2002 and in 2006 failed. The admittance of the LGBT NGOs in 2006 was the first breakthrough for the movement in years (Sanders 2007).

Where men like Sanders (1992, 1996) used mainstream human rights language, stressing equality and non-discrimination, the women in the governmental and non-governmental delegations preparing the Fourth World Conference on Women to be held in Beijing in 1995, linked the fight against sexual orientation discrimination to the ongoing debate about sexual rights, that is, freedom of choice and autonomy in sexual matters (Rothschild 2000). This debate was inspired by the growing global recognition of violence against women as a human rights violation, as well as reflecting a painful, 'leftover' issue from the Cairo conference, where reproductive rights were recognized but acceptance of sexual rights remained a 'bridge too far' (Keck and Sikkink 1998, Joachim 2003). The final result is well known. The term

'sexual orientation' was deleted from the final text, as was 'sexual rights'. The original definition of sexual rights was retained, but without that term. The first sentence of the now famous paragraph 96 came to read:

> The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. (Platform for Action 1995)

The delegation of South Africa officially put on record that, for them, this clause also comprised the right to be free from coercion, discrimination and violence based on sexual orientation (Report 1995, p. 172). This sentiment was also orally expressed by more (Western) delegations during the debates, but was not officially put on record (Sanders 2007).

Attempts to put the issue of LGBT rights on the UN agenda and define sexual orientation issues as a UN matter have met firm resistance. The UN has been unwilling or unable to recognize that LGBT rights are human rights, or fully to incorporate LGBT issues into its human rights work. As we have seen, the Fourth World Conference on Women, held in Beijing in 1995, refused to incorporate the words 'sexual orientation' in the final document, the Platform for Action. Technically, the sexual orientation issue finally reached the UN agenda, when, in February/March 1995, the Netherlands and Sweden moved the EU to table this new language, and Canada joined in. Practically, the issue was on the agenda when the Main Committee of the Beijing Conference debated the issue for hours during the last night of the conference. For many, it was an enormous victory that it was discussed at all; for some, it was 'a central success of the conference' (Rothschild 2000, p. 53). Politically, however, the decision to delete the bracketed texts meant that sexual orientation was effectively pushed off the agenda.

After Beijing, the Commission for Human Rights (CHR), and its successor body the Human Rights Council (HRC), also refused to deal with the issue. In 2005, the CHR declined for the third time to decide on a general resolution on 'Human Rights and Sexual Orientation', first tabled by Brazil in 2003 (UN Commission on Human Rights 2003). Although support for putting the issue on the agenda in a meaningful way is growing, the deadlock has not been broken so far (Sanders 2006, 2007, Girard 2007). Remarkably, the original text tabled by Brazil was only put in terms of non-discrimination, and did not mention the legacies of Beijing, such as sexual rights, and the right to control matters related to sexuality or the integrity of the human body. Apparently, diplomats sent to the CHR failed to incorporate the lessons of Cairo or Beijing, a sign of the fragmentation of staffing policies by member states and of the 'silo effect of UN negotiations' (Girard 2007, p. 343). The Brazilian delegation had tabled that draft resolution in 2003 without much consultation of like-minded governments or NGOs. In more recent years, feminist activists and LGBT groups have jumped in, but it has not been easy for them to organize effectively. Governments' support at the CHR for taking LGBT issues on board also has been growing. In December 2006, at the third meeting of the new HRC, an intervention by Norway that sought to put sexual orientation and gender identity-based human rights violations on the council's agenda, was supported by 54 UN member states, including some countries in Latin America and Asia (ARC-International 2006). In March 2008, this number rose to 60, when Slovenia (EU Presidency) and Argentina (on behalf of Mercosur) made similar statements (ILGA 2008). Remarkably, without explanation or public discussion, numerous UN member states publicly supported the concept 'LGBT' and the issue of sexual identity. Whether they were simply following NGO language or really understood what they said, is unclear.

While CHR, as the main intergovernmental human rights body at the UN, so far largely has failed to recognize LGBT issues, various treaty bodies, special rapporteurs and working groups have in recent years dealt with numerous cases of human rights violations on the grounds of

sexual orientation and gender identity (International Commission of Jurists 2007b, Saiz 2005). The first and most important 'case law' is the 'opinion' of the Human Rights Committee in *Toonen* vs. *Australia*, stating that criminalizing same-sex sexual activities between consenting adults amounts to discrimination and is a violation of the right to privacy (Human Rights Committee 1994). In addition to clear-cut cases of discrimination, examples of homophobic hate crimes – extrajudicial killings, torture, arbitrary detention and the like – also have been reported by these 'special procedures' at the UN. After the reports of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, the CHR incorporated 'sexual orientation' in five subsequent resolutions, in a list of hate crimes that states are obliged to prevent and investigate (International Commission of Jurists 2000b, pp. 16–18). These are the only places (next to a couple of resolutions on the death penalty) where the CHR has not shied away from mentioning sexual orientation. Another Special Rapporteur, Paul Hunt, who reported in 2004 on the right to health, was less successful, and met with fierce opposition when he made a crystal clear statement:

> [T]he Special Rapporteur has no doubt that the correct understanding of fundamental human rights principles, as well as existing human rights norms, leads ineluctably to the recognition of sexual rights as human rights. Sexual rights include the right of all persons to express their sexual orientation, with due regard for the well-being and rights of others, without fear of persecution, denial of liberty or social interference. (Commission on Human Rights 2004, p. 15)

Saiz (2005, p. 21) states that 'the momentum at the UN for addressing issues of sexual orientation within the broader framework of sexual rights is unstoppable.' This may be true, but it must be kept in mind that, so far, this is only valid for the niches of the UN where rapporteurs and independent expert bodies can say what they want. An unequivocal and broad support at the intergovernmental level is still far away.

Explaining different outcomes at the EU and the UN

The issue of LGBT human rights – at least the rights of gay men and lesbian women – have found a place on the official political agenda of the EU and various specific demands have been processed through the EU political system. LGBT human rights at the UN, however, are stuck. Some NGOs have found a place at the table by receiving the much sought-after consultative status, but others, such as ILGA-World, are still kept out. The issue is taken on board by some 'special procedures' at the UN, such as thematic rapporteurs and treaty-monitoring bodies. These are, however, 'niches' in the organization that do not have a say over the binding decisions taken at the intergovernmental level. At that level, a majority of unwilling member states still keep the doors firmly closed. How can these different outcomes be explained? In this section, I will utilize theory from social movement, agenda-setting and other socio-political literatures discussed in section two to address this puzzle.

Differences in the 'mobilizing structures' (resources) of the movement: entrepreneurship, constituency, expertise and strategies

ILGA and ILGA-Europe played a major part in lobbying both the EU and the UN, and the demands were basically the same. In the initial stages of gaining access at the EU, the movement – helped by the European Parliament – was knocking on *one* door: DG V, the Directorate-General of the European Commission in charge of Social Affairs and Employment. At the UN, two to three points of access were targeted. These campaigns for access, however, were organized by different actors, in different political contexts in different geographical locations. Women's groups tried to get 'sexual orientation' included in the Platform for Action at various

UN conferences. The main 'arena' was the Beijing Conference (1995) and its preparatory meetings, mainly in New York. Not many men from the international gay movement were active in this fight. The international gay and lesbian movement (officially mixed, but male-dominated in practice, although gradually less so) was active on two other fronts. They tried to get formal access to the UN by applying for consultative status with ECOSOC and lobbying the Commission (later the Council) on Human Rights to get LGBT issues on its agenda, activities which are concentrated in Geneva. This diversified pattern was not a deliberate choice, but more a form of *venue shopping* induced by the opportunities offered by the world conferences in the early 1990s (Cairo and Beijing) and by the complicated structure of the UN. Girard's (2007, p. 341) analysis of the divisions between feminist activists and LGBT groups trying to work together in Geneva, makes clear that an institutional memory was lacking and that each group had the inclination to ride its own hobby horse.

Differences in framing of the issue

At the EU, the LGBT movement – helped with subsidies from the Commission – paid a great deal of attention to framing the issue in terms the organization might swallow. The issue was presented first as an internal market issue and as a social issue and later as a question of human rights (Clapham and Waaldijk 1993, Beger *et al.* 1998). At the UN, the movement's use of the human rights frame was not as clearly articulated, but rather was largely taken for granted. When Western delegations introduced the term 'sexual orientation' in the draft outcomes of Beijing, the contents and implications of this terminology had hardly been discussed (Girard 2007, p. 338). While ILGA-Europe sends a memorandum every 6 months to the upcoming EU presidency containing a statement of principles and a coherent programme of demands, similar documents from ILGA-World are lacking (cf. ILGA-Europe 2008). The mainstream human rights organizations, such as Amnesty International, have done better in this respect (Amnesty International 2001, Baird 2004).

It was this lacuna that the organizers of the International Conference on LGBT Human Rights of the 1st World Outgames wanted to fill by the drafting of the Declaration of Montreal (2006). (As a footnote to history, I can add that I was the main drafter of this text.) This Declaration was an attempt – probably the first one – to summarize the main demands of the international LGBT movement in the broadest possible terms. The aim was to put these demands at a higher level by explaining them in the language used in international organizations. It was intended as a political document, meant to strengthen the legitimacy of the demands of the LGBT movement and to facilitate their access to the global political arena. The document tried to illustrate that, by defining LGBT issues as human rights issues, the very concept of human rights had to change; that concept should no longer be allowed to reinforce the traditional, male-dominated, heteronormative vision of the world. In this context, the declaration stressed the commonality of the demands of the women's movement and those of the LGBT movement. 'That "commonality" is our right to control our bodies and choose how we live our lives. Our joint goal is to challenge the rigidity of the fixed roles allocated to women and men and the dominance of heterosexual male norms and interests' (Declaration of Montreal 2006, p. 6).

Another attempt to sustain the claim that LGBT rights are human rights is the Yogyakarta Principles (2007): an elaborate application of existing human rights law provisions to the issues of sexual orientation and gender identity, drafted by an expert group in November 2006 and first publicly launched in March 2007 in Geneva. By systematically working through a long list of human rights law provisions accepted by and binding for a majority of UN member states, the experts spelled out that there could be no reason why these provisions would not also be valid for LGBT individuals and described in detail what this could imply.

In this way, the experts avoided falling into the trap of inventing 'new' rights, while, at the same time, addressing specific LGBT issues. One conspicuous exception to this approach was that the group of experts stopped before stating that the right to marry should be conceived as also including the right to marry a partner of the same sex. Instead, the Yogyakarta Principles proclaim a much vaguer 'right to found a family, regardless of sexual orientation or gender identity', even adding 'including through access to adoption or assisted procreation (including donor insemination)' (principle 24). In my view, this anomaly does not contribute to the credibility of the Principles.

Differences in the political opportunity structures

Although it can be argued that the LGBT movement adopted a more effective strategy for lobbying the EU and framing LGBT rights issues within EU policy discourses, differences in the political opportunity structures of the EU and the UN form the heart of the explanation for the different LGBT rights outcomes. In the 1990s, various factors and circumstances came together at the EU and helped the LGBT movement to put the issue on the agenda and get their demands at least partly addressed. Very few of these opportunities existed or existed to the same extent at the UN.

In the 1990s, the dynamics of market integration gave a boost to social policies (Leibfried and Pierson 1996). Moreover, an ambitious commissioner – Padraig Flynn, as a quintessential bureaucratic entrepreneur – set the stage for expanding his Directorate General's competences in the anti-discrimination area. The fight against sexual orientation discrimination reached the EU agenda in the course of the deliberate widening of the social policy agenda (Greenwood 2007). At the UN, a similar widening has not occurred. On the contrary, increasing dissatisfaction with the functioning of both the HRC and of the various treaty bodies has induced various reform processes, which have given rise to uncertainty about future opportunities for continuing lobbying activities by the LGBT movement (Sanders 2007).

When the doors in Brussels opened, it was not only because the movement was knocking so loudly, but also because '*fonctionnaires*' and MEPs let them in. ILGA-Europe could not have been built up as a professional lobby organization without Commission support (Bell 2002). The European Parliament reports mentioned in section three were at least partly drafted by gay activists who had jobs as assistants within certain parliamentary groups. The lobby work that resulted in Article 13 of the TEC was coordinated by the same activists, now under the umbrella of the Intergroup on Gay and Lesbian Rights. Later the Intergroup became instrumental in coordinating the internal lobby efforts among MEPs and forming political coalitions on such issues as enlargement and free movement. At the UN, by contrast, although the circle of 'friendly elites' is growing, they are not numerous or strong enough to outweigh opposing forces from (mainly) Islamist and conservative Catholic states and NGOs.

One might also think that the governments of the 12–15 member states that made up the EU in the 1990s were on the whole much friendlier to the demands of the LGBT movement than the 27 member states that currently make up the EU. Some of the former communist states of Eastern Europe have acquired a bad record of homophobia, hate speech (even by politicians) and incidents at gay pride marches. We have no systemic evidence of this factor, however. Whether the attitudes of governments can stand as an explanatory factor for the earlier success of the LGBT movement at the EU remains to be seen. The fact that in the run-up to the Treaty of Amsterdam it was Ireland, backed by Italy and Austria, that put sexual orientation in the draft text and the Netherlands that tried to strike it out again, does not seem to fit into this pattern (Bell 2002, pp. 106–107). The final result was a question of smart 'politicking', in which a network of parliamentarians and activists played a major role. In the adoption of the

anti-discrimination package of 2000, the wish of governments to seem tough on discrimination and the bandwagon effect that put sexual orientation discrimination on board apparently were stronger than the conservative religious influences which opposed gay and lesbian rights.

Racist violence in Europe visibly increased in the early 1990s, when the fall of communism and growing migration and globalization gave rise to profound economic, social and political changes. This moved European politicians to demand EU measures against racial discrimination and to force the member states to put anti-discrimination laws in place. The lobbyists for gay and lesbian rights used the tactic of coat-tail riding to include sexual orientation discrimination in this new policy area. Bell (2002, p. 104) calls this the *bandwagon effect*. Following Ruzza (2002, p. 114), we could also define this process as a case of *double frame bridging*. First, the fight against racism is constructed as an instrument to promote the freedom of movement and the proper functioning of the labour market. The next step is to 'mainstream' anti-racism into a broad policy which also includes other forms of discrimination. Technically, the legislation against the 'new' forms of discrimination was modelled on the long-standing *acquis communautaire* against sex discrimination (Ellis 2005). Legislators did not have to start from scratch. Lastly, the growing importance of the human rights agenda has provided a convenient stepping stone for staging the claims of the LGBT movement and linking them to issues such as the accession of new member states. At the UN, the human rights frame in itself did not provide an extra opportunity for issue linkage. Or perhaps that chance was not seized. It seems as if human rights were simply taken for granted. For a short while, it seemed as if the women's stage could provide a good opportunity to claim freedom of choice based on sexual orientation in the context of the Beijing discussion about sexual rights. But this turned out to be a 'bridge too far'.

Framing the issue in human rights terms touched the EU at the core of its soul, linking mythical concepts such as the 'European identity' to the problems of credibility and popular support. Williams (2004) has labelled EU human rights policies 'ironic', because of the discrepancies between internal and external policies. Nevertheless, the framing of LGBT issues in human rights terms has given the issue a moral leverage that is often essential for symbolic politics. This made it possible to fight the enemy with his own weapons. At the EU, the *shame factor* could be shamelessly exploited. At the UN, this has worked out differently. The opponents of the LGBT movement claimed that sexual orientation as a concept made no sense and was hardly ever used in UN documents. Key officials within the UN denied that it was a human rights issue, an assertion that is difficult to make in the European context (Saiz 2005, p. 12).

The successes at the EU on issues such as enlargement and free movement were mainly due to playing it 'by the book': combining forces from outside and inside the system, and knowing how the system works and how to work the system. At the UN, such strategies following 'the rules of the game' could hardly be applied, because the LGBT movement was not admitted into the 'game'.

Conclusion

Putting LGBT issues on the agenda at the EU has been much more successful than at the UN. At the EU, the movement had better strategies and resources: in the beginning, its supporters found *one* point of access where 'gatekeepers' were helpful, so that a professional lobby could be formed and the demands could be appropriately 'framed'. The main factor behind the success at the EU, however, was a more welcoming political opportunity structure. Time was ripe for widening EU competences, and there was help from friendly elites who had their own reasons for wanting to expand the agenda. Growing concern about racism and the 'en vogue' nature of human rights language helped to establish issue linkages, while the existing legislation on sex equality served as the model. The ambition of the EU to be a 'community of values' gave

ample opportunity to exploit the shame factor. Further successes achieved in later years were mainly due to a smart use of the 'rules of the game' by prominent LGBT and human rights organizations.

At the UN, different points of access were tried by different groups of actors, with different demands and strategies. The movement did not speak with one voice. The demands for LGBT human rights were not very well substantiated. But the lack of political opportunity structures has been decisive. Competences were not expanding; on the contrary, reform created uncertainty. Friendly elites, though growing in number, are still overruled by an opposing majority of unfriendly states. Opportunities for issue linkage, such as the linkage to the issue of sexual rights, failed.

This contribution refers to the first question asked by the editors in the introduction: 'How can recent global developments related to LGBT human rights advocacy and organizing be explained by political and sociological theories?' The different outcomes in the two cases explored in this analysis can to a great extent be explained by social movement and agenda-setting theories. In addition, the neo-functionalist school of thought concerning European integration, especially its emphasis on the entrepreneurial EU elites, is also relevant.

I have one concluding remark on theory and research. Social movement and agenda-setting theories perceive social movement actors too readily as the main originators of ideas and demands, reducing politicians and civil servants in the institutions to mere objects for lobbying activities. Policymakers inside the institutions are in many cases also political entrepreneurs who originate ideas and behave like activists. Keck and Sikkink's (1998, p. 165) analysis of the transnational networks on violence against women is, in my view, too much biased towards the NGO input and underestimates the role played by government and UN officials. Joachim (2003) makes the same mistake. A similar criticism could be raised on the scarce literature on the fight for LGBT human rights both at the EU and at the UN. Beger (2004), Bell (2002) and Girard (2007) have interviewed comparatively very few actors from within the system. Further research should cover the role of political actors on the governmental side and officials within the international organizations more extensively. In my view, the container concept 'political opportunity structure' has more heuristic than explanatory value. As the analysis of the cases examined here shows, the political opportunity structure is not a more or less given 'political environment', but in fact consists of political actors with a will of their own. They are all in the game.

Finally, a concluding remark on strategy. At the EU, the concept of 'sexual orientation' seems to have been accepted, even put into the treaties and secondary legislation, without asking questions, without even a definition (Waaldijk and Bonini-Baraldi 2006, pp. 32–33). At the UN, the concept is highly controversial. Adversaries claim that the concept of sexual orientation does not exist, or that they do not know what it means (Saiz 2005, p. 12). But authors who sympathize with the cause also have their doubts. They are concerned that the concepts and legal categories we use could potentially perpetuate the hierarchies we want to combat. 'The binary categories contained in non-discrimination norms ("men/women", "homo/heterosexual") can also serve to subtly reinforce the subordination of one by the other' (Saiz 2005, p. 18). Mertus (2007, p. 1048) proposes to replace 'LGBT human rights' with the notion of 'sexual rights as human rights' 'because [identity] categories may be contested, but behaviours are more clearly identifiable'. On the other hand, the authors of the Yogyakarta Principles reinforce identity politics by invariably adding 'gender identity' whenever they say 'sexual orientation'. (The first letters of these four words – SOGI – now form an acronym used in mailing lists and shorthand titles.) As we have seen, supportive government representatives also follow this language. All this seems to point to a considerable conceptual confusion in and around the UN on what it is to be or behave as gay, lesbian or transgender, or to 'have'

one or another 'sexual orientation'. In my view, the authors of the Yogyakarta Principles have begun at the wrong end of the problem. Their elaborate list of rights based on sexual orientation and gender identity tends to reify sexual preferences into solid, essentialist identities. They ignore the fact that in non-Western societies same-sex sexual activities exist outside a context of gay or lesbian identities. They ignore the scholars who have warned 'that this global queer discourse may become the latest form of sexual imperialism' (Wieringa 2007, p. 10). They ignore the whole school of thought wanting to debunk such identities (Waites 2007). Moreover, how can such a long and elaborate list, detailed *ad absurdum*, ever work in a UN context, before we have a political vision and a programme with clear-cut priorities, priorities that focus on behaviour, and do not presuppose a Western 'gay' identity? The Declaration of Montreal (2006) puts 'essential rights' up front: (a) protection against state and private violence; (b) freedom of expression, assembly and association; (c) decriminalization of (private, consensual, adult) same-sex sexual activity. Focusing on a non-discrimination perspective inevitably brings the marriage issue onto the stage, and that will spoil immediate chances of success – and give rise to uneasy divisions inside the global LGBT movement. It is no coincidence that the drafters of the Yogyakarta Principles tripped over this stumbling block. Tinkering with detailed human rights law provisions cannot replace developing a global political vision. Fighting for basic rights must top the agenda. In my view, the number one priority for the global LGBT movement is defining concepts and strategies within a human rights frame, to persuade a majority of UN member states to recognize the issue as a legitimate human rights issue. To be able to do so, we must first put our own house in order; that is, define what it is that we want – and in which order.

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