Notes and comments

Promoting conversations in a state-centric reality – queer and feminist perspectives on the consultative structure set up by the United Nations under article 71 of the UN Charter

Introduction

The Convention on the Elimination of All Forms of Discrimination Against Women (the CEDAW Convention) has been in force for over thirty years; but the battle against discrimination and abuse of women is far from over. In the reverberation of the anti-essentialist critique of the second wave of the (legal) feminist movement, we are in need of as many perspectives and experiences as possible to find new and innovative ways of protecting the basic rights of women to life, equality, health and dignity. In the fight against gender inequality, women around the world have traditionally formed networks and coalitions to advance women's rights, to educate the public, and to give greater exposure to the many problems women face around the globe. The international women's movement, as channelled mostly through the work of international non-governmental organisations (NGOs), contributing to the process of making international law has so far done well in advancing women's human rights in general. However, this achievement, I argue, has been made possible by some serious trade-offs within the women's movement itself with regard to the mainstreaming of perspectives and voices heard on the international level. The approach of most feminist NGOs on this level has generally been to unite voices to gain strength rather than to find strength in the diverse experiences of women. It is submitted that on a theoretical level, complex systems with different levels of participants – like the one generating international law – tend to force participants into conventional approaches to law. Hence feminist NGOs have been forced to seek high levels of representation, and most importantly, to claim to speak on behalf of all to fit into the state-centric system.

Representation is a classic feminist battleground. In early feminism the focal point was the right to vote and the right to stand for office; since the 1990s much of the debate, through the anti-essentialist or intersectionalist critiques of feminism,[1] has shifted towards how the voices heard within and through the

[1]See Walker *In search of our mothers' gardens* (1983); Weedon 'Key issues in postcolonial feminism: A western perspective' (2002) 1 *Gender Forum* 15; Hunter 'Deconstructing the

feminist movement can be diversified to represent more, if not all, women. This critique has largely focused on how we can acknowledge and include perspectives that are foreign to our own.[2] With the anti-essentialist feminists in mind, the article highlights some basic characteristics of the international legal system and, departing from this structure, analyses its inherent inability to represent fragmented views of women's lives and experiences. From a queer vantage point I further argue that the state-centric system in itself supports the ongoing exclusion of minority women and minority experiences from reaching the international sphere.[3] The objective is to forward some compelling arguments as to why parts of this structure need to be reviewed and re-designed without fear of fragmentation, chaos and the unknown; arguments that are common in defending the status quo of international law.[4] Even though not a separate issue, the focus is not on the actual content of the generated law, but on the diversity of actors that should be involved in making it.

To emphasise the importance of the diversification of perspectives that are recognised by international law in protecting women's rights, I shall explore the example of the consultative structure set up by the United Nations (UN) under article 71 of the UN Charter[5] to include civil society in the form of NGOs under the structure of the Economic and Social Council (ECOSOC). It is through this core structure that NGOs can gain access to the Commission on the Status of Women (CSW) which is the principal global policymaking body dedicated exclusively to gender equality and the advancement of women's rights. In 2010 the UN General Assembly (UNGA) constituted the UN Entity for Gender Equality and the Empowerment of Women (UN Women) as part of the UN reform agenda. Under the Beijing platform, this entity was formed to streamline resources and mandates to give greater impact to women's rights.[6] The

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subject of feminism: The essentialism debate in feminist theory and practice' (1996) 6 *Australian Feminist Law Journal* 135; Harris 'Race and essentialism in feminist legal theory' (1990) 42/3 *Stanford Law Review* 581, 585: Cornell *Feminist transformations: Recollective imagination and sexual difference* (1993).

[2]See Mohanty *Feminism without borders – decolonizing theory, practicing solidarity* (2003).

[3]See Carline and Pearson 'Complexity and queer theory approaches to international law and feminist politics: Perspectives on trafficking' (2007) 19/1 *Canadian Journal of Women and the Law* 73-118; Otto 'Subalternity and international law: The problems of global community and the incommensurability of difference (1996) 5 *SAGE* 337: Otto 'Rethinking universals: Opening transformative possibilities in international human rights law' (1997) 18 *Australian Yearbook of International Law* 1-36; Butler *Undoing gender* (2004); Beck-Gernsheim, Butler and Puigvert (eds) *Women and social transformation* (2003); Butler, Laclau and Zizecii *Contingency, hegemony and universality: Contemporary dialogues on the left* (2000); Butler *Gender trouble: Feminism and the subversion of identity* (1999); Butler *Bodies that matter: On the discursive limits of sex* (1993).

[4]Carline and Pearson n 3 above at 74.

[5]Charter of the United Nations (24 October 1945) 1 UNTS XVI.

[6]UN Women merges and builds on the important work of four previously distinct parts of the UN system which focused exclusively on gender equality and women's empowerment, namely the

organisation of UN Women is governed by a multi-tiered intergovernmental power structure in charge of providing normative and operational policy guidance to member states. The UNGA, ECOSOC, and CSW constitute this governance structure and set out the normative policy guiding principles of the entity.[7] The main objectives of UN Women are to support inter-governmental bodies, such as the CSW, in their formulation of policies, global standards and norms. It should furthermore help the member states to implement these standards and norms and forge effective partnerships with civil society to hold the UN system accountable for its own commitments on gender equality.

Through the CSW, NGOs that are accredited (in consultative status) to and in good standing with the ECOSOC may designate representatives to attend the annual sessions of the CSW. NGOs in consultative status with the ECOSOC may also send representatives to open, official meetings of the CSW to express their opinions on their gender policy. Importantly, it is only through a strict accreditation process, as further discussed below, effectively excluding small/local NGOs and placing the power to choose who can participate in the hands of the member states, that the relevant NGOs are selected. It is submitted that in excluding small/local/unwanted NGOs from participating there is a great loss of important perspectives on women's rights and a forfeiture of prime sources of information/knowledge in the fight to develop and advance women's rights. It is further argued that the restrictions set up to guide the inclusion of *some* NGOs in the UN consultative structures, favours mainstreamed voices, conformity, and a few subjects set to speak on behalf of all. Moreover, I highlight the total control state parties have over the process of selecting the participating NGOs through the UN Committee on Non-Governmental Organizations (Committee on NGOs) thereby excluding unwanted NGOs.

From a feminist perspective there is a constant need to scrutinise and problematise whose voices are heard and whose are excluded from the international lawmaking structure and why this happens. The hypothesis that has guided the overall analysis is that the closer an organisation is to the actual source, the better position it will be in to involve more perspectives of women's lives, share more minority perspectives and perspectives of the 'other'.[8] This relates to the ideas of, amongst others, Butler and Puigvert about

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Division for the Advancement of Women (DAW); the International Research and Training Institute for the Advancement of Women (INSTRAW); the Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI); and importantly, the United Nations Development Fund for Women (UNIFEM). It furthermore embraces the work of the CEDAW Committee.

[7] The intergovernmental governance structure in charge of providing operational policy guidance to UN Women includes the UNGA, the ECOSOC and the organisation's Executive Board. The latter consist of forty-one members, elected by the ECOSOC for a term of three years.

[8] Butler 'Gender and social transformation: A dialogue' in Beck-Gernsheim *et al* (eds) n 3 above at 116.

the importance of diversity and dialogue within feminist theory and politics and the lack of these ideas within the framework of international lawmaking.

However, the lack of dialogue and diversity within international lawmaking is a comprehensive and complex issue of which only certain perspectives will be covered in this article. To create a point of departure for the main discussion, a theoretical framework is created below. This notional backdrop highlights some aspects of complexity theory to give a sense of the structures that are relevant to this debate and the level of complexity at hand when commenting on the international lawmaking framework. It is furthermore important to acknowledge that in a complex system such as the global human rights system, as part of international law, there are many different levels of concern in promoting conversation and dialogue between all parties; not all of them to do with the state-centric system of international law. Even though it is outside the main domain of this article, it is essential to point out that the same lack of representation that exists on the macro level within the UN, may well exist on the micro level within the same local level agents discussed in this article. *Selectiveness* is a matter that should not be ignored on any level, and it is imperative to recognise that all NGOs, whether involved in the process of making international law or not, must be sensitive to the issues of inclusion/exclusion of what Butler referrers to as the 'other' and the 'other' 'other'.[9] It cannot be overemphasised that, if they claim to *represent* women, all NGOs need to take ownership of organising themselves in such a way as to promote even the most unconformable conversations aimed at challenging the fundamental structures and policies that may exclude certain groups or experiences.

It should further be acknowledged that within the UN consultative system there is an on-going, general, debate about reform and the position of NGOs overall.[10] My aim, however, is not to depart from the perspectives of the agents already accepted into the system, but rather to analyse the perspectives of those left outside. Nevertheless, the critique that has been launched within the ambit of this debate is of some relevance to further understanding that any reform of the consultative structures within the UN needs to address *access* and *representation* as well as the processes of *interaction* between the UN, member states, and NGOs. The latter processes will only here be discussed within the theoretical framework, while *access* and *representation* take centre stage in the further discussions.

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[9] *Id* at 121.

[10] See, eg, United Nations 'UN and Civil Society Relationship Questionnaire on NGO opinion' (1-10-2003) *United Nations* http://www.un-ngls.org/orf/UNreform.htm (accessed 30-3-2012).

Complexities in international law

An important part of feminist politics and the quest for women's rights currently takes place on the international arena under international law. The process of international lawmaking is complex and difficult to overview. Contemporary discussions about the protection of women's rights from both strictly legal and legal feminist perspectives tend to gravitate towards a resolution that asserts universal inclusivity. However, it is questionable to what extent this is a correct reflection of international law toady.[11] In this regard, feminist and queer theories may help to explore how to advance a more comprehensive reaction to problems facing women on the international lawmaking level. Is it at all possible, on this level, to identify and consider the diversity of lived experiences of women worldwide? This is an enormous and complex issue and the aim of this article is not to give an overarching answer to this question but rather to, within the scope as presented in the introduction, highlight one possible theoretical avenue that would enable us to make feminist politics and the process of drafting or re-drafting internationally recognised legal instruments, more inclusive.

Although I do not focus directly on complexity theory, as such, some of its fundamental explanations can be very helpful in understanding the international community and the processes of making international law. It can further be of value in relation to the discussion concerning queer theory, below. A complex system is one in which numerous independent elements continuously interact and spontaneously organise and reorganise themselves over time into more and more elaborate structures.[12] Complexity in a system like the international system can be characterised by a large number of similar but independent elements or agents; a persistent movement and responses by these elements to other agents and adaptability, ie that the system adjusts to new situations to ensure survival. It can furthermore be characterised by auto-organisation, in terms of which order forms spontaneously in the system. There are national and /or international rules that apply to each agent and there is progression in complexity so that over time the system becomes larger and more sophisticated.[13] On the matter of complex systems, Gallopin *et al* argue that 'it is impossible to have a unique, correct, all-encompassing perspective on a system at even one system's level; plurality and uncertainty are inherent in systems behaviour'.[14] Within the present context, this is further illustrated by the copious and diverse NGOs at hand, who interact in a number of non-linear and multi-dimensional ways with other actors such as states, transnational corporations, inter-governmental organisations, and with

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[11] Carline and Pearson (2007) n 3 above at 74.
[12] Williams *Chaos theory amed* (1997) 234.
[13] *Ibid*.
[14] Gallopin *et al* 'Science for the twenty-first century: From social contract to the scientific core' (2001) 168 *International Social Science Journal* 219 223-224.

each other in ways that create self-directed orders with their own dynamics. Complex systems can naturally evolve to a state of auto-organised criticality, in which behaviour lies at the border between order and disorder. The same system can display order, chaos, and auto-organising complexity, depending on the control parameters. The concept of auto-organising complexity offers a decidedly precise description of the international order, including the system for international lawmaking, as an incessantly changing, auto-adapting system of autonomous agents (states and others) developing into more and more complexity; forcing the subjects to form alliances and to mainstream perspectives to counterbalance the inherent fragmentation.[15]

The behaviour of auto-organising complex systems cannot be predicted and does not observe the principle of additivity, ie its modules cannot be separated and examined in isolation.[16] This cannot be ignored when exploring a part (the consultative structure) of a complex system like the international legal system. The picture produced will not be complete and is subject to constant challenge. It is not possible accurately to identify what appreciating diversity and plurality in international law really mean. Diversity might include differences in terms of interests and future plans or in terms of backgrounds and knowledge. Appreciating diversity also consists of recognising differences in terms of experience, resources, and power that may affect the ability of the various actors to participate. For actors in the international lawmaking structure, this means appreciating a multiplicity of actors' voices and interests rather than privileging the voice of one particular type of actor. In complex systems, this approach means acknowledging that there can be a number of valid perspectives, none of which is the accurate or correct perspective, but all of which may be relevant in the decisionmaking process. The development of an approach that would value the input of many diverse actors seems to necessitate a key paradigm shift in terms of changes to recognised structures and processes of international law. One such shift would be to allow small/local NGOs, and even other entities and social groups, access to the processes of lawmaking on the international level. Within the traditional state-centric framework of international law, complexity theories, as briefly discussed above, can assist with this re-conceptualisation, building on existing critique of international law that challenges its exclusivity and acknowledges the dynamics of social change.

The ESCOSOC Consultative Structure set up by the UN under article 71 of the UN Charter

In the field of international human rights law, the decisionmaking process has over

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[15] William n 12 above at 234.

[16] Beyerchen 'Clausewitz, nonlinearity and the unpredictability of war' (1992) 17 *International Security* 59 62.

the years been challenged by an ever increasing number of non-state actors wishing to participate in strengthening and widening the protection of human rights. To epitomise the lack in *access* and *representation* in relation to the main law/policymakers in the specific field of international women's rights and with regard to diverse actors outside the mainstream feminist movement, the general structure of NGO participation within the ECOSOC framework will be further explored. This analysis will highlight the structure of the UN's engagement with NGOs and the problems that exist within this structure. Through this example, attention will be drawn to the exclusive tendencies of both feminist politics and the international lawmaking processes that persist in the context of international law in terms of allowing states and international NGOs, in the main, to develop international law, building on incomplete perspectives of women's realities.

Since its creation, the UN has claimed to serve as the main international forum for intergovernmental discussions on mutual concerns and collective responses. Thus, NGOs have been increasingly active within the UN since its creation in 1945. NGO-related work at the UN involves a number of different activities including policy advocacy and providing technical expertise as well as collaborating with UN-agencies, programmes and funds. The engagement between the UN and NGOs takes place formally and informally both at the national level and at the UN itself. Official UN Secretariat relations with NGOs fall into the two main groups: *consultations with governments;* and *information servicing* by the Secretariat. These functions are the responsibility of two main offices of the UN Secretariat dealing with NGOs: the NGO Unit of the Department of Economic and Social Affairs; and the NGO Section of the Department of Public Information. Furthermore, NGOs may receive accreditation for a specific conference, meeting, or other event organised by the United Nations. They can also establish working relations with particular Departments, Programmes or Specialised Agencies within the UN system, based on communal fields of interest and prospects for joint activities. But most importantly, international NGOs working in the field of economic and social development (including any activity within the field of international human rights) can pursue consultative status with the ECOSOC. Any formal interactions between NGOs and the UN are strictly governed by the UN Charter and related resolutions of the ECOSOC as discussed further below.

Here I focus only on the single formal and, generally speaking, permanent way in which (feminist) NGOs can be involved with gender specific policy/law-generating bodies within the UN. This is done through obtaining consultative status with the CSW through the prescribed ECOSOC procedure. Today 3 534[17]

[17]United Nations 'Organizations in Consultative Status with ECOSOC' (31-12-2011) UN NGO Branch http://esango.un.org/civilsociety/login.do (accessed 18-3-2012).

NGOs have consultative status with the ECOSOC. Through these specific NGOs, civil society represents an important source of knowledge and skills as well as a possible partner in the international lawmaking process. Via an affiliation with the ECOSOC, an accepted NGO may participate, in relation to its focus and classification (more on this below), in the proceedings of the CSW set to produce policy and norms on the international level. The CSW is a key body of the UN with which to engage in the drafting and implementation of international gender related policy/law. Only NGOs in consultative status with ECOSOC, as mentioned in the introduction, can be accredited to participate in the CSW's sessions as observers. Generally, informal consultations on the negotiation of outcomes (decisions, resolutions and agreed conclusions) are restricted to member states, preventing even accredited NGO participation and so perpetuating the state-centrism of the system. The chairperson of the CSW sometimes allows NGO representatives to observe informal consultations but strictly without direct participation.

The main NGO gateway to the UN is ECOSOC resolution 1996/31[18] (resolution 1996/31) establishing formal arrangements for the implementation of article 71 of the UN Charter.[19] It reinforces the consultative relationship between NGOs and the ECOSOC and its subsidiary bodies – principally the UN substantive commissions[20] and the Human Rights Council. When granted ECOSOC status through accreditation, NGOs can, after registration, send representatives to relevant UN meetings. Resolution 1996/31 offers a consultation procedure relevant to the level of significance of the activities of the NGO applying for accreditation. Importantly, and in line with article 71, NGOs that have been accepted will have no right to vote, ie NGOs are not accepted as equal partners but as advisory bodies; again the system remains state-centric.

There are three different levels of consultative status. 'General consultative status'[21] is established for NGOs that are involved in most of the activities of the ECOSOC and its subsidiary bodies. These are NGOs that are deemed to have the capacity to represent major sectors of society on the international level. NGOs in general consultative status may speak during meetings of the

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[18]ECOSOC resolution 1996/31 'Consultative Relationship between the United Nations and non-governmental organizations' ECOSO 49th Plenary meeting 25 July 1996.

[19]UN accreditation or affiliation can also be done through the DPI. In the case of Israeli-related matters it can also be accomplished through the Committee on the Exercise of the Inalienable Rights of the Palestinian People. In addition, the Office of the UN High Commissioner for Human Rights may provide financial assistance to NGOs which do not have formal accreditation or affiliation.

[20]Most importantly the CSW, Commission on Sustainable Development and Commission on Science and Technology for Development.

[21]There are currently 144 NGOs in general consultative status with ECOSOC. United Nations 'Organizations in Consultative Status with ECOSOC' n 17 above.

ECOSOC and its subsidiary bodies; they may also circulate relevant written documents;[22] and may submit proposals to the Committee on NGOs requesting the Secretary-General to place items on the provisional agenda of the ECOSOC.

'Special consultative status'[23] is granted to NGOs having distinct competence in a specific area, but which are involved with only a few of the fields of activity relevant to the ECOSOC and its subsidiary bodies. These NOGs are allowed to circulate written documents[24] relevant to the issue at stake to ECOSOC and to subsidiary bodies. NGOs with special consultative status are further permitted to make oral statements before subsidiary bodies related to their field of activities. The third and last level of the consultative status is the 'Roster List option'.[25] This option is open to NGOs able to make infrequent but valuable contributions to the work of the ECOSOC or its subsidiary bodies within their specific area of expertise. Resolution 1996/31 establishes an additional option for NGOs granted consultative status before any other specialised agency or subsidiary body of the UN. Those NGOs can also be registered on the Roster List. NGOs on the Roster can provide the ECOSOC with written statements when invited to do so by the UN Secretary-General.

With regard to all three categories of consultative status there are similar rules governing the process of accreditation. The application essentially consists of an explanation of the aims of the organisation and examples of its activities together with an account of possible contributions it could make to the ECOSOC. It is further required of the NGO to disclose any government funding. Once an application from an NGO has been reviewed and approved by the Committee on NGOs, the NGO is regarded as having been recommended for consultative status. The ECOSOC will then review the recommendations and make a final decision on accreditation. In terms of resolution 1996/31, the main criteria for UN accreditation are that the aims and purposes of the NGO should be in conformity with the spirit, purposes and principles of the UN Charter.[26] The NGO undertakes to port the work of the UN and to promote knowledge of its principles and activities in accordance with its own aims and purposes and the nature and scope of its expertise and accomplishments. Consultative relationships may, under resolution 1996/31, only be established with international, regional, sub-regional and national NGOs.[27] Of specific importance

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[22]Not exceeding 2 000 words.

[23]There are currently 2408 NGOs in special consultative status with ECOSOC. United Nations 'Organizations in Consultative Status with ECOSOC' n 17 above.

[24]Not exceeding 500 words to ECOSOC and 2 000 words to subsidiary bodies.

[25]There are currently 984 NGOs on the roster list. United Nations 'Organizations in Consultative Status with ECOSOC' n 17 above.

[26]See arts 1 and 2 of the UN Charter.

[27]ECOSOC resolution 1996/31 n 18 above principle No 4.

with regard to access and representation in the present context, is that fact that resolution 1996/31 specifically omits small/local NGOs from accreditation and also indicates that the NGO seeking consultative status must prove that it is authorised to speak on behalf of all is members.[28]

Consultative status is only granted after the approval of ECOSOC, consisting of the fifty-four member states,[29] on the recommendation of the Committee on NGOs, consisting of nineteen elected ECOSOC member states,[30] as indicated above. The members of the Committee on NGOs are elected by the Council on the basis of equitable geographical representation, in accordance with the relevant ECOSOC resolutions and the decision and rules of procedure of the Council.[31] One important aspect of this system is, of course, that it is strictly controlled by states. It is specifically provided in resolution 1996/31 that the arrangements for consultative status should 'not be such as to overburden the Council or transform it from a body for coordination of policy and action, as contemplated in the Charter, into a general forum for discussion'.[32] After an NGO has applied, the outcome of the application is decided by the nineteen state parties all with different agendas and with an incentive to protect their own powers and interests. The decisions of the Committee on NGOs are then referred to the fifty-four member states that serve on the ECOSOC who take the final decision.

The consultative status of an NGO can be suspended for up to three years, or revoked, if it engages '[i]n a pattern of acts contrary to the purposes and principles of the Charter of the United Nations including unsubstantiated or politically motivated acts against Member States of the United Nations incompatible with

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[28]The organisation shall have authority to speak for its members through its authorised representatives. Evidence of this authority shall be presented, if requested. ECOSOC resolution 1996/31 n 18 above principle No 11.

[29]UN Charter article 61.

[30]Members of the NGO Committee for the period 2011-2014 are the following: Belgium, Bulgaria (Vice-Chair), Burundi, China, Cuba, India, Israel, Kyrgyzstan, Morocco, Mozambique, Nicaragua, Pakistan (Vice-Chair and Rapporteur), Peru (Vice-Chair), Russian Federation, Senegal (Vice-Chair), Sudan, Turkey (Chair), United States of America, and Venezuela (Bolivarian Rep.)

[31]The Committee on Non-Governmental Organizations is a standing committee of the Economic and Social Council (ECOSOC), established by the Council in 1946. It reports directly to ECOSOC, and the two reports of its annual regular session (usually at the end of January) and resumed session (in May) include draft resolutions or decisions on matters calling for action by the Council. The Committee has 19 members elected on the basis of equitable geographical representation: 5 members from African states; 4 members from Asian states; 2 members from Eastern European states; 4 members from Latin American and Caribbean states; and 4 members from Western European and other states. In accordance with ECOSOC decision 70 (ORG-75) of 28 January 1975, the term of office of its members is four years. The current terms of reference of the Committee are set out in resolution 1996/31. In its proceedings the Committee is guided by the rules of procedure of the Council.

[32]ECOSOC resolution 1996/31 n 18 above principle 19.

those purposes and principles'.[33] This indicates that the relevant member states have a broad mandate to exclude NGOs that are putting forward uncomfortable information, as long as they can drum up sufficient support. It is questionable whether this structure favours the gathering of vital information and its dissemination in a reality where the line between promoting and protecting human rights and acting politically against a state is at times blurred. In countries where human rights are violated on the basis of political considerations, surely complaining about this can be seen as being politically motivated?

Queer theory as a perspective of diversify

What can be described as a lack of perspectives of women and women's lived lives on the international level, links up with the fact that very few interest groups (such as NGOs) with close links to the lives and experience of truly marginalised women are directly represented on the international stage. As early as 1997, Otto argued that dialogue in the context of human rights must be based on the common ethical commitment among participants to address the material aspects of human dignity, particularly economic justice and equality.[34] She commended the use of these commonalities in terms of ethical goals (such as equality) to inform the struggles involved in negotiating differences and diversity.[35] The ideas of commonalities or multiple 'consciousness' or 'literacies' as Otto labels them, can be very useful in the development of a more diverse international community in that they inspire feminists to keep sight of the main goals such as dignity, non-discrimination and equality, while allowing space for diversity in experiences and implementation. Building on Otto's work and using complexity and queer theories, Carline and Pearson present some useful ideas on how these theories can assist both international law and feminist politics to consider issues of difference in a way that avoids the tendency to exclude the 'other' and to privilege dominant perspectives.[36] They further argue that openness to the unknown and to uncertainty are fundamental to a critical feminist politics concerned with the construction of more comprehensive legal responses that will consider the challenges and diversities of women's lives.[37]

Within the international system and in the context of women's rights, it is imperative to explore the space left open – if any – for dialogue, pluralism and uncertainty. This section further highlights an alternative theoretical approach to this discussion by exploring some queer contributions made by Butler and Puigvert to the debate surrounding multifaceted conversations in complex systems such as that of the UN, where a great part of international law is made.

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[33] *Id* principle 57 (a).
[34] Otto (1997) n 3 above.
[35] *Id* at 32-5.
[36] Carline and Pearson n 3 above at 87-88.
[37] *Id* at 75.

This analysis will, moreover, link with the discussion in the following section on the need for multifaceted conversations within international law.

From this perspective, the crucial notion of queer theory is that it points to the significance of discourse, ingenuousness, ambiguity, and the inclusion of more rather than less in the future of feminist politics and a feasible legal protection of women's rights within the ambit of international law.[38] The main objective is to discuss if and how we can theorise around the need for conversation between diverse groups of people, as emphasised by feminist and queer theories, within international law considering its tendency towards state dominance and the state-centric model around which the lawmaking process is constructed. It is submitted that a lot could be learnt from multi-level engagement theories – such as queer theory – in the sense that they can assist in explaining the multiplicity of views and experiences that share, or rather could share, the international domain through the processes that creates and develops international law.

Above I introduced a version of the idea, as expressed by Otto, that the international lawmaking structure is lacking in the conversation and exchange of views that queer theory emphasises as a necessity. Otto has suggested that 'queering' international law suggests something more than normative inclusion; it presents an essential challenge to the usual way of thinking about international law.[39] In her opinion, queering international law means that we must, in the terminology borrowed from Halley,[40] 'take a break' from the ordinary way of doing things in international law in order to open new ways of seeing international legal problems and expose some of the limitations of international law's 'normal' response to them – even when that normal response might be a feminist response.[41] In this sense a queer perspective, within the ambit of this article, a queer perspective on the participation of NGOs in the international lawmaking process, can bring a selection of currently marginalised experiences challenging old norms that emphasise international legal dogma and practice. Queer theory has the ability to ask different questions than feminist legal theory which may lead to explanations that will guarantee, rather than threaten, the propagation of different practices of choice and desire.[42]

[38] This does not only relate to women's rights but to a large extent to other groups that for the purpose of the law are seen in homogenous terms instead of the heterogeneous group that they are.
[39] Otto '"Taking a break" from "normal": Thinking queer in the context of international law' (2007) 101 *American Society of International Law* 119 at 120.
[40] *Id* at 119.
[41] *Id* at 122.
[42] *Ibid*.

What is it then that queer theory challenges within international law? Otto suggests that we step outside the normal presumption of heterosexuality and stop engaging sexuality as a primary category in the analysis of international law. In the same way that feminists asserted that gender become a principal category which set in motion new ways of detecting gender issues in, for example, legislation that had previously looked un-gendered, so too does a queer perspective display the [hetero]sexual order that is taken for granted as a foundation of the customary system of international law.[43] By looking through a queer lens, heterosexuality appears as the rudimentary model for all dominant systems of social relations. The heterosexual model offers some of the basic building blocks for international law's conception of 'order'.[44] This order, furthermore, very strongly supports the notion of international law as state-centric in the sense that the state is the norm and the 'natural' communicator on the international stage. As indicated by Otto:

> [u]nderstood as the elemental, natural, 'normal' form of human association, heterosexuality not only shapes how we think of 'normal' interpersonal and familial relationships, but is also the presumed basis for all forms of 'normal' community, including that encompassed by the 'normal' nation-state, international law's primary subject.[45]

Order, in the sense of the international community, is built around the notion of the nation state, the (reluctant) inclusion of the view of the 'other' through a top controlled (by states) system of mainly international NGOs that, for the sake of order, are to represent the diverse views of the (hetro)-family of mankind in a non-threatening and mainstreamed way. By looking at the international system from this perspective it becomes clear that it is trying its best to get away from a pluralist approach to international law. On the surface it might seem that the international system is ever diversifying; but on closer inspection it becomes apparent that the nation states set the agenda based on power. They control who from civil society may participate through rigorous procedures and the disqualification of local input that might render international law more diverse.

As part of this queer perspective, dialogic feminism, as a feminist approach inspired by queer theory, embraces an important theoretical perspective in that it professes to attempt to include the voice of all women in feminist theory. This method is grounded in unrestricted dialogue, camaraderie, and the capacity of all to take part in transformation. Starting from the principle of equality of differences, dialogic feminism tries to escape from both a homogenising vision of equality and an exclusionary concept of difference. Today, in an increasingly multicultural society, dialogic feminism propagates

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[43]*Id* at 120.
[44]*Ibid*.
[45]*Ibid*.

the important and fundamental message that it is necessary to formulate feminist proposals that include the equal right to be different and that difference as a right within feminism itself requires the diversity of perspectives of reality to be given a voice and a platform. In this sense, many 'other' women are creating spaces locally in which they are overcoming barriers and making their voices heard and considered. They are thus transforming their personal and social environments. Within the scope of this article, dialogic feminism presents an interesting theoretical alternative to the state-centric because it points us in a direction where we have to start recognising and creating opportunities for diverse actors such as women and groups of women, to be heard. The current international lawmaking system is not conducive to the types of interaction suggested as will be further emphasised in the following section.

The need for multifaceted conversations in international law

The relevance of a queer theory stance (including dialogic feminism) becomes even more relevant when the involvement of 'feminist' NGOs in the lawmaking process on the international stage is considered. It is important to acknowledge that the policy and opinions of the various feminist NGOs that engage in the making of international law could bar specific groups of women not included in the overall focus group of the NGO from participating in the conversation. The structure of NGO representation, as discussed above, needs to be diversified. The point of departure for the discussion about queer theory above was chosen mainly because of its possible contributions to the methodologies of the international lawmaking processes and feminist participation in it. From the critical perspective of queer theory, this article strives to stress the particularity and diversity present in the modern issues that impact on women's rights and lives today. Queer theory puts forward some analytical tools that could contribute to a project that seeks to reflect on issues of diversity, dissimilarities, ambiguity, and openness in international law. Conversation and dialogue are at the heart of this theory and below I shall briefly outline why these components are key to the NGO consultative process at the UN.

International law is traditionally built on a state-focused postulation. States generally make the law but the growing understanding is that other actors could offer important perspectives that could help inform the lawmaking process. Traditionally the international community has striven to keep the focus on states as the makers of the law, and has tried to avoid adding to the fragmentation of the international community by including other subjects. While modernists to a large extent have theorised around the international system from the perspective of assumed unity, post-modernist – including queer – theorists have theorised

from fragmentation.[46] In the last few years the world has observed unprecedented activity from NGOs involved in lawmaking and legal reform at the international level; fragmentation in the making. NGOs have become more and more involved in setting the international agenda, in influencing international rule-making, and in contributing to the implementation of international law. This new dimension to the international lawmaking structure raises a number of questions, not all of them relevant to the scope of this article. Of importance, however, is the question of whether the representativity of NGOs working on the international level would be increased by allowing small/local/unwanted NGOs to participate. Furthermore, could the informal/formal interactions between these diverse actors be stimulated, and how could the experiences and knowledge possessed by smaller, diverse actors be harvested?

In any environment, under any conditions, social transformation necessitates the creation of spaces that are conducive to an equal dialogue between women. But it also, as pointed out by Puigvert, requires all individuals involved to be receptive to the opinions and realities of others. This boils down to the issues of engaging in dialogue and transcending borders to look beyond the perspectives that are our own. Even though Puigvert has been subjected to harsh criticism – from Butler, amongst others – that she is herself constructing the borders that should be transcended, it is the 'border crossing' that is the critical part of the argument. Butler urges us to think about the 'other' 'other', those women who are not even part of the 'other women'.[47] This becomes important within the context of international law in the sense that we must never stop questioning the apparent exclusion of perspectives through the design of the system. From a queer perspective, we need to engage in cross border dialogues, deconstruct identities within the realm of the system set up for consultations, and help build a system that favours different knowledge rather than position. Mohanty states that 'our most expansive and inclusive vision of feminism needs to be attentive to borders while learning to transcend them'.[48] To achieve social justice for a larger group of women, this means that we need to ensure that international law is a forum in which all (feminist) can engage, be heard, and be taken seriously. This approach forces us to enter into dialogues with others and to create the spaces and structures that make us engage.

Given the reluctance of formal international law structures to embrace developments that bring greater plurality and uncertainty to international lawmaking, it is difficult to imagine how to move beyond the exclusive and

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[46] Kepros 'Queer theory: Weed or seed in the garden of legal theory?' (2000) 9 *Law and Sexuality* 279 283.
[47] Butler 'Gender and social transformation: A dialogue' in *Women and social transformation* n 3 above at 116.
[48] Mohanty n 2 above at 2.

partial response of law, so that law and legal reform might encourage and facilitate spaces of engagement between a diversity of actors. Encouraging plurality and a diversity of perspectives is key to understanding and managing the uncertainty inherent in complex adaptive systems rather than perceiving these dynamics as a threat to order.[49] It is easy to assume that this perspective presents a contradiction. How can we hope to understand the uncertainty and disorder that arise out of plurality? How can we hope to build coherent legal responses that are based, not on an established order and notions of exclusivity, but rather on engagement with a plurality of perspectives? Acknowledging plurality does not mean that all points of view are necessarily regarded as equally valuable.[50] In this regard we can again turn to Otto's notions of communalities or multiple 'consciousness' to focus on issues such as inequality which unite feminists, but allow different perspectives. This approach recognises that complex adaptive systems such as social groups cannot be fully understood from only one perspective and that there is 'an irreducible plurality of pertinent analytical perspectives' for any situation of inquiry.[51] This perspective acknowledges that the international lawmaking system cannot be entirely understood from the uni-dimensional perspective of states. It emphasises, rather, that there may be a number of relevant perspectives that diverse actors, such as local actors, can bring to the international lawmaking processes. But it also forces us to think about more inclusive and creative ways of supporting the dialogues, as discussed above, and so inform the system and the lawmaking process.

As we have seen, queer theory is concerned with the apparent exclusion of perspectives in feminist theory and politics (and elsewhere) and it proposes to explore the position of ingenuousness, ambiguity and the inclusion of perspectives. Butler highlights the importance of keeping our conversations – queer, feminist and legal – open to the diversity of cultural expressions and lived realities, and constantly to be open to re-thinking the core of our own discourses. The willingness to enter into a conversation, accepting the uncertainty of the outcome and embracing the unknown are, in a sense, the nucleus of any critical project involved with the finer points of women's lived realities.

Concluding remarks: The lack of diversity and dialogue within the consultative system

If the contributions of queer theory and dialogic feminism discussed above are considered, the international lawmaking structure could be re-thought adding

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[49]Otto (1996) n 3 above at 358-359.
[50]O'Connor 'Dialogue and debate in a post-normal practice of science: A reflection' (1999) 31 *Futures* 671 672.
[51]*Id* at 673-675.

more conversations and viewing the process of making or reforming the law as an uncertain and open-ended venture naturally open to input from diverse perspectives. However, it is clear that this is still a distant reality, and that the systems in place need to be transformed to value diversity. Two different issues are involved: first the apparent exclusion of the type of organisations that are best suited to represent lived realities and minority perspectives based on the arguments of uncertainty and chaos; and secondly, the overwhelming power that states possess in selecting which NGOs may participate as consultants, seriously curtailing the flow of information. It would be unthinkable in a democratic state for the state apparatus to exclude civil society organisations from making important contributions to proposed legislation or legal reform based on size, positioning, or criticism of the state, yet the international system is built on this notion.

The issue of the exclusivity of the international system it no novelty – it has been debated for decades. I conclude by advancing some new arguments in the critique of the current under-representation of minority perspectives within the realm of international law and by offering some suggestions for change. It is apparent that the idea of the inclusion of minority perspectives and different realities is far from reality in the international system. In this regard it is important to acknowledge, as discussed above, that resolution 1996/31 specifically spells out that the consultative structure should take into account 'the full diversity of the non-governmental organizations at the national, regional and international levels', and that the UN should recognise 'the changes in the non-governmental sector, including the emergence of a large number of national and regional organizations'.[52] It is significant that there is no mention of any direct relationship between the UN and small/local NGOs representing minority perspectives. The great majority of these organisations are focusing on specific geographical areas and themes. These include NGOs that focus on abuse, HIV/AIDS, land reform, lesbian/transsexual rights, women's education, sex workers and so forth. These organisations would theoretically be in a better position to represent more diverse perspectives of women's realities and struggles. Even if we question this hypothesis, ie how well any of these local organsiations in fact represent the differences in the lived realties of women, it becomes practically impossible to deny the fact that the closer an organisation is to the actual target group, the better position it will be in to at least obtain/share more minority perspectives and perspectives of the 'other'. Small/local NGOs have been encouraged by the UN to affiliate themselves to national, regional or international NGOs already listed with the ECOSOC or national human rights institutions to streamline their views. However, there has been no attempt to open the door further for their direct

[52]ECOSOC resolution 1996/31 n 18 above preamble.

participation within ECOSOC and its subsidiary organs such as the CSW, to create plural perspectives.

As the example used in the introduction, the gendered rights as set out in the CEDAW Convention claim to speak on behalf of all women and protect all women, but, as I have shown, it was conceived in a system that recognises very few actors and even fewer opinions in the sense that it adheres strictly to the traditional state-centred (heterosexual) order which consequently forces NGOs that act on the international level to mainstream their views. This system will furthermore have the same effect on any forthcoming strategy from UN Women through the CSW in that as a subsidiary body of the ECOSOC, it must submit to the consultative structures. Furthermore, international human rights law is becoming more and more visible in domestic jurisprudence. International human rights – including women's rights – are used as guiding norms when interpreting equality, non-discrimination, and dignity.[53] The essence here lies in the fact that the norms that are sometimes used to guide domestic policy and litigation do not necessarily include the perspectives of the truly marginalised women within that local context. It is discouraging to have to acknowledge that vocal NGOs with extensive knowledge of important (minority) issues such as 'correctional rape', and the relationship between specific customs and inequalities based on gender, are anything but present within the formal context of the international legal system and international feminist dialogue.

It is true that many international NGOs in the human and women's rights fields more specifically, have regional and national offices worldwide. The information gathered by these satellite offices is not unimportant to the information flow within the international lawmaking system, but local knowledge and direct involvement with victims of violations such as rape, abuse, and discrimination through cultural practices, have important perspectives to add to the international discussion about women's rights. When analysing the NGOs that are accredited to the ECOSOC, it becomes clear that the majority of those concerned with women's rights have a clear global or international mandate and operate on very broad mandates as representing 'Women in Radio and Television', 'in Universities', 'Jewish Women', 'Women in Nigeria' or 'Black Women'. There is a myriad of different NGOs representing women's causes, which could lead us to believe that we are faced with an inclusive rather than an exclusive system. But when their mandates are examined many of these organisations come across as exclusionary, stereotyped, and to some extent far removed from the realities of many women. In this regard it is especially concerning that so few national

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[53]See, eg, *Carmichele v Minister of Safety and Security* 2000 10 BCLR 995 (CC).

NGOs are truly represented at the UN. Disheartening, too, is the fact that small/local NGOs are excluded from consultative status, save as affiliates.

There are a number of changes, exposed by the analysis above, that will have to be made in order to ensure that the ECSOC consultative process resonates with the strategies put forward by queer theory in the promotion of dialogue. On a theoretical level, especially states, but also NGOs already involved in the system, need to look beyond the possible issues of uncertainty, chaos and conflict in engaging with the consultation process. Only when this process is made inclusive, with all that has to offer, will women's human rights be forwarded in true equality. We could, at least in theory, ask why states should have the monopoly in deciding, on the international level, over policy and law that concern us all? Even if it is Utopian to argue that states at some point soon will relinquish this monopoly, it is possible to work towards broadening the spectrum of realities that are considered. It is proposed that resolution 1996/31 be re-drafted to include small/local NGOs, and that technology and money is allocated to include voices and perspectives that are otherwise disregarded. Local and personal knowledge should not only be considered at shadow events in the major international hubs of the world, but by compelling states to participate in broader forums with room for more perspectives than only those of international NGOs. Today technology offers us possibilities of communication, dialogue and interaction far removed from the idea of signing up for a meeting in Geneva or New York, and then putting together the means of actually getting there; many of the restrictions faced by small/local NGOs stem from restrictions imposed by resources and location.

Furthermore, the whole impetus of the international system needs to change towards de-monopolising power. Within the specific ambit of this article this could be achieved by at least entrusting the selection (which should rather be re-draft as a registration process) to the Secretariat rather than a state- based committee and in the end the ECOSOC. This would reduce possible state influence in the selection process and perhaps present opportunities for more diverse views. To avoid uncertainty and chaos, the requirements, as discussed above, are high in terms of the NGOs that are actually given consultative status. In relation to including small/local NGOs, these requirements need to be relaxed emphasising the importance of diversity, pluralism, openness and inclusivity. Less focus should be put on the physicality of the UN, and more on the centrality of virtual fora with open access for small/local NGOs and even individuals to gain admission to the consultative spaces that are currently out of their reach. This is not to suggest that all local NGOs or other concerned entities or individuals would want or have the capacity to participate in this process, but the trick would be not to discriminate against those who do.

I have submitted that an engagement with queer theory provides an opportunity for legal scholars (feminist or otherwise) to converse over issues of plurality, difference, uncertainty, and openness in law – in this case within the context of NGO representation. This theory may assist both law and feminist politics to consider issues of difference in a way that avoids both their tendencies to exclude the 'other' and favour dominant perspectives. Complexity theory, which highlights the inevitability of plurality and uncertainty, presents a stark contrast to the traditional, positivist framework of international law and its rational, objective, and ordered paradigm. It provides a framework from which we can recognise the reality of the presence of diverse actors, such as local NGOs, in international lawmaking structures and processes. From a queer theory perspective, I have analysed the very real possibility of exclusivity within the NGO sector of the UN. I have further argued that a mindful endeavour to value diversity and plurality might enable us to overcome the one-sidedness and exclusionary effects of international law constructed from incomplete perspectives. The recognition of the importance of diversity is encompassed by terms such as 'lived experiences' from a queer theory perspective, and the 'multiple literacies' or 'multiple consciousness' that Otto puts forward, may be used to encapsulate a complexity theory view. These terms pave the way for the acknowledgment of the importance of plural, diverse perspectives in international law and feminist politics, as well as the ways in which the creation of alternative legal meanings and law reform are facilitated by diverse dialogues. I conclude by arguing, alongside Carline and Pearson, that rather than fearing uncertainty, a more inclusive feminist politics concerned with the development of international law and social transformation, needs to embrace it.[54] The uncertainty that goes with a multitude of actors and perspectives of reality is inevitable and essentially good. If an embracing feminist politics and an all-encompassing international law which acknowledge and respect diverse and multiple ways of living are pursued, international law must become a forum in which feminists can engage in conversations without fear of the uncertainty that will result. Engaging as many actors as possible is crucial in this regard; and allowing small/local/unwanted NGOs and individual voices to play a greater role in international lawmaking would be a great leap forward.

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[54]Carline and Pearson n 3 above at 117.