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Article

The UN Human Rights Committee and LGBT Rights: What is it Doing? What Could it be Doing?

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ABSTRACT

The United Nations Human Rights Committee has been praised as one of the most influential human rights bodies in the world; however, its track record for the protection of the rights of lesbian, gay, bisexual and transgender (LGBT) persons has not yet been comprehensively or systematically examined. Individuals in many parts of the world face severe human rights violations because of their sexual orientation or gender identity. In many countries, men caught engaging in homosexual conduct can be imprisoned or even sentenced to death, and LGBT people are still subjected to widespread violence and legally sanctioned discrimination on a daily basis. This article critically analyses the work of the Human Rights Committee over a ten-year period to determine what it has done to protect the rights of sexual minorities, and whether there is more it could do to enhance this protection of the LGBT rights. An examination of the Committee's concluding observations, General Comments and Views in individual communications, reveals that while progress is being made by this body of experts, there is still room for a greater emphasis on the distinct challenges facing LGBT communities for the complete fulfilment of the norms of the International Covenant on Civil and Political Rights.

KEYWORDS: lesbian, gay, bisexual and transgender rights, sexual orientation, non-discrimination, International Covenant on Civil and Political Rights, United Nations Human Rights Committee

1. INTRODUCTION

In many parts of the world, individuals continue to face severe human rights abuses due to their sexual orientation or gender identity. For example, in 2014 there are 80 states where consensual same-sex conduct between adult males is still a criminal

offence, attracting significant prison sentences.¹ In five of these states, the death penalty can be imposed for these ‘offences’.² Rather than repealing these laws, many states are endeavouring to further criminalise homosexuality, including in recent years, Uganda, South Sudan, Burundi, Liberia and Nigeria.³ Furthermore, the extent to which these laws are being actively enforced appears to be increasing. For example, in December 2012, a Cameroon appellate court upheld a three year jail sentence imposed on Jean-Claude Roger Mbede, for ‘homosexuality’ on the basis of a text message he sent to another man,⁴ and in 2010, in Malawi, a judge imposed the maximum sentence of 14 years imprisonment with hard labour on a gay couple convicted of gross indecency and unnatural acts, after they held an engagement ceremony.⁵ In light of the enthusiastic enforcement of laws criminalising homosexual conduct in many parts of the world, it is timely to ask, what is the UN doing to protect sexual minorities from discrimination and persecution?

The United Nations Human Rights Committee (‘HR Committee’), as the body responsible for monitoring States Parties’ implementation of the International Covenant on Civil and Political Rights (‘ICCPR’),⁶ has an important role to play in promoting and protecting the human rights of LGBT persons. Several Articles in the ICCPR are particularly relevant to this mandate, including Article 2(1) which provides that each State Party

undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Also Article 26 which provides that

[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

- 1 For complete details of the laws and penalties in each of the 80 states, see: drpaulagerber.wordpress.com/ [last accessed 20 May 2014].
- 2 Mauritania, Sudan, Iran, Saudi Arabia and Yemen. This will soon increase to six states once Brunei completes its phasing in of Sharia law which will include death by stoning for homosexuality.
- 3 See, Amnesty International, *Facts and Figures, Making Love A Crime: Criminalization of same-sex conduct in Sub-Saharan Africa*, 25 June 2013, AI Index: AFR 01/007/2013.
- 4 ‘Cameroon jails “gay” man for texting “I’m in love with you” to male friend’, *The Guardian*, 18 December 2012.
- 5 ‘Malawi gay couple get maximum sentence of 14 years’, *BBC News*, 20 May 2010.
- 6 The HR Committee was established pursuant to Article 28 of the International Covenant on Civil and Political Rights 1966, 999 UNTS 171, and is made up of 18 independent experts who meet twice a year for three weeks at a time.

Although neither Article specifically mentions discrimination on the grounds of sexual orientation, it is now well established that these Articles encompass discrimination on the grounds of sexual orientation, although the exact derivation of this is somewhat contentious.⁷

This article considers the work of the HR Committee in using the non-discrimination provisions of the ICCPR to protect the rights of lesbian, gay, bisexual and transgender (LGBT) persons. It does this by analysing three separate components of the Committee's work, namely: concluding observations in relation to States Parties' Periodic Reports, General Comments and Views regarding Individual Communications. This analysis of the HR Committee's work reveals that while there has been improvement in its approach to the promotion and protection of LGBT rights, there is still much more that could be done by this UN body.

A. The operating context of the HR Committee and its membership

The Human Rights Committee is one of the most influential international human rights bodies in the world. Taking just one aspect of its work as an example, the Committee has received over two thousand individual complaints under the Optional Protocol to the ICCPR, the largest of any of the UN treaty committees.⁸ Its work impacts upon multiple aspects of the United Nations system and increasingly its jurisprudence is relied upon by other regional human rights instrumentalities and by national courts. However, it is axiomatic that this body of human rights experts does not operate in a political, social or economic vacuum. By analysing how the HR Committee's practices and procedures have evolved against a backdrop of the financial constraints and political realities that plague the UN treaty body system, Professor Tyagi catalogues a number of attributes of the HR Committee that suggest it is a neutral, diverse, apolitical body consisting of independent and unaligned experts, including

the equitable geographical distribution of membership; representation of different forms of civilization and of the principal legal systems; the renewal of 50 per cent of the membership in alternate years; high moral character of members; duty of members to act in their personal capacity; solemn declaration by members to discharge their responsibility impartially and conscientiously; and servicing of the system by a staff that is bound by the UN Charter not to seek

7 Following the decision in *Toonen v Australia* (488/1992), CCPR/C/50/D/488/1992 (1994); 1–3 IHRR 97 (1994) and an individual concurring opinion of two HR Committee members in (902/1999) *Joslin and Others v New Zealand* (902/1999), CCPR/C/75/D/902/1999; 10 IHRR 40 (2003), the basis of this inclusion is an expansive reading of the term 'sex' in the ICCPR. However, note the criticism by the European Court of Justice in C-249/96, *Grant v South West Trains Ltd* [1998] ECR I-621. The Committee on Economic, Social and Cultural Rights has opted to include sexual orientation as grounds of discrimination through a reading of the term 'other status': UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 20: Non-discrimination in economic, social and cultural rights (art. 2(2)), 25 May 2009, E/C.12/GC/20; 16 IHRR 925 (2009) at para 32.

8 The treaty body that has received the second highest number of complaints is the Committee Against Torture, which has received fewer than 600 individual complaints: see Office of the United Nations High Commissioner for Human Rights, 'Human Rights Bodies-Statistical Information', available at: www2.ohchr.org/english/bodies/petitions/StatisticalInformation.htm [last accessed 20 May 2014].

or receive instructions from any government or from any other authority external to the United Nations.⁹

Nevertheless, an oft-cited critique of the Committee is that because states are responsible for nominating and electing Committee members, this process is often highly politicised and can result in the election of Committee members who lack the requisite expertise or independence to uphold the spirit of the ICCPR. Although the treaty mandates that its members be of ‘high moral character and recognised competence in the field of human rights’,¹⁰ no oversight or guidelines exist to ensure that a certain standard is met. An analysis of the makeup of the Committee membership in 2013 reveals a lack of geographic and gender diversity. Of the current 18 members, seven are from Europe or Western States (39 per cent),¹¹ and only five are female (28 per cent).¹² Little can be said for whether the Committee is diverse in terms of sexual orientation or any other axis. This may suggest ‘a need to improve [Committee member] nomination and election procedures and to diversify their expertise’.¹³

In spite of the shortcomings of the HR Committee membership, the Committee’s objectivity in periodically reviewing States Parties’ compliance with the ICCPR and its consideration of individual complaints has been met with praise. For example, Tyagi acknowledges that Committee members generally ‘consider State reports with great sincerity and utmost care’¹⁴ and that ‘the Committee commands greater respect than some of the other expert bodies and subsidiarity organs’ of the UN.¹⁵

A specific example of how the operating context of the HR Committee can affect whether issues are raised by the HR Committee during periodic reviews is demonstrated in Section 2 below, which examines how changing membership of the expert body can influence what concerns are addressed in the concluding observations that follow the periodic review of a State Party.

2. THE HR COMMITTEE’S CONCLUDING OBSERVATIONS

*I am turned into a sort of machine
for observing facts and grinding out conclusions.*¹⁶

A useful way of evaluating the HR Committee’s work in relation to the rights of LGBT persons is to analyse its concluding observations on States Parties’ Periodic

9 Tyagi, *The UN Human Rights Committee: Practice and Procedure* (Cambridge: Cambridge University Press, 2011) at 55.

10 Article 28 ICCPR.

11 Ms Christine Chanet (France), Mr Cornelis Flinterman (The Netherlands), Mr Walter Kalin (Switzerland), Ms Iulia Antoanella Motoc (Romania), Mr Gerald L. Neuman (USA), Sir Nigel Rodley (UK) and Ms Anja Seibert-Fohr (Germany).

12 Ms Christine Chanet (France), Ms Zonke Zanele Majodina (South Africa), Ms Iulia Antoanella Motoc (Romania), Ms Anja Seibert-Fohr (Germany) and Ms Margo Waterval (Suriname).

13 Tyagi, *supra* n 9 at 147.

14 *Ibid.* at 310.

15 *Ibid.* at 50.

16 Darwin (ed.), *Life and Letters of Charles Darwin* (London: John Murray, 1887), available at: darwin-online.org.uk [last accessed 20 May 2014].

Reports so as to gauge the extent to which it has addressed compliance with Articles 2 and 26 of the ICCPR, in relation to discrimination against LGBT people. This section examines ten years of concluding observations (2003–2013) to determine the HR Committee's level of engagement with LGBT issues and to identify trends in the way this treaty committee has dealt with States Parties' efforts (or lack thereof) to protect the rights of LGBT persons.

Concluding observations provide the HR Committee with an opportunity to comment on the performance of States Parties with respect to the treaty obligations, commend the States Parties for positive progress and note how they can improve. The HR Committee's concluding observations not only provide insight into how the Committee views each State Party's progress but also reveals its perspective on specific human rights issues. They are one mechanism by which a treaty committee can raise awareness of the importance of a particular norm and demonstrate the need for States Parties to implement particular standards.¹⁷ Concluding observations 'have been elevated to be the primary record of the findings and recommendations regarding each State Party under review [and] they constitute important interpretative tools for the respective treaties'.¹⁸ Nevertheless, as O'Flaherty concludes, 'considerable scope remains for the enhancement of concluding observations and follow-up procedures'.¹⁹

The analysis in this part suggests that the HR Committee has begun to address LGBT issues, but only sporadically. It has failed to address, in a systematic manner, the most flagrant violation of LGBT rights, namely, the continued criminalisation of homosexuality in numerous states around the world.

A. Overview of the Concluding Observations

For the period March 2003 to March 2013, the HR Committee prepared Concluding Observations on 139 States Parties and mentioned LGBT issues in relation to 47 States Parties, which amounts to 33.8 per cent of states reviewed. O'Flaherty and Fisher undertook a similar calculation in 2008,²⁰ and concluded that the HR Committee 'frequently raises the issue' of LGBT rights. However, our analysis of ten years of concluding observations suggests there is still significant room for improvement. Of the 54 concluding observations that contained comments in relation to LGBT issues (that is, an individual numbered paragraph), 11 observations were of a positive nature, praising progress that a State Party had made, while 43 involved the Committee encouraging a State Party to make improvements to the protection and promotion of LGBT rights.

17 Eide and Letschert, 'Institutional Developments in the United Nations and at the Regional Level' (2007) 14 *International Journal on Minority and Group Rights* 299 at 327.

18 O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies' (2006) 6 *Human Rights Law Review* 27 at 51.

19 Ibid.

20 O'Flaherty and Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles' (2008) 8 *Human Rights Law Review* 207 at 218. The authors reported that between 2000 and 2006, the HR Committee raised these issues for 13 of the 84 States reported (that is, about 15 per cent of States).

In terms of subject matter, the HR Committee's observations on areas in which a State Party could improve tended to fall into two categories:

1. Anti-discrimination measures (including the failure to prohibit employment-related discrimination, the failure to include the category of sexual orientation in broad anti-discrimination legal regimes, inadequate institutional response to discriminatory attitudes and violence, and unequal ages of consent for sexual activity); and
2. The decriminalisation of homosexual activity.

The comments relating to discrimination sometimes recommended not only the repeal of discriminatory criminal laws but also the adoption of proactive anti-discrimination laws or policies. Other observations were made in relation to the social stigmatisation of LGBT persons, state-mandated violations of LGBT human rights (for example, forcing transsexual women to be placed in clinics to undergo 'sexual reorientation treatments'²¹ and harassment by police and other officials²²) and specific laws which limit the enjoyment of civil rights (for example, laws barring unmarried same-sex partners from renting public housing).²³ Table 1 highlights the different subject areas the HR Committee addressed relating to LGBT issues.

An analysis of these data reveals that most observations by the HR Committee concern the enactment of anti-discrimination laws and countering violence against LGBT persons. Thus, the Committee's priority appears to be to enhance institutional or legal protection of LGBT persons and reduce targeted violence.

It also appears that the HR Committee often comments simultaneously on anti-discrimination in the State Party's laws and the prevalence of hate-based violence against LGBT persons. For instance, in its 105th Session in 2012, the HR Committee noted that a number of Lithuania's laws 'may have the effect of justifying discrimination against [LGBT] individuals' (a structural observation). In the same paragraph, it noted its concern over 'instances of violence and discrimination [and] reports of reluctance on the part of police officers and prosecutors to pursue allegations of human rights violations against persons based on their sexual orientation or gender identity' (a behavioural observation). This appears to conflate two isolated (and sometimes unrelated issues) issues. Addressing these two issues jointly combines 'structural' and 'programmatic' observations, making it less clear what kind of response is required of the State Party.²⁴ The UN High Commissioner for Human Rights (UNHCHR) recently published a report entitled *Strengthening the United*

21 Human Rights Committee, Concluding observations regarding Ecuador, CCPR/C/ECU/CO/5, 4 November 2009, at para 12.

22 Human Rights Committee, Concluding observations regarding Azerbaijan, CCPR/C/AZE/CO/3, 13 August 2009, at para 19.

23 Human Rights Committee, Concluding observations regarding Japan, CCPR/C/JPN/CO/5, 18 December 2008, at para 29.

24 See Egan, 'Strengthening the United Nations Human Rights Treaty Body System' (2013) 13 *Human Rights Law Review* 209.

Table 1. Breakdown of the HR Committee's concluding observations by subject matter

Nature of comments		Frequency of comments	Percentage
Matters of concern	Comment relating solely to anti-discrimination measures and/or reducing violence against LGBT persons	26	48.15%
	Comment relating solely to the decriminalisation of homosexual activity	7	12.96%
	Comments addressing both anti-discrimination and decriminalisation	5	9.26%
	Comments relating to other issues ^a	5	9.26%
			79.63%
Positive comments	Observations praising a State Party for advances it had made with respect to LGBT rights	11	20.37%
Total		54	100%
			20.37%

For example, see *supra* n 23.

Nations Human Rights Treaty Body System (UNHCHR Report).²⁵ The UNHCHR Report advocates separating recommendations for structural change and those for programmatic change in concluding observations because the former should require 'systematic' reform while the latter 'should include indicators by which to measure achievement'.²⁶ Thus, it would have been more propitious if the HR Committee had not combined the above recommendations for Lithuania. Best practice requires that these distinct issues of anti-discrimination and violence against LGBT persons are dealt with separately.

Membership of the HR Committee clearly affects whether LGBT issues are raised during the meetings in which the Committee considers a State Party report. During the same ten-year period, 35 individuals were or continue to be members of the Human Rights Committee.²⁷ Twenty-four members (69 per cent) raised LGBT issues during the Committee's periodic review of States Parties, although, there were nine members who raised these issues only once during the ten-year period. A close analysis of the Summary Records of the periodic review process reveals that, by and

25 Office of the United Nations High Commissioner for Human Rights, *Strengthening the United Nations Human Rights Treaty Body System: A Report by the United Nations High Commissioner for Human Rights*, 26 June 2012, A/66/860.

26 Egan, *supra* n 24 at 18.

27 Tyagi, *supra* n 9 at Appendix IX.

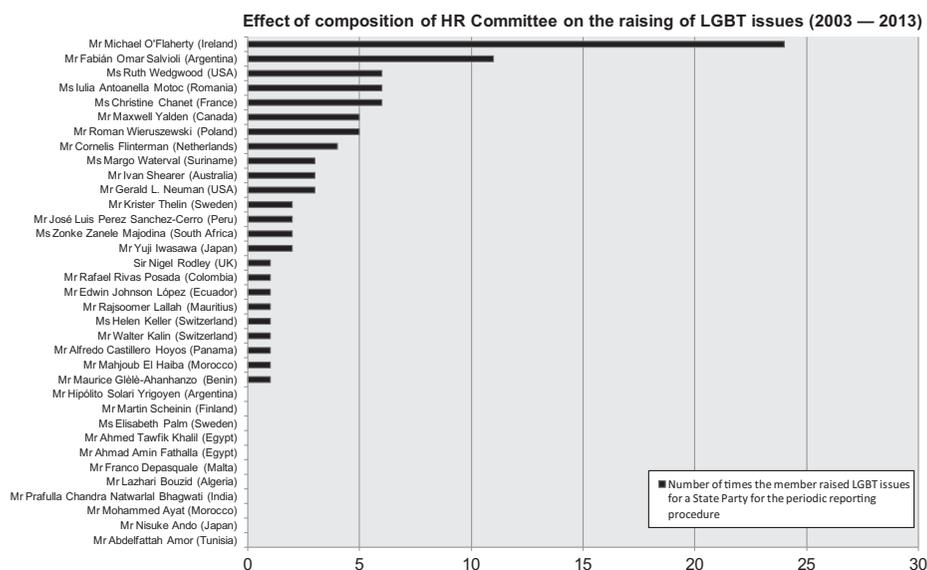


Figure 1. Breakdown of which members of the HR Committee raised LGBT-related issues during reviews of States Parties' compliance with the ICCPR.

large,²⁸ there were only five members who consistently raised LGBT issues—more than five times during the period, that is, more than once every two years on average. The graph (Figure 1) illustrates the number of times each Committee member has raised LGBT issues during the periodic review process.

Figure 1 vividly illustrates the challenging environment in which the Committee operates when reviewing the human rights records of States Parties. Of the five members who raised LGBT issues most, three are no longer on the Committee.²⁹ It will be interesting to observe whether their departures result in a decline in the extent to which LGBT issues are raised, or whether other members will take over responsibility for addressing concerns about the rights of LGBT persons. This examination of which members of the HR Committee focus on the rights of LGBT persons during the periodic review process reinforces Tyagi's observation that the HRC Committee does not operate in a vacuum and that the makeup of the membership affects the trajectory of the Committee as a whole.³⁰

The 11 members who have never raised LGBT issues are from various states, including those where the recognition of LGBT rights would be considered to be

28 Summary Records for a small number of Meetings of the HR Committee were missing or unavailable on the HR Committee website.

29 Ms Ruth Wedgwood (USA) retired in 2010, Mr Michael O'Flaherty (Ireland) retired in 2012 and Ms Julia Antoanella Motoc (Romania) retired in 2013.

30 It would be interesting to undertake a similar analysis of how other 'sensitive' human rights issues are influenced by the membership of the HR Committee. For example, are there certain members who consistently raise issues such as women's reproductive rights, including abortion.

well advanced.³¹ The majority of the members who have never raised LGBT issues are from states which still criminalise homosexuality (six of the 11 members).³² However, a member's home state appears to be less relevant than their individual commitment to the rights of LGBT persons. This is highlighted by the two members from Argentina who served on the Committee during the decade from 2003–2013. Mr Hipólito Solari Yrigoyen was a member of the HR Committee from 1999 to 2006, and appears to have never raised LGBT concerns in the period analysed for this research. In contrast, his compatriot, Mr Fabián Omar Salvio, whose HR Committee membership began in 2009 and is due to end in December 2016, has raised LGBT concerns 11 times in a period of four years.

The fact that so many members of the HR Committee neglect to consistently comment on a State Party's failure to protect the rights of LGBT persons supports Tyagi's observations regarding the shortcomings of the processes for the election of and participation by members of the HR Committee.

B. Positive aspects of the HR Committee's concluding observations

An analysis of concluding observations over a decade reveals three aspects that give cause for optimism, namely, an increased number of references to LGBT rights, increased depth and detail in the observations, and greater use of LGBT-precise language.

(i) Increased number of references to LGBT rights

In the decade analysed, it is clear that the HR Committee has increased its references to LGBT issues in its concluding observations. For instance, in 2004 the HR Committee considered 15 States Parties' reports, and made only four comments regarding LGBT issues. In 2013 the HR Committee again considered 15 States Parties' reports, but this time made 12 recommendations relating to LGBT issues. In the second half of the period examined, the HR Committee significantly increased the number of times it addressed LGBT issues in any state. In the first five years (2003–2007), the HR Committee commented on a state's efforts with respect to LGBT rights, on average, less than once per session (0.867 comments per session). In the second five years (2007–2013), the HR Committee dramatically increased its commentary on LGBT issues, making an average of over two and a half comments per session (2.563 comments per session). Although, in general, the HR Committee dedicates a single paragraph to LGBT issues per State Party, in recent years, it has dedicated two and even three paragraphs to these issues per State Party.³³ Table 2 and Figure 2 illustrate this steady increase from the 77th Session in 2003 to the 107th Session in 2013.

31 For example, Japan, Sweden and Finland. See, Itaborahy and Zhu, *State Sponsored Homophobia Report*, 6th edn (International Lesbian, Gay, Bisexual, Trans and Intersex Association, May 2013).

32 Tunisia, Morocco, Algeria, Egypt (two members) and India, where homosexuality was decriminalised in 2009 pursuant to a decision of the New Delhi High Court which found Section 377 of the Criminal Code unconstitutional. However, in December 2013, the Supreme Court overturned that decision, making sex between consenting homosexual partners once again a criminal offence.

33 See, for example, Human Rights Committee, concluding observations regarding Turkey, CCPR/C/TUR/CO/1, 13 November 2012, at paras 8 and 10; and Human Rights Committee, Concluding observations regarding Lithuania, CCPR/C/LTU/CO/3, 31 August 2012, at paras 3, 8 and 15.

Table 2. Breakdown of the HR Committee's work on LGBT rights by year

Year	No. of State Parties reviewed	No. of comments made in regards to LGBT issues	Average number of LGBT comments made per State Party
2003	12	3	0.25
2004	15	4	0.27
2005	14	2	0.14
2006	11	2	0.18
2007	12	2	0.17
2008	15	4	0.27
2009	12	5	0.42
2010	13	8	0.62
2011	14	8	0.57
2012	15	12	0.80
2013 ^a	6	4	0.67
Total	139	54	
Average per year ^b	13.3	5	

^aThe last two sessions of 2013 had not been completed at the time of writing, and are therefore not included in this table.

^bAverages per year do not include figures from 2013.

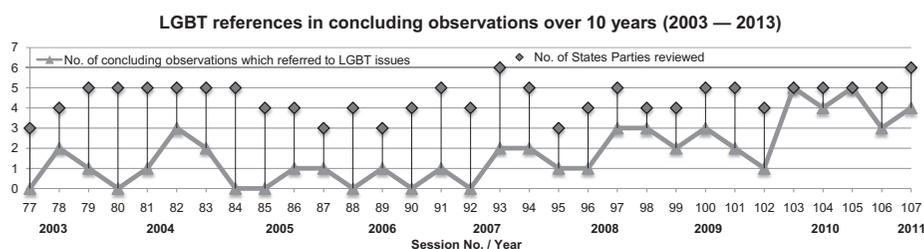


Figure 2. Graph of the HR Committee's references to LGBT rights by session.

(ii) *Increase in depth and detail of commenting for individual states*

An analysis of the concluding observations for a single State Party over two reporting periods demonstrates that the HR Committee has begun to publish longer, more detailed recommendations. The HR Committee reviewed the Philippines' compliance with the ICCPR in October 2003, and again in October 2012. In 2003 the HR Committee made a generic 115-word recommendation to 'the State party to take the necessary steps to adopt legislation explicitly prohibiting discrimination...related to sexual orientation'.³⁴ In 2012 the HR Committee wrote a 196-word recommendation, a 70 per cent increase, and referred specifically to the 'Ang Ladlad case', a 'statement of the delegation that it will take up a leadership role to promote [LGBT] rights', 'the "grave scandal" provision provided under Article 200 of the Revised

34 Human Rights Committee, Concluding observations regarding the Philippines, CCPR/CO/79/PHL, 1 December 2003, at para 18.

Penal Code' and the 'comprehensive anti-discrimination bill that prohibits discrimination on grounds of sexual orientation and gender identity'.³⁵ A similar observation can be made about the reviews of Hong Kong. In 2006 the HR Committee wrote 17 words on LGBT issues,³⁶ and in 2013 it wrote 128 words—over seven times the amount.³⁷ In 2004, no relevant observations were made in the concluding observations for Lithuania or Colombia, but in subsequent reviews in 2012 and 2010,³⁸ respectively, substantive recommendations were made regarding LGBT issues. Indeed, in 2012 the HR Committee made their lengthiest observation yet with respect to LGBT issues about Lithuania—472 words.³⁹

Although counting the words used is a simplistic way to measure a treaty committee's engagement with LGBT issues,⁴⁰ a review of the Committee's concluding observations demonstrate that the more recent concluding observations are significantly more detailed, focused and contain actionable comments. The more nuanced and comprehensive the recommendations of the Committee, the more likely it is that a State Party will be able to report on the degree to which it has implemented the recommendations of the Committee, at its next periodic review.

(iii) *Changes in use of identity terms*

Before 2009 the dominant terminology for referring to LGBT persons was 'sexual orientation'. In October 2009, following the 97th Session, the HR Committee for the first time used the term 'LGBT' in its review of Russia, commenting about 'acts of violence against lesbian, gay, bisexual and transgender (LGBT) persons'.⁴¹ Since then, the use of the term 'LGBT' has become ubiquitous. In the concluding observations of the 105th, 106th and 107th Sessions, the HR Committee used the term LGBT in each observation made relating to sexual minority rights. Around the same time, the HR Committee also began using the phrase 'gender identity and activity'. In two instances in 2012, the HR Committee mentioned 'intersex' persons (in relation to Kenya⁴² and Guatemala⁴³) and in the case of Kenya, also used the more expansive acronym, LGBTI (the 'I' denoting intersex). The HR Committee's use of the terms 'LGBT', 'LGBTI', 'gender identity' and 'intersex' signals a greater sensitivity to the diversity and dispersed-nature of sexuality, because as compared with

35 Ibid. at para 10.

36 Human Rights Committee, Concluding observations regarding Hong Kong Special Administrative Region, CCPR/C/HKG/CO/2, 21 April 2006, at para 4.

37 Human Rights Committee, Concluding observations regarding Hong Kong, China, CCPR/C/CHN/HKG/CO/3, 26 March 2013, at para 23.

38 Human Rights Committee, Concluding observations regarding Lithuania, CCPR/C/LTU/CO3, 31 August 2012, at para 3; and Human Rights Committee, Concluding observations regarding Colombia, CCPR/C/COL/CO/6, 4 August 2010, at para 12.

39 Human Rights Committee, Concluding observations regarding Lithuania, CCPR/C/LTU/CO3, 31 August 2012, at para 3.

40 Cf UNHCHR Report, *supra* n 25 at 61–2.

41 Human Rights Committee, Concluding observations regarding Russia, CCPR/C/RUS/CO/6, 29 October 2009, at para 27.

42 Human Rights Committee, Concluding observations regarding Kenya, CCPR/C/KEN/CO/3, 31 August 2012, at para 8.

43 Human Rights Committee, Concluding observations regarding Guatemala, CCPR/C/GTM/CO/3, 19 April 2012, at para 11.

'sexual orientation', LGBT specifically encompasses four distinct segments of the homosexual population.

However, sexual identity labels are highly political.⁴⁴ There are limitations in the use of both the terms 'sexual orientation', 'LGBT' and their variants. Using LGBT in certain contexts can be over-inclusive because it encompasses distinct segments of sexual identity. The HR Committee has used language relating to sexual minorities inappropriately on several occasions. For example, stating 'that transsexual women have been placed in private clinics or rehabilitation centres in order to undergo so-called sexual reorientation treatments'⁴⁵ demonstrates a misunderstanding of the nature of transsexuality; confusing sexual orientation with gender identity. This suggests the lack of a nuanced understanding on the part of the HR Committee.

Further, as Otto has pointed out in relation to adding a reference to the word 'women' in human rights documents, 'it is not enough to ensure the indivisibility of women's human rights, without also attending to the structural causes of women's marginalization and exclusion'.⁴⁶ Some scholars have objected to the use of identity terms deriving from LGBT and 'sexual orientation' because their use 'inevitably excludes potential subjects in the name of representation'.⁴⁷ The problem is arguably most pronounced in relation to non-Western realities of sexuality and may be a key factor in explaining the slow progress in the recognition of and protection of rights in those regions. According to Butler, a theorist who has done much to examine the risks and limitations of identity politics, homosexuality and heterosexuality are not fixed categories. A person is merely in a condition of 'doing straightness' or 'doing queerness'.⁴⁸ In the context of human rights, this is not merely a problem of semantics. Identity labels vary from culture to culture. Discourse choice by UN organs that 'appear to globalize essentialist and culturally specific notions of "lesbian/gay identity" may be seriously counter-productive'.⁴⁹ For instance, the term 'homosexual' [connotes] a 'European notion of static homosexual identity' which fails to reflect that 'same-sex affective and domestic relationships were not at all unusual in many precolonial cultures' in Africa.⁵⁰ And terms such as LGBT can never encompass groups such as the Fa'afafine (boys raised as girls) in Samoa. As such, the Western paradigm of sexual identity and the dominant binary categories of anti-discrimination normative discourse (gay/straight, man/woman, even black/white) do not always

44 See, for example, Waites, 'Sexual Orientation, Human Rights and Global Politics' (Paper for the Annual Meeting of the (British) Political Science Association, University of Bath, 11–13 April 2007).

45 Human Rights Committee, Concluding observations regarding Ecuador, CCRP/C/ECU/CO/5, 4 November 2009, at para 12.

46 Di Otto, 'Gender Comment: Why Does the UN Committee on Economic, Social and Cultural Rights Need a General Comment on Women' (2002) 14 *Canadian Journal of Women and the Law* 1 at 2.

47 Jagose, *Queer Theory* (New York: New York University Press, 1996) at 82.

48 Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York/London: Routledge, 2006).

49 Saiz, 'Bracketing Sexuality: Human Rights and Sexual Orientation—A Decade of Development and Denial at the UN', Working Paper No 2, *Sexual Policy Watch*, 2 November 2005, at 16; see also, Katyal, 'Exporting Identity' (2002) 14 *Yale Journal of Law and Feminism* 97; Phillips, 'Constituting the Global Gay', in Herman and Stychin (eds), *Sexuality in the Legal Arena* (London: Athlone, 2000); and Adam, Duyvendak and Krouwel (eds), *The Global Emergence of Gay and Lesbian Politics* (Philadelphia: Temple University Press, 1998).

50 Patton, 'From Nation to Family: Containing African Aids', in Ablove, Barale and Halperin (eds), *The Lesbian and Gay Studies Reader* (Great Britain: Routledge, 1993) 127 at 133.

adequately reflect and address the sexual realities of non-Western states. In Waites' comprehensive analysis of the lesser-problematised, yet increasingly ubiquitous term 'sexual orientation', he concludes that

dominant understandings of 'sexual orientation' tend to assume that it refers to a fixed characteristic of individuals, existing independently of their current socio-cultural reality, and that this characteristic involves a desire towards individuals of a single sex'. However, it has been argued that 'sexual orientation' is not inherently incompatible with sexual diversity with respect to bisexuality, or queer sexualities that decentre gender as the focus of sexual 'object-choice', 'desire' and/or behaviour. Rather, 'sexual orientation' and 'gender identity' hold a range of potential meanings that are subject to contestation.⁵¹

Thus, it may be that the search for a general, all-encompassing term is forlorn, and that the HR Committee will need to carefully examine the actual realities of sexual identity or performativity of the State Party under review in order to accurately and potentially address a particular state's issues.

C. Areas in which the HR Committee could improve its concluding observations

(i) *Failure to comment on the decriminalisation of same-sex sexual activity*

Over the decade 2003–2013, the HR Committee published 13 concluding observations that condemned a State Party's criminalisation of same-sex sexual activity. In that same decade, the number of states for which same-sex sexual activity is criminal (or was criminal at the time of reporting) was 31.⁵² Thus, only 41 per cent of the States Parties which criminalise same-sex sexual conduct received any comment on this by the HR Committee. The Honourable Michael Kirby, speaking about laws which criminalise same-sex conduct, has said that

in most parts of the Commonwealth, the laws are no dead-letter having no official backing. Far from being un-enforced and no more than an embarrassing legal relic, the criminal laws are used in many lands to sustain prosecutions, police harassment and official denigration and stigmatisation.⁵³

Even if provisions of this kind have 'never been applied against anyone' as claimed by the Seychelles' Government,⁵⁴ O'Flaherty and Fisher maintain that 'such laws can

51 Waites, 'Critique of 'Sexual Orientation' and 'Gender Identity' in Human Rights Discourse: Global Queer Politics Beyond the Yogyakarta Principles (2009) 15 *Contemporary Politics* 137 at 152.

52 Angola, Yemen, Iran, Kenya, Turkmenistan, Jamaica, Kuwait, Malawi, Ethiopia, Dominica, Seychelles, Togo, Cameroon, Uzbekistan, Tanzania, Tunisia, Botswana, Libyan Arab Jamahiriya, Algeria, Zambia, Sudan, Grenada, Barbados, Saint-Vincent and the Grenadines, Syrian Arab Republic, Mauritius, Morocco, Namibia, Uganda, Equatorial Guinea and Sri Lanka: see Itaborahy and Zhu, *supra* n 31.

53 Kirby, 'Homosexual Law Reform: An Ongoing Blind Spot of the Commonwealth of Nations', 16th Commonwealth Law Conference, Hong Kong, 8 April 2009, at 6.

54 Seychelles, Consideration of Seychelles, UPR Reports, 20th Plenary Meeting, 21 September 2011, H.E. Mrs Sandra Michel, Second Secretary, Treaties and Consular Affairs Section, Ministry of Foreign Affairs

be used to arbitrarily harass or detain persons of diverse sexual orientations and gender identities, to impede the activities of safer sex advocates or counsellors, or as a pretext for discrimination in employment or accommodation'.⁵⁵

Thus, for the HR Committee to fail to comment on this issue in more than half of the States Parties with such laws during the periodic review process reveals major gaps in its procedure. In 2011, in relation to Togo it was noted that 'the Committee remains concerned about the criminalization of sexual relations between consenting adults of the same sex, punishable by 1 to 3 years imprisonment and a fine'.⁵⁶ In March of the same year, the HR Committee considered the situation of civil and political rights in Seychelles (in the absence of a State Report), in which same-sex sexual activity is also illegal and punishable by 14 years imprisonment,⁵⁷ but due to the absence of a report 'decided to await the State Party's report before taking matters any further'.⁵⁸ Although the HR Committee's provisional concluding observations sent to the State Party are unpublished, the List of Issues fails to mention the criminalisation of homosexuality.⁵⁹ One explanation for this discrepancy is that the NGO shadow report for Togo mentioned the law that criminalised same-sex activity,⁶⁰ whereas there was no NGO shadow reports submitted for the Seychelles. If this explanation is correct, it demonstrates the importance of NGO shadow reports in bringing issues to the attention of the HR Committee. Interestingly, in September of the same year, as part of its feedback to the Human Rights Council pursuant to the Universal Periodic Review process, an official of the Seychelles Government was cited as agreeing to decriminalise homosexuality 'pretty soon, as the government and civil society want so' (sic).⁶¹

The inconsistency in commenting on the issue of decriminalisation is not, as might be expected, limited to the earlier years of the decade examined. As recently as 2013, the HR Committee failed to comment on the criminalisation of same-sex sexual activity in Angola. A survey of the 11 NGO shadow reports for Angola submitted for this Session reveal that no NGO commented on LGBT issues in this state.⁶² In

Consideration of the UPR Reports of Seychelles, A/HRC/18/7, 19th Plenary Meeting, Human Rights Council, 18th Session Agenda and Draft programme of work.

55 O'Flaherty and Fisher, supra n 20 at 210–11 (citations omitted).

56 Human Rights Committee, Concluding observations regarding Togo, CCPR/C/TGO/CO/4, 28 March 2011, at para 14.

57 Itaborahy and Zhu, supra n 31 at 56.

58 Human Rights Committee, Report of the Human Rights Committee, Vol. 1, A/67/40, 18 June 2012, at para 95.

59 Human Rights Committee, List of issues to be taken up in the absence of an initial report on the Republic of Seychelles, CCPR/C/SYC/1, 15 April 2010.

60 Centre for Civil and Political Rights, *Rapport de la société civile sur la mise en oeuvre du PIDCP (Réponses à la liste des points à traiter, CCPR/C/TGO/Q/4)*, at paras 12–13.

61 Seychelles, Consideration of Seychelles, UPR Reports, supra n 54.

62 The following reports from Civil Society Organisations were submitted for consideration by the HR Committee in relation to Angola: see Amnesty International – Task force, Amnesty International submission to the African Commission – Task force, Global Initiative for Economic, Social and Cultural Rights, Global Initiative to End All Corporal Punishment of Children, Human Rights Litigation and International Advocacy Clinic and Human Rights Program, University of Minnesota, Human Rights Watch, International Disability Alliance (IDA) — Task force, International Disability Alliance (IDA): The right to vote of persons with disabilities, International Fellowship Of Reconciliation (IFOR), International Organisation for Migration, National NGO Coalition.

the same Session, the HR Committee commented on Belize's prohibition of same-sex relations.⁶³ Once again, the discrepancy between the Committee's treatment of these two States Parties may be attributed to NGO activity, since a shadow report relating to Belize highlighted 'the widespread and systematic human rights violations against sexual minorities in Belize'.⁶⁴

At the very least, there is little consistency in the way the HR Committee addresses decriminalisation of same-sex sexual activity from year to year and state to state. The Committee has stated in a General Comment that States Parties are required to take all necessary steps to enable every person to enjoy these rights, which includes 'the removal of obstacles to the equal enjoyment of such rights, the education of the population and of State officials in human rights, and the adjustment of domestic legislation'.⁶⁵ The HR Committee could improve its own practices by consistently monitoring whether States Parties are taking such steps to ensure that sexual minorities enjoy human rights protection.

(ii) *Lack of specificity and actionable recommendations*

NGOs have endorsed the recently released UNHCHR Report urging treaty bodies to formulate 'targeted, specific, measurable, achievable and time-bound' recommendations.⁶⁶ Often the HR Committee's observations regarding LGBT issues were general, vague and offered little guidance to the State Party under review. For example, it made the following recommendations to several States Parties:

- 'state clearly and officially that it does not tolerate any form of social stigmatization';⁶⁷
- 'provide effective protection of LGBT persons';⁶⁸ and
- 'launch a campaign'.⁶⁹

While these comments cannot be faulted for their sentiment and aims, they offer little guidance on the expectations of the HR Committee. By repeating the same generic statements *ad nauseum*, the HR Committee demonstrates that there was no genuine consideration of the causes of infringements of the rights of LGBT persons,

63 Human Rights Committee, Concluding observations regarding Belize, CCPR/C/BLZ/CO/1, 26 March 2013, at para 13.

64 Heartland Alliance for Human Needs and Human Rights and the United Belize Advocacy Movement, *Human Rights Violations of Lesbian, Gay, Bisexual and Transgender (LGBT) People in Belize: A Shadow Report* (Geneva, March 2013) at 2.

65 Human Rights Committee, General Comment No 28: Equality of rights between men and women (art. 3), CCPR/C/21/Rev.1/Add.10 (2000); 8 IHRR 303 (2001), at para 3.

66 Amnesty International, *Pretoria Statement on the Strengthening and Reform of the UN Human Rights Treaty Body System*, Pretoria, 20–21 June 2011, IOR 40/012/2011, 21 July 2011, at para 9.1.

67 Human Rights Committee, Concluding observations regarding Armenia, CCPR/C/ARM/CO/2, 31 August 2012, at para 10; Human Rights Committee, Concluding observations regarding Dominican Republic, CCPR/C/DOM/CO/5, 19 April 2012, at para 16; and Human Rights Committee, Concluding observations regarding Guatemala, CCPR/C/GTM/CO/3, 19 April 2012, at para 11.

68 *Ibid.*

69 Human Rights Committee, Concluding observations regarding Mexico, CCPR/C/MEX/CO/5, 7 April 2010, at para 21.

and possible solutions. Furthermore, a generic recommendation to ‘state clearly and officially’ carries the risk of arbitrary or capricious application.

The HR Committee’s generic approach to the use of the phrases ‘state clearly and officially that it does not tolerate any form of social stigmatization’ and ‘send a clear message’ in its comments in 2012 for Armenia, Dominican Republic and Guatemala is particularly problematic.⁷⁰ By using these simple, generic comments, with no consideration of the different circumstances of the States Parties, and the ways in which a State Party might implement a campaign to fight discrimination, the Committee wasted the opportunity to make constructive, actionable recommendations. One example of a more useful recommendation made by the HR Committee to a State Party is found in the concluding observations for Belize in 2013, which included the following:

The State party should review its Constitution and legislation to ensure that discrimination on grounds of sexual orientation and gender identity are prohibited. The Committee further urges the State party to include in its initial report information on the outcome of the case challenging the constitutionality of section 53 of the Criminal Code and section 5(1)(e) of the Immigration Act. The State party should also ensure that cases of violence against LGBT persons are thoroughly investigated and that the perpetrators are prosecuted, and if convicted, punished with appropriate sanctions, and that the victims are adequately compensated.⁷¹

This comment specifies the object of the criticism (‘discrimination on grounds for sexual orientation and gender identity’), the purpose of the comment (ensuring that discrimination is prohibited), a primary means of compliance (reviewing the Constitution and legislation), complementary means of achieving compliance with the norm (investigating and punishing cases of violence, and compensating victims) as well as some degree of follow-up action (by requesting that the State Party report on the outcome of a constitutional challenge). Two ways in which the comment might be improved is by adding in a suggested timeline for progress in the recommendation and a goal (or series of goals) for the particular recommendation.

A further concern in the generality of the comments is the apparent disregard for the possible impact of recommendations for reform on the people affected by the laws. Scholars have noted that real damage can result from untested or unsuitable human rights strategies.⁷² An example of this phenomena occurred in 2006 when the Same Sex Marriage (Prohibition) Act was introduced in Nigeria to criminalise

70 Human Rights Committee, Concluding observations regarding Armenia, CCPR/C/ARM/CO/2, 31 August 2012, at para 10; Human Rights Committee, Concluding observations regarding the Dominican Republic, *supra* n 67 at para 16; and Human Rights Committee, Concluding observations regarding Guatemala, *supra* n 67 at para 11.

71 Human Rights Committee, Concluding observations regarding Belize, *supra* n 63 at para 13.

72 David Kennedy refers to this as the ‘dark side of virtue’: see Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Oxfordshire: Princeton University Press, 2004).

same-sex marriage and LGBT advocacy.⁷³ Human rights groups in Nigeria ‘deliberately kept a fairly low profile in their protests about the legislation, as they believed Nigerian politics would be focused on the upcoming election’ and believed the bill would be forgotten.⁷⁴ However, an international campaign to ‘take urgent action to press their government’s to lobby the Nigerian government to uphold international human rights law and to drop this draconian legislation’,⁷⁵ caused increased international awareness of the bill, which resulted in the bill reappearing.

Concluding observations are the primary means by which the Human Rights Committee is able to make public findings and recommendations for States Parties to the ICCPR. As a result, they are a fundamental tool to clarify and enforce treaty norms. Given that they are a rare opportunity for a body of experts to analytically examine States Parties’ compliance with the ICCPR, considerable effort should be invested in this process. One of the strategies proffered below in Section 5 is to adopt tailored programmes for states and regions to increase effectiveness and reduce the possibility of wasted opportunities for critical review, or worse, endanger people the ICCPR is designed to protect.

3. THE HUMAN RIGHTS COMMITTEE’S GENERAL COMMENTS

*Organisation can never be a substitute for initiative and for judgement*⁷⁶

A. Nature and status of General Comments

In addition to reviewing States Parties’ compliance with the ICCPR, the HR Committee drafts General Comments designed to clarify and explain the nature of the obligations imposed by the Covenant. General Comments have become an important instrument of treaty committees, independent of the reviewing system.⁷⁷ The function of General Comments is unsettled and they have been used by the UN Treaty Committees in various ways so that ‘General Comments tend to range from describing what the law *is* to articulating what the law *should be*; from business-as-usual to best practice.’⁷⁸ The HR Committee states that General Comments represent ‘its interpretation of the content of human rights provisions’⁷⁹ and are focused on ‘thematic issues or methods of work’.⁸⁰

73 Mittelstaedt, ‘Safeguarding the Rights of Sexual Minorities: The Incremental and Legal Approaches to Enforcing International Human Rights Obligations’ (2008) 9 *Chicago Journal of International Law* 353 at 371.

74 Ibid. at 374.

75 Tatchell, *Nigeria — Vicious New Anti-Gay Law: World’s Most Sweeping, Draconian Homophobic Legislation*, 19 January 2006, available at: www.petertatchell.net/a2/print_versions/251.htm [last accessed 20 May 2014].

76 Brandeis, *Business-A Profession* (1914), available at: www.law.louisville.edu/library/collections/brandeis/node/218 [last accessed 20 May 2014].

77 Buergenthal, ‘The U.N. Human Rights Committee’, in *Max Planck Yearbook of the United Nations*, Vol. 5 (2001) 341 at 386–87.

78 Gerber, Kyriakakis and O’Byrne, ‘General Comment 16 on State Obligations Regarding the Impact of the Business Sector on Children’s Rights: What is its Standing, Meaning and Effect?’ (2013) 14 *Melbourne Journal of International Law* at 10, available at: www.law.unimelb.edu.au/mjil [last accessed 20 May 2014].

79 See www2.ohchr.org/english/bodies/hrc/comments.htm [last accessed 13 August 2012].

80 See www2.ohchr.org/english/bodies/treaty/index.htm [last accessed 13 August 2012].

Alston describes General Comments as a primarily descriptive tool

by which a UN human rights expert committee distils its considered views on an issue which arises out of the provisions of the treaty whose implementation it supervises.... In essence the aim is to spell out and make more accessible the 'jurisprudence' emerging from its work.⁸¹

Indeed, the HR Committee continually debates the nature and function of the General Comment. At its 107th Session in 2012, in relation to the drafting of a new General Comment on Article 9 of the ICCPR, Committee members debated the relative merits of collecting and explaining the Committee's previous findings in relation to Article 9 or developing the interpretation of the rights and articulating the Committee's position on areas which it had not yet specifically addressed in either its concluding observations or its Views on Individual Communications. The core of the ongoing debate is whether General Comments should capture and distil the *existing* state of international law, or go further by identifying applications and proactive steps for the *evolution* of different treaty provisions. The probable future for General Comments is likely to be a hybrid of these two approaches, interweaving normative and interpretive guidelines.

The legal status of General Comments is also subject to some debate.⁸² During the early years of the operation of the treaty committees, it is unlikely that General Comments were 'regarded as having any distinct status in law, being essentially procedural and descriptive, and therefore rather innocuous in character'.⁸³ Although General Comments do not legally bind States Parties 'they have acquired a more normative and prescriptive status than in the past, though the precise contours of that status are difficult to define'.⁸⁴ According to Otto, General Comments are perceived as 'quasi-judicial' and as carrying 'enormous political and moral weight'.⁸⁵ Notwithstanding the absence of a settled or formal legal character, the UNHCHR Report supports General Comments as an effective way for treaty committees to assist States Parties to comply with their treaty obligations.⁸⁶

B. HR Committee's General Comments

Since 1981, the HR Committee has published 34 General Comments. Strikingly, the Committee has never referred to LGBT issues in any of its General Comments. One reason for this absence may be that sexuality 'remains one of the arenas where the universality of human rights has come under the most sustained attack'.⁸⁷ The closest

81 Alston, 'The Historical Origins of the Concept of "General Comments" in Human Rights Law', in Boisson de Chazournes and Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (Leiden: Martinus Nijhoff, 2001) 763 at 764.

82 See discussion in Gerber, Kyriakakis and O'Byrne, supra n 78 at 6–8; and Alston, supra n 81 at 763, 764.

83 Citations omitted.

84 Gerber, Kyriakakis and O'Byrne, supra n 78 at 7.

85 Otto, supra n 46 at 11.

86 UNHCHR Report, supra n 25 at 82.

87 Saiz, supra n 49 at 15.

it has come to acknowledging LGBT persons has been to recognise, in General Comment No 19, 'the existence of various forms of family'.⁸⁸

Although the increase in references to LGBT rights in the HR Committee's concluding observations indicates that national or regional cultural values do not override fundamental human rights, the lack of any acknowledgment of LGBT rights in any General Comment suggests that 'in practice states are still afforded a wide margin of discretion within the UN human rights system when it comes to matters of sexuality'.⁸⁹ During the HR Committee's consideration of a periodic report in 2006, a representative of a State Party commented that there was no mention of transsexual people in the Covenant, the inference being that transsexuals are not entitled to the same protection as other people.⁹⁰ Such an observation is evidence of the urgent need for the HR Committee to clarify the application of the human right norms in the Covenant to sexual minorities in the form of a General Comment addressing the relationship between the ICCPR and LGBT rights.

There have been numerous opportunities to include reference to LGBT rights in the 34 General Comments published by the HR Committee. For example, General Comment No 18 which focused on the non-discrimination provisions of Articles 2 and 26, would have been an ideal opportunity to elaborate on the meaning of discrimination on the grounds of 'other status', and to specify that it included sexual orientation and gender identity. However, in 1989, when General Comment 18 was published, lobbying for LGBT rights was in its infancy, and it may have been too early for such a statement. After all, the HR Committee had not yet been presented with any Individual Communications relating to this issue; *Toonen v Australia*,⁹¹ the first complaint in this area, was not lodged until December 1991, and not decided until early 1994.

In General Comment 28 on the equality of rights between men and women, the HR Committee explained:

Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes....States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's equal right to equality before the law and to equal enjoyment of all Covenant rights.⁹²

The HR Committee could have mentioned that States Parties have a responsibility to protect the rights of lesbians including preventing violence perpetrated against them under the guise of cultural, religious or traditional attitudes, including, for example, 'corrective rape' used in some cultures as a means to 'convert' lesbians

88 Human Rights Committee, General Comment No 19: Protection of the family, the right to marriage and equality of the spouses (art. 23), HRI/GEN/1/Rev.9 (Vol. I) (1990); 1–32 IHRR 24 (1994) at para 2.

89 Saiz, *supra* n 49 at 16.

90 O'Flaherty and Fisher, *supra* n 20 at 222.

91 *Toonen v Australia*, *supra* n 7.

92 Human Rights Committee, General Comment No 28: Equality of rights between men and women (art. 3), CCPR/C/21/Rev.1/Add.10 (2000); 8 IHRR 303 (2001) at para 5.

into straight women.⁹³ Underlying this practice is the belief that homosexuality is a curable disease.

General Comment 31 on the nature of the general legal obligation imposed on States Parties was promulgated in 2004, a decade after the *Toonen* decision. In this General Comment, the HR Committee explained that '[i]n fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of article 26.'⁹⁴ It would have been useful for the HR Committee, here or elsewhere in the General Comment, to add that discrimination on the basis of sexual orientation falls within 'other status' in this Article.

General Comment No 34 on Article 19, freedom of opinion and expression, was adopted in 2011.⁹⁵ During the second reading of a draft version of the General Comment, the Committee discussed a proposal by several NGOs to include a reference in the General Comment to the right of expression of 'dress, as well as forms of expression of sexual orientation and gender identity' in paragraph 12 of the General Comment.⁹⁶ The Committee members were reluctant to include such a reference. Mr Fathalla and Mr Thelin objected on the basis that paragraph 12 dealt with forms of expression and not content of expression.⁹⁷ Ms Chanet similarly articulated discomfort with limiting sexual orientation to a form of expression and said that if the Committee wanted to include 'dress' it should be gender neutral.⁹⁸ Sir Nigel Rodley not only expressed concern about whether the proposed inclusion had 'the same generic quality as the other forms of expression enumerated', but also noted that 'it was undoubtedly a form of expression that merited protection'.⁹⁹ As a result, the Committee agreed to the addition of the phrase 'forms of dress' to paragraph 12, without any reference to sexual orientation or gender identity.

This decision not to include a specific reference to the different forms of expression of sexual orientation and gender identity is disappointing as gender identity clearly encompasses more than forms of dress alone.¹⁰⁰ However, the greater disappointment is the remarkable absence of any mention of sexual orientation or gender identity in a General Comment about freedom of expression. Standards and principles of freedom of expression inextricably connect to the rights of LGBT persons

93 See Brown, 'Corrective Rape in South Africa: A Continuing Plight Despite an International Human Rights Response' (2012) 18 *Annual Survey of International & Comparative Law* 45.

94 Human Rights Committee, General Comment No 31: Nature of the general legal obligation imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (2004); 11 IHRR 905 (2004), at para 8.

95 Human Rights Committee, General Comment No 34: Freedoms of opinion and expression (art. 19), CCPR/C/GC/34 (2011); 19 IHRR 303 (2012).

96 Human Rights Committee, Summary Record of the 2788th Meeting, 23 March 2011, CCPR/C/SR.2788, at para 2; and O'Flaherty, 'Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 24' (2012) 12 *Human Rights Law Review* 627 at 648.

97 Human Rights Committee, Summary Record of the 2788th Meeting, 23 March 2011, CCPR/C/SR.2788, at paras 27 and 28.

98 *Ibid.* at para 29.

99 *Ibid.* at para 3.

100 *Ibid.* at para 30.

because violations of the human rights of LGBT persons is often triggered by the mere expression of sexual or gender identity, through dress or otherwise.¹⁰¹

Article 19 of the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity ('Yogyakarta Principles') supports a comprehensive right to freedom of expression without limitations in relation to gender identity or sexual preference. It states:

Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.¹⁰²

In *Covering: The Hidden Assault on Our Civil Rights*, Professor Kenji Yoshino promotes the idea of a spectrum of self-censorship—'conversion', 'passing' and 'covering'—explaining '[i]f conversion divides ex-gays from gays, and passing divides closeted gays from out gays, covering divides normal from queers.'¹⁰³ He further explains that the demands placed on rights-holders by denial of freedom of expression are a manifestation of discrimination which

directs itself not against the entire group, but against the subset of the group that fails to assimilate to mainstream norms. This new form of discrimination targets minority cultures rather than minority persons. Outsiders are included, but only if we behave like insiders — that is, only if we cover... This covering demand is the civil rights issue of our time. It hurts not only our most vulnerable citizens but our most valuable commitments.¹⁰⁴

The Yogyakarta Principles, together with Professor Yoshino's insightful analysis, highlight that freedom of expression is integral to the fulfilment of the rights of LGBT persons. Further, the suppression of identity, for fear of abuse—whether by conversion, passing or covering—is a form of self-censorship which is contrary to

101 Commission on Human Rights, Report by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, 27 March 2006, E/CN.4/2006/16/Add.1. The Special Rapporteur explains (at paras 72–73):

State interference with such exercise of the freedoms of expression, assembly and association have included banning of Pride marches, conferences and events, condemnatory anti-homosexual comments by political representatives, police failure to protect participants from violence or complicity in such violence, and discriminatory or arbitrary arrests of peaceful participants.

102 Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, available at: www.yogyakartaprinciples.org/principles__en.htm [last accessed 20 May 2014].

103 Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (New York: Random House, 2006) at 77.

104 Ibid. at 22–3.

the principles of free expression and non-discrimination. It is extremely unfortunate that the HR Committee missed the opportunity, in General Comment 34, to include any reference to the right of sexual minorities to express their sexual orientation or gender identity.

(i) *Draft General Comment 35*

The HR Committee is currently in the process of drafting a new General Comment. The process of drafting and developing General Comments ‘can have a critical impact on their capacity to promote a coherent and consensus-based interpretation of international human rights law’.¹⁰⁵ In its draft General Comment 35 on Article 9 (liberty and security of person), the HR Committee proposes to address an LGBT issue for the first time in a General Comment—violence against sexual minorities. The current draft of this General Comment includes the following provision:

The right to ‘security of person’ in article 9... obliges States parties to take appropriate measures to protect individuals, whether detained or non-detained, from known threats to life or bodily integrity proceeding from either governmental or private sources. States parties must respond appropriately to patterns of violence against categories of victims such as... violence against *sexual minorities*.¹⁰⁶ (emphasis added)

The approach adopted in draft General Comment 35, which appears to ‘situate sexuality within a more comprehensive human rights framework and to explore commonalities between disparate struggles’,¹⁰⁷ is consistent with the strategy which Saiz proffered as an explanation for why the European Union is much more advanced than the UN when it comes to addressing LGBT issues.¹⁰⁸ This, it is suggested, is due to its tendency to mainstream LGBT rights within the general discourse on human rights.

The HR Committee began the first reading of draft General Comment 35 at its 107th Session in March 2013. As compared to the strong and important influence exerted by NGOs in the periodic review process, via shadow reports, there is nothing in the HR Committee’s deliberations during the 106th (the initial half day discussion) and 107th Session to suggest that any NGO or State Party made submissions regarding the inclusion of sexual minorities in the draft General Comment. Rather, it appears that the Committee Rapporteur, Harvard Law School Professor, Gerald L. Neuman who prepared the first draft of this General Comment, drew upon the previous work of the HR Committee. In his opening remarks on those days of

105 Gerber, Kyriakakis and O’Byrne, *supra* n 78 at 15. See generally, Keller and Grover, ‘General Comments of the Human Rights Committee and their Legitimacy’, in Keller and Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge: Cambridge University Press, 2012).

106 Human Rights Committee, Draft General Comment No 35: Article 9: Liberty and security of person, CCPR/C/107/Rev.3 (2013), at para 8 (citations omitted).

107 Saiz, *supra* n 49 at 20.

108 See, for example, Swiebel, ‘Lesbian, Gay, Bisexual and Transgender Human Rights: the Search for an International Strategy’ (2009) 15 *Contemporary Politics* 19.

discussion, he explained that the draft ‘attempts to synthesize and clarify the Human Rights Committee’s practice based on our views.’¹⁰⁹

The textual notes of the language of the draft suggest that the reason for the reference to sexual minorities was a concluding observation made in 2003 against El Salvador regarding to ongoing violence against sexual minorities.¹¹⁰ The inclusion of the term ‘sexual minorities’ is a significant step forward and is evidence that the remarks the HR Committee makes during the periodic review of States Parties’ compliance with the ICCPR can have a trickle-down effect on LGBT rights in more general instruments. At the 108th Session in July 2013, the Committee continued its first reading of the draft, after some paragraphs of the initial draft were redrafted following the previous session.¹¹¹ The reference to ‘sexual minorities’ remains in the current draft. At the end of the first reading, the revised draft will be posted online for States Parties and civil society to review and make comments. During the second reading, the text will be finalised. The Committee has an open timetable for the finalisation of the Comment, but it is likely to be completed in the second half of 2014.

In light of the minimal recognition of LGBT rights in the HR Committee’s General Comments to date, it is worth considering the extent to which other treaty committees have addressed the rights of sexual minorities in their General Comments. Have they have been more proactive in this area? Can their experience offer any guidance as to how treaty bodies can deal with LGBT issues?

(ii) Other Treaty Committees

The rights of sexual minorities have a much stronger presence in the General Comments published by other UN treaty committees. Figure 3 illustrates which treaty committees have been the most proactive in addressing LGBT rights in their General Comments.

The most effective, yet arguably the simplest General Comment, was made by the Committee on Economic, Social and Cultural Rights (‘ESC Committee’) in 2009. It stated:

‘Other status’ as recognized in article 2, paragraph 2, includes sexual orientation.¹¹² States parties should ensure that a person’s sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor’s pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender,

109 Human Rights Committee, 107th Session, First Reading of the draft General Comment No 35 on Article 9, 21 and 26 March 2013.

110 Human Rights Committee, Concluding observations regarding El Salvador, CCPR/CO/78/SLV, 22 August 2003, at para 16.

111 Human Rights Committee, 108th Session, First Reading of draft General Comment on Article 9, 18 July 2013.

112 See Committee on Economic, Social and Cultural Rights, General Comment No 14: Right to the highest attainable standard of health (art. 12), E/C.12/2000/4; 8 IHRR 11 (2001); and Committee on Economic, Social and Cultural Rights, General Comment No 15: The right to water (arts. 11 and 12), E/C.12/2002/11; 10 IHRR 303 (2003).

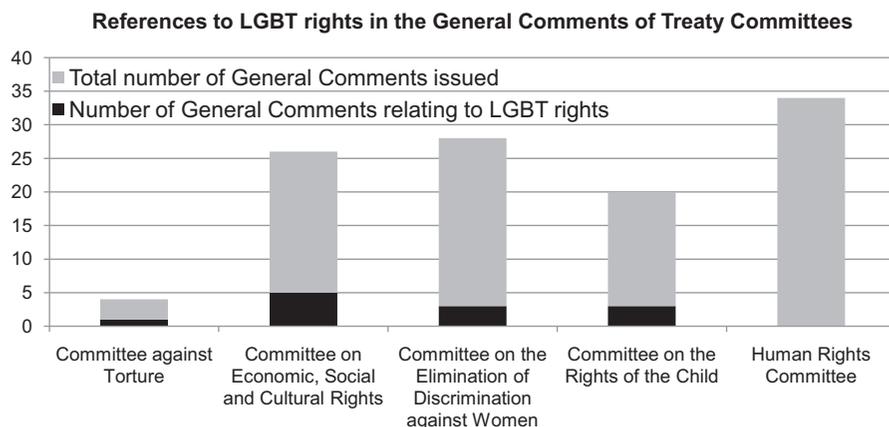


Figure 3. Comparison of the references to LGBT rights in the General Comments of five UN treaty committees.

transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace.¹¹³

UN treaty committees tend to mention LGBT issues in their General Comments or Recommendations in a way that complements the main issue under consideration. For example, the ESC Committee has affirmed the principle of non-discrimination on grounds of sexual orientation in its General Comments on the right to work, water, social security and the highest attainable standard of health.¹¹⁴ According to the Committee against Torture, States Parties are obligated to protect all persons from torture and ill-treatment, regardless of their sexual orientation or transgender identity.¹¹⁵

In their most recent General Comments and Recommendations, the Committee on the Rights of the Child (CRC) and the Committee on the Elimination of Discrimination against Women (CEDAW) went further than simply affirming the status of sexual orientation as grounds of discrimination and included more concrete recommendations on how States Parties can counter discrimination based on sexual

113 Committee on Economic, Social and Cultural Rights, General Comment No 20: Non-discrimination in economic, social and cultural rights (art. 2(2)), E/C.12/GC/20, 2 July 2009; 16 IHRR 925 (2009), at para 32.

114 See Committee on Economic, Social and Cultural Rights, General Comment No 18: The right to work (art. 6), E/C.12/GC/18; 13 IHRR 625 (2006), at para 12; General Comment No 15, supra n 112 at para 13; General Comment No 19: The right to social security (art. 9), E/C.12/GC/19; 15 IHRR 605 (2008), at para 29; and General Comment No 14, supra n 112 at para 18.

115 Committee against Torture, General Comment No 2: Implementation of Article 2 by States Parties, CAT/C/GC/2, 24 January 2008; 15 IHRR 311 (2008), at para 21.

orientation and gender identity.¹¹⁶ For example, in 2013 CEDAW published General Recommendation 29, which states:

Certain forms of relationships (i.e. same sex relationships) are not legally, socially or culturally accepted in a considerable number of States parties. However, where they are recognized, whether as a de facto union, registered partnership or marriage, the State party should ensure protection of economic rights of the women in these relationships.¹¹⁷

In 2011, the CRC noted that '[g]roups of children which are likely to be exposed to violence include, but are not limited to, children: ... who are lesbian, gay, transgender or transsexual'.¹¹⁸

These more substantive General Comments and Recommendations from various treaty committees highlight how little the HR Committee is doing in this area. In response to this inertia, some scholars have advocated a specific treaty or declaration on LGBT rights.¹¹⁹ However, others have noted that 'such a project is... hopelessly unattainable in the current climate'.¹²⁰ One alternative to integrating LGBT rights into new General Comments could be for the HR Committee to develop a General Comment devoted to addressing discrimination and persecution of sexual minorities. Such a General Comment would be consistent with the HR Committee's past practise of developing General Comments that focus on how the ICCPR should be applied to specific groups of people. For example, General Comment 23 was devoted to the rights of ethnic, religious and linguistic minorities and General Comment 17 to the rights of children under the Covenant.

General Comments are 'a powerful and indispensable juridical tool that assists in reinforcing standards as well as in pushing at the boundaries of the law'.¹²¹ They are 'frequently invoked before tribunals, particularly by litigants seeking a progressive interpretation of the law'.¹²² General Comments have been relied on to establish propositions of law by UN treaty bodies.¹²³ Furthermore, apart from their relevance to the HR Committee's jurisprudence, domestic usage of and attitudes to General

116 See Committee on the Rights of the Child, General Comment No 4: Adolescent health and development, CRC/GC/2003/4; 11 IHRR 1 (2004) at para 6; Committee on the Rights of the Child, General Comment No 2: The role of independent national human rights institutions in the protection and promotion of the rights of the child, CRC/GC/2002/2; 10 IHRR 317 (2003) at para 21; and Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation No 28: Core obligations of States parties under Article 2 of the Convention, CEDAW/C/GC/28; 18 IHRR 928 (2011) at para 18; and CEDAW, General Recommendation No 29: Economic consequences of marriage, family relations and their dissolution (art. 16), CEDAW/C/GC/29, 26 February 2013 at para 24.

117 CEDAW, General Recommendation No 29, *ibid.* at para 24.

118 Committee on the Rights of the Child, General Comment No 13: The right of the child to freedom from all forms of violence, CRC/GC/2011/13, 18 April 2011; 19 IHRR 1 (2012) at para 74.

119 Heinz, *Sexual Orientation: A Human Right* (Leiden: Martinus Nijhoff, 1995) at 300.

120 Saiz, *supra* n 49 at 18.

121 Gerber, Kyriakakis and O'Byrne, *supra* n 78 at 35.

122 Blake, 'Normative Instruments in International Human Rights Law: Locating the General Comment', Working Paper No 17 (Centre for Human Rights and Global Justice, New York University School of Law, 2008) at 16.

123 See, for example, (282/2005) *SPA v Canada* CAT/C/37/D/282/2005, at paras 4.2, 7.2 and 7.5.

Comments is improving.¹²⁴ Some domestic courts consider General Comments authoritative,¹²⁵ while some reject any attempt to confer authoritative status.¹²⁶ Nevertheless, General Comments are now cited in arguments and judgments in domestic cases around the world.¹²⁷ As such, the inclusion of sexual minorities in a General Comment is particularly significant and a worthwhile objective.

4. THE HR COMMITTEE'S VIEWS ON INDIVIDUAL COMMUNICATIONS

*The aim of argument or of discussion, should not be victory but progress.*¹²⁸

A. Five of the HR Committee's Views on complaints relating to LGBT issues

The HR Committee has dedicated significant efforts to sexual minority issues in its Views on Individual Communications. Since the 1982 decision of *Hertzberg v Finland*, in which the Committee found that the State Party had not violated Article 19 by failing to intercede when its broadcasting company banned radio programme segments dealing with homosexuality,¹²⁹ the Committee has published five views involving allegations by sexual minorities of breaches of various rights in the ICCPR, namely:

- i. *Toonen v Australia* (1994)¹³⁰
- ii. *Young v Australia* (2000)¹³¹
- iii. *Joslin v New Zealand* (2001)¹³²
- iv. *X v Colombia* (2005)¹³³
- v. *Fedotova v Russian Federation* (2012)¹³⁴

124 See generally, International Law Association, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies*, Berlin Conference on International Human Rights Law and Practice (2004).

125 *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* (2002) 6 BCLR 625 (High Court Witwatersrand, Local Division, South Africa) 629 at para 17: 'General Comments have authoritative status under international law.'

126 *Hanrei Jihō*, Judgment, 28 October 1994 (Osaka High Court, Japan) at 74: 'The General Comment neither represents authoritative interpretation of the ICCPR nor binds the interpretation of the treaty in Japan'; see also *Jones v Ministry for the Interior for Saudi Arabia* [2006] UKHL 26 (House of Lords as it was then, United Kingdom) at [23] *per* Lord Bingham: 'The Committee is not an exclusively legal and not an adjudicative body; its power... is to make general comments; the Committee did not, in making this recommendation, advance any analysis or interpretation of... the Convention; and it was no more than a recommendation. Whatever its value in influencing the trend of international thinking, the legal authority of this recommendation is slight.'

127 See, for example, Blake, *supra* n 122 at 20.

128 Joubert, *Pensées* (1842), available at: quotationsbook.com/quote/2909/ [last accessed 20 May 2014].

129 *Hertzberg and Others v Finland* (61/1979), CCPR/C/OP/1 at 124.

130 *Supra* n 7.

131 (941/2000), CCPR/C/78/D/941/2000; 11 IHRR 146 (2004).

132 *Supra* n 7.

133 (1361/2005), CCPR/C/89/D/1361/2005.

134 (1932/2010), CCPR/C/106/D/1932/2010; 20 IHRR 374 (2013).

Only one of these five views resulted in a finding that the rights of the LGBT person making the complaint had not been violated (*Joslin v New Zealand*), and there have been optimistic predictions that if a case similar to *Joslin* were to be presented to the Committee in the future, the decision might well be different.¹³⁵

(i) *Toonen v Australia (1994)*

In 1991, Nicholas Toonen submitted a communication to the HR Committee complaining that Sub-sections 122(a) and 122(c) and Section 123 of the Tasmanian Criminal Code Act 1924, criminalising consensual sex between adult males in private, were a violation of the ICCPR. It was alleged that the laws violated the right to privacy, distinguished between individuals in the exercise of the right to privacy on the basis of sexual activity or orientation, and amounted to the unequal treatment of homosexual men in Tasmania.¹³⁶

In 1994, the HR Committee decided that ‘the reference to “sex” in Articles 2 and 26 is to be taken as including sexual orientation’.¹³⁷ The decision was a landmark in that it effectively extended the non-discrimination provisions of the Covenant to sexual minorities. It was the first time that any UN organ had acknowledged that the protection of human rights extended to gays and lesbians. The HR Committee held that matters of morality are not solely a domestic concern and may be influenced by international human rights norms.¹³⁸ As a result of the *Toonen* decision, litigation and advocacy concerning rights violations based on sexual orientation immediately ‘increased at both the domestic and international level’.¹³⁹

Subsequent to *Toonen*, the HR Committee has avoided specifying that the basis for the inclusion of sexual minorities is an expansive reading of the term ‘sex’, because doing so created some controversy among human rights advocates. The controversy arose out of concern that reading the term ‘sex’ to include ‘sexual orientation’ may conflate the issue and ‘obscure the pervasive and continuing nature of the oppression against women’.¹⁴⁰ Nevertheless, a concurring opinion of two HRC members in *Joslin v New Zealand* stated that, ‘it is the established view of the Committee that the prohibition against discrimination on grounds of “sex” in Article 26 comprises also discrimination based on sexual orientation’.¹⁴¹ This conflict of interpretation demonstrates another reason why a General Comment on the specific

135 See Joseph, ‘UN Human Rights Committee: Latest trends under the Optional Protocol’, 9 October 2013, *International Service for Human Rights*, available at: www.ishr.ch/news/un-human-rights-committee-latest-trends-under-optional-protocol [last accessed 20 May 2014].

136 *Toonen v Australia*, supra n 7 at 3.1.

137 Ibid. at para 8.7. Subsequent to *Toonen*, the HR Committee has avoided specifying that the basis for the inclusion of sexual minorities is an expansive reading of the term ‘sex’. Nevertheless, an individual concurring opinion of two HRC members in the case of *Joslin v New Zealand*, in 2002, states that ‘it is the established view of the Committee that the prohibition against discrimination on grounds of “sex” in Article 26 comprises also discrimination based on sexual orientation’: supra n 7 at Appendix 7.

138 Supra n 6 at para 8.6.

139 Helfer and Miller, ‘Sexual Orientation and Human Rights: Towards a United States and Transnational Jurisprudence’ (1996) 9 *Harvard Human Rights Journal* 61 at 63.

140 Ibid. at 75.

141 *Joslin v New Zealand*, supra n 7 at Appendix.

issues surrounding sexual orientation may be warranted, given that one of the central roles of General Comments is to be an interpretive aid.

(ii) *Young v Australia (2003) and X v Colombia (2005)*

Both *Young v Australia* and *X v Colombia* concerned the exclusion of same-sex partners from pension benefits which were extended to unmarried heterosexual partners.

In *Young v Australia*, published in 2003, the HR Committee found that the denial of pension benefits to the same-sex partner of a deceased war veteran breached Article 26, as Australia had failed to provide any justification for making a distinction on the basis of ‘sex or sexual orientation’. However, a separate concurring opinion by two Committee members observed that discrimination on the basis of sexual orientation is not inherently contrary to the ICCPR, since ‘not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria’.¹⁴²

The HR Committee acknowledged an earlier communication¹⁴³ in which ‘the Committee found that differences in the receipt of benefits between married couples and heterosexual unmarried couples were reasonable and objective, as the couples in question had the choice to marry with all the entailing consequences’.¹⁴⁴ However, the HR Committee distinguished the instant case, finding that there were ‘no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective’.¹⁴⁵ In the concurring opinion, the two members of the Committee stated that ‘the Committee has not purported to canvas the full array of “reasonable and objective” arguments that other states and other complainants may offer in the future on these questions in the same or other contexts as those of Mr Young’,¹⁴⁶ leaving open the possibility of future incursions on the right to equality for LGBT persons on the basis of ‘reasonable and objective’ criteria.

In *X v Colombia*, the members of the Committee similarly concluded that there were no reasonable and objective criteria to justify the distinction of entitlement to pension payments between same-sex unmarried couples and heterosexual couples.¹⁴⁷ However, in a dissenting opinion, two members observed that ‘a couple of the same sex does not constitute a family within the meaning of the Covenant and cannot claim benefits that are based on a conception of the family as comprising individuals of different sexes’.¹⁴⁸ According to this dissenting view, Article 26 of the ICCPR should be read taking into account Article 23 which stipulates that ‘the family is the natural and fundamental group unit of society’ and that ‘the right of men and women of marriageable age to marry and found a family shall be recognized’.

142 *Young v Australia*, supra n 131 at para 10.4.

143 *Danning v The Netherlands* (180/1984), CCPR/C/OP/2.

144 *Young v Australia*, supra n 11 at para 10.4.

145 Ibid.

146 Ibid. at Appendix.

147 *X v Colombia*, supra n 133 at para 7.2.

148 Ibid. at Annex.

The HR Committee's views in the above three cases indicate that there is a lack of unanimity within the HR Committee when it comes to fundamental interpretation of the norms relating to the right to equal treatment before the law and, more generally, recognising the rights of sexual minorities to be free from discrimination on the basis of their sexual orientation. This is contrary to Tyagi's observation that the Committee generally 'maintains consensus on the interpretation of most of the provisions of the ICCPR'.¹⁴⁹ The HR Committee's inability to reach a level of agreement on the very status of sexual orientation as an aspect of a protected human right norm could have a chilling effect on any possibility of developing of a General Comment relating to the rights of sexual minorities, because General Comments are adopted by consensus.¹⁵⁰

(iii) *Joslin v New Zealand (2001)*

In *Joslin*, a lesbian couple applied for a marriage licence in New Zealand and were refused. The authors argued that the Marriage Act 1955 discriminated against them because of their sex and sexual orientation. The HR Committee found that refusing to issue marriage licenses to same-sex couples did not violate Article 26. The Committee held that

the use of the term 'men and women' rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of State parties stemming from article 23, paragraph 2 of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.¹⁵¹

Accordingly, the Committee refused to interpret the phrase 'men and women' disjunctively to mean that 'men as group and women as a group may marry'.¹⁵² A similar argument that 'men and women' could be interpreted to demarcate that 'men and women' can marry as distinct from children also supports the more inclusive interpretation of the Article such that same-sex couples come within its ambit.

This decision is the low-point when it comes to the recognition of LGBT rights within the UN, and appears to conflict with the view expressed by the HR Committee and other international human rights bodies 'that "marriage" and "the family" are continuously evolving concepts that apply to a diversity of arrangements across cultures and so must be interpreted broadly'.¹⁵³ A separate concurring opinion of two committee members suggested that if the authors had identified a difference in treatment due to their preclusion from marriage, 'the Committee's jurisprudence supports the position that such differentiation may very well, depending on the circumstances of a concrete case, amount to prohibited discrimination'.¹⁵⁴

149 Tyagi, *supra* n 9 at para 555.

150 Gerber, Kyriakakis and O'Byrne, *supra* n 78 at paras 12–15.

151 *Joslin v New Zealand*, *supra* n 7 at para 8.2.

152 *Ibid.* at para 3.8.

153 Saiz, *supra* n 49 at 9.

154 *Joslin v New Zealand*, *supra* n 7.

Joslin v New Zealand reinforces the sentiment contained in the dissenting opinion in *X v Colombia* by demonstrating that the HR Committee appears to tolerate discrimination in the rights of those in a partnership, based on the protection of the family unit which some have commented is 'a legitimate interest invoked in an unduly restrictive way'.¹⁵⁵ Scholars have designated this approach as 'heterosexist',¹⁵⁶ 'heteronormative'¹⁵⁷ and structurally biased.¹⁵⁸ The *Joslin v New Zealand* case shows that '[h]uman rights relating to sexual orientation continue to be opposed with reference to heteronormative understandings of cultural tradition, national identity and religious belief.'¹⁵⁹

(iv) *Fedotova v Russian Federation (2012)*

The most recent decision of the HR Committee is *Fedotova v Russian Federation*, in which the author was convicted of an administrative offence under the Ryazan Region Law on Administrative Offences ('Ryazan Region Law') for displaying two posters stating 'Homosexuality is normal' and 'I am proud of my homosexuality' near a secondary school. The HR Committee found that the petitioner's conviction under the Ryazan Law, which prohibits 'public actions aimed at propaganda of homosexuality among minors' violated her right to freedom of expression, read in conjunction with her right to freedom from discrimination under the ICCPR.¹⁶⁰ This was because the State Party

failed to demonstrate why, on the facts... [i]t was necessary for one of the legitimate purposes of... the Covenant to restrict the author's right to freedom of expression... for expressing her sexual identity and seeking understanding for it, even if indeed... she intended to engage children in the discussion of issues relating to homosexuality.¹⁶¹

The decision is especially important because it effectively reverses the position taken by the Committee in *Hertzberg v Finland*, which upheld a Finnish statute prohibiting 'encouragement to indecent behaviour between members of the same sex' on the basis that expressing opinions and information about same-sex sexual orientation could be limited in the name of public morality.¹⁶² In *Fedotova*, the Human Rights Committee recalled and drew upon General Comment 34, and reiterated that limitations for the purpose of public morals, which are derived 'from many social, philosophical and religious traditions' could not be based exclusively on a single tradition and that any such limitations 'must be understood in light of universality of human rights and the principle of non-discrimination'.¹⁶³ The Committee further

155 Saiz, *supra* n 49 at 18.

156 *Ibid.*

157 Waites, *supra* n 44 at 140.

158 Saiz, *supra* n 49 at 18.

159 Waites, *supra* n 44 at 140.

160 *Fedotova v Russian Federation*, *supra* n 134 at para 10.8.

161 *Ibid.* at para 10.8.

162 *Hertzberg v Finland*, *supra* n 129 at paras 2.1, 10.3 and 10.4.

163 *Fedotova v Russian Federation*, *supra* n 134 at para 10.5.

recalled that the 'prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation'.¹⁶⁴

Critically, the View in *Fedotova* is the first time that the HR Committee has identified a violation of rights, other than Articles 17 and 26, in an LGBT-related complaint. This is significant because it signals a greater awareness of the entitlement of sexual minorities to enjoy the full spectrum of rights under the ICCPR. Such a view is consistent with the Yogyakarta Principles, especially Principle 1 which states: 'Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.'¹⁶⁵

Although the Committee's decision in *Fedotova* is encouraging, it appears so far to have had minimal impact on the State Party, as demonstrated by the Russian Parliament unanimously passing a law, in June 2013, providing for the imposition of fines on any citizen who shares information discussing 'non-traditional sexual relations' with minors which might cause a 'distorted understanding' that gay and lesbian relationships are 'socially equivalent' to heterosexual relationships.¹⁶⁶ The fines increase if the person disseminating the 'propaganda' is a state or legal official.

Nevertheless, collectively the jurisprudence of the HR Committee reveals that the Committee struggles with the interplay between human rights norms which affect the rights of LGBT persons and the restrictions placed on the norm by the State Party (for example, the domestic restriction on pension entitlements in *Young and X*, the right to marry for heterosexuals only in *Joslin*, or the limitations on the right to freedom of expression in *Fedotova*). The Committee also appears to struggle with the relationship between several human right norms (like the meaning and significance of the Articles concerning 'family' in *X v Columbia* and *Joslin*). Bamforth has noted that that the 'extent to which human rights considerations should pay deference to local cultural mores proclaimed by national governments is thus a constantly recurring theme when considering human rights abuses based on sex and sexual orientation'.¹⁶⁷ The result is that the HR Committee sometimes hesitates to protect LGBT rights under the ICCPR when domestic laws or other human rights norms place demands on their realisation, despite acknowledging that domestic 'morality' cannot override ICCPR norms.

5. WHAT MORE COULD THE HR COMMITTEE BE DOING?

*The secret of change is to focus all of your energy, not on fighting the old, but on building the new.*¹⁶⁸

164 Ibid. at para 10.5.

165 Principle 1 Yogyakarta Principles.

166 Federal Law of Russian Federation No 436-FZ of 2010-12-23, 'On Protection of Children from Information Harmful to Their Health and Development' (Федеральный закон Российской Федерации от 29 декабря 2010 г. N 436-ФЗ «О защите детей от информации, причиняющей вред их здоровью и развитию»).

167 Bamforth (ed.), *Sex Rights: The Oxford Amnesty Lectures 2002* (Oxford: Oxford University Press, 2005) at 8.

168 Millman, *Way of the Peaceful Warrior: A Book that Changes Lives* (California: HJ Kramer/New World Library, 2006) at 105.

O’Flaherty and Fisher have acknowledged that although there has been significant attention dedicated to issues of sexual orientation and gender identity, ‘there is a great deal of room for [treaty bodies] to integrate these issues more systematically within consideration of State reports, concluding observations and General Comments’.¹⁶⁹ The above analysis of three aspects of the HR Committee’s work reinforces O’Flaherty and Fisher’s conclusion that there is considerable room for improvement in how this UN body interprets and applies the ICCPR to protecting the rights of sexual minorities.

Although many of the working procedures of the treaty committees are taken to be inalienable, these same procedures have generally been developed by the treaty committees themselves, and thus can be reformed by the same treaty committees. For example, the HR Committee ‘did achieve something of a breakthrough when, in 1984, it began the practice of reporting the dialogue between its members and representatives of the State Party’.¹⁷⁰ This breakthrough was the genesis of what we now know as concluding observations. This change in practice demonstrates both the malleability of the treaty system and the capacity of the committee members to control their own working methods.

It is therefore timely to ask: ‘How the HR Committee can improve its three main outputs (concluding observations, General Comments and Individual Communications) so as to better respond to the issues facing sexual minorities? We make two recommendations for how the HR Committee could improve its effectiveness when it comes to protecting the rights of sexual minorities. These two recommendations—to tailor its outputs in programmatic ways and to mainstream LGBT rights in existing works—are synthesised from the current work of human rights theorists, as well as the UN itself.

A. Tailoring outputs

As noted above, the HR Committee’s concluding observations is one area where there is significant scope for improvement. The periodic review of States Parties’ compliance with the ICCPR could be more meaningful and effective if the HR Committee provided specific, tailored observations and recommendations.

The UNHCHR Report recognised the value of dividing goals and observations into short-term and long-term, and programmatic and systematic. The HR Committee would do well to embrace this recommendation and incorporate into its concluding observations a series of targeted reforms—taking into account social and political factors—which a State Party could undertake. Doing so might enable the HR Committee to play a more robust role in securing State Party compliance by staggering human rights imperatives over time and according to the circumstances of a particular state. For example, in 2012 the HR Committee made almost identical recommendations to two States Parties in Central America in relation to their failure to tackle discrimination against LGBT persons (the Dominican Republic and Guatemala).¹⁷¹ Instead of simply

169 O’Flaherty and Fisher, *supra* n 20 at 231.

170 O’Flaherty, *supra* n 18 at 29.

171 Human Rights Committee, Concluding observations regarding Dominican Republic, CCPR/C/DOM/CO/5, 19 April 2012, at para 16; and Human Rights Committee, Concluding observations on

rehashing the same comment for both States Parties, the HR Committee could make regional observations. For example, it could have highlighted progress made in other states in the region, such as El Salvador, which in 2010 issued a government decree to eliminate discrimination on the grounds of gender identity or sexual orientation in the civil service.¹⁷² It could recommend that the Dominican Republic and Guatemala take similar public steps to reduce discrimination within government and civil positions as an immediate goal. It could also suggest a longer term goal to develop awareness raising programmes in collaboration with regional partners.

The provision of more tailored, concrete and measurable concluding observations would also enable the Committee to more comprehensively and actively monitor the goals set, and recommendations made. By focusing on systems that test and monitor the outputs of the HR Committee, there is a greater chance that the Committee could 'put an end to the haphazard and unpredictable manner in which State reporting is currently managed'.¹⁷³ Such reform would be consistent with the recommendations set out in the UNHCHR Report, which urged treaty committees to develop monitoring systems and to conduct studies, in consultation with the UN bodies to identify obstacles to the achievement of treaty goals.¹⁷⁴

The HR Committee recognises the importance of requesting States Parties to report on specific areas of concern. For example, it urged one State Party, which was considered in the absence of a report, 'to include in its initial report information on the outcome of the case challenging the constitutionality of section 53 of the Criminal Code which prohibits same sex relations'.¹⁷⁵ The HR Committee should ensure that each actionable recommendation be attached to a follow-up goal or outcome so that the effectiveness of its work can be monitored in the short, medium and long term.

B. Integrating and Mainstreaming LGBT rights

Petrova, the executive director of the Equal Rights Trust, acknowledges that

while single-identity causes and identity politics have historically been instrumental in empowering the most disadvantaged identity groups, they have limitations, including in the case of advancing LGBT rights.¹⁷⁶

There is a growing support for a model of advancing LGBT rights which focuses on bringing specific LGBT issues onto the human rights agenda by relating them to other issues which have an existing reception by the relevant human rights organ. This approach has become known as the 'mainstreaming' of LGBT rights.

Guatemala, CCPR/C/GTM/CO/3, 19 April 2012, at para 11.

172 Human Rights Committee, Concluding observations regarding El Salvador, CCPR/C/SLV/CO/6, 18 November 2010, at para 3.

173 Egan, *supra* n 24 at 7.

174 Amnesty International, *Pretoria Statement*, *supra* n 66 at para 10(h).

175 Human Rights Committee, Concluding observations regarding Belize, *supra* n 63 at para 13.

176 Petrova, 'The use of equality and anti-discrimination law in advancing LGBT rights', in Lennox and Waites (eds), *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalisation and Change* (New York: Human Rights Consortium, Institute of Commonwealth Studies, School of Advanced Study, University of London, 2013) 477 at 477.

Mainstreaming transnational LGBT issues involves ‘framing the situations of LGBT (or otherwise-identified) people in terms of rights violations, and protections, that existing human rights movements understand’.¹⁷⁷

The approach is particularly amenable to states that are ‘still ridden by strong cultural, legal, political or religious opposition to sexual minority rights’.¹⁷⁸ While the approach is generally one which is suggested for advocacy groups, it is just as applicable to the HR Committee. For example, Petrova applies a unified framework of equality to situate LGBT rights in the broader, more general mandate of equality. The HR Committee could do the same so as to situate sexuality rights within the larger framework of civil and political rights set out in the ICCPR. As previously noted, Saiz suggests that this strategy is partly responsible for the greater protection of LGBT rights by the European Union as compared with the UN.¹⁷⁹

It is useful to look at a practical example of how LGBT rights could be mainstreamed. There are a number of different ways of challenging laws which criminalise homosexual conduct, apart from outright denunciation, which is the HR Committee’s standard comment against infringing States Parties. For example, where criminalisation of same-sex conduct is based on Sharia law, the HR Committee could encourage the State Party to recognise the rights of LGBT persons on the basis that Islamic and Sharia laws ‘encompasses the promotion of diversity, tolerance, non-compulsion and the principle that all people are equal before God (*Taqwa*)’.¹⁸⁰

If a state which criminalises homosexual conduct has a constitution that recognises the right to equality, for example Gambia, the HR Committee could recommend that the offending criminal law provision be repealed because, *inter alia*, it violates the State Party’s own constitution. Such an approach would be appropriate for members of the African Union, because the African Charter on Human and Peoples’ Rights imposes obligations on States Parties to protect the rights of every individual ‘without distinction of any kind’.¹⁸¹ By relying on domestic or supra-national jurisprudence, laws or constitutions in their comments, the HR Committee can ‘develop law from the ground up and illustrate how national [and supra-national] legal systems can be used in challenging serious societal problems’.¹⁸² By using local laws to justify claims made under the ICCPR, the HR Committee also ossifies its comments and decisions so as to generate maximal impact.

In relation to General Comments, the prospect of the HR Committee developing a dedicated thematic General Comment on the application of the ICCPR rights to LGBT persons has been described as ‘hopelessly unattainable’.¹⁸³ This assessment is reinforced by the Committee’s refusal to address the responsibilities of States Parties to protect the right of self-expression of LGBT persons, especially as co-extensive

177 Human Rights Watch, *Together Apart: Organising around Sexual Orientation and Gender Identity Worldwide* (Human Rights Watch, 2009) at 18.

178 Petrova, *supra* n 176 at 478.

179 See, for example, Swiebel, ‘Lesbian, gay, bisexual and transgender human rights: The search for an international strategy’ (2009) 15 *Contemporary Politics* 19.

180 Petrova, *supra* n 176 at 496–7.

181 Article 2 African Charter of Human and Peoples’ Rights 1986, CAB/LEG/67/3 rev5; 21 ILM 58 (1982).

182 Petrova, *supra* n 176 at 497.

183 See *supra* n 118 and discussion in Section 3(B)(ii) above.

with the exercise of other rights in the ICCPR. One can only hope that the current reference to sexual minorities in draft General Comment 35 survives the drafting process and is retained in the final version of this General Comment. If it does, it will serve as an example of how the interests of sexual minorities can be included in the work of the HR Committee, regardless of whether those interests are different or co-extensive.

Lastly, on a purely theoretical level, the mainstreaming of LGBT rights acknowledges that

grounds of discrimination are often *multiple and intersecting* [and] that the impact of discrimination on more than one ground is not just ‘cumulative’, but often intersects to create new and aggravated forms of discrimination that are greater than the sum of their parts.¹⁸⁴ (emphasis in original)

Yet mainstreaming LGBT rights into more general mandates carries risks. Policies at the UN aimed at mainstreaming gender issues which one might think open new possibilities have ‘understood “gender” as a synonym for biological sex and hence have not prompted new policy initiatives on sexuality or “gender identity”’.¹⁸⁵ Thus, the danger of mainstreaming LGBT rights is the possibility that the nuances of individual claims could be lost in the attempt to generalise nuanced issues.

6. CONCLUSION

*As for the future, your task is not to foresee it, but to enable it.*¹⁸⁶

At the outset, we posed the question: what is the UN Human Rights Committee doing to protect sexual minorities from discrimination and persecution? It is clear that the Committee takes its responsibility to ensure compliance with the ICCPR seriously when presented with violations of the rights of sexual minorities. The increasing depth of its concluding observations in response to States Parties periodic reporting, and the majority of its decisions in relation to communications impugning a States Parties’ treatment of LGBT persons, signal a greater awareness of the relevance to and importance of the ICCPR to LGBT persons, at a grass-roots level. As a result of the above qualitative and quantitative analysis, two salient observations can be made about the HR Committee’s current practices.

First, NGO shadow reports on States Parties are crucial to the HR Committee’s cognisance and depth of understanding of LGBT issues. It is clear that when issues such as the on-going criminalisation of homosexual acts are not addressed in a shadow report, it is highly unlikely that the HR Committee will address the issue in its concluding observations. The fact that NGO shadow reports are *ad hoc*,

184 ARC International, IGLHRC and ILGA, *Recommendations as regards the Draft General Comment No. 20 on nondiscrimination, interpreting Art. 2(2) of the United Nations International Covenant on Economic, Social, and Cultural Rights*, 15 December 2008, at 1.

185 Waites, *supra* n 44 at 141.

186 Antoine de Saint-Exupery, *Citadelle* (1948), available at: www.finestquotes.com/select_quote-category-Future-page-0.htm [last accessed 20 May 2014].

negatively impacts on the HR Committee's capacity to comprehensively, consistently and independently address violations of LGBT rights in all States Parties.

Secondly, the work of the HR Committee has demonstrated the heterogeneity of states regarding the issue of LGBT rights, and the internal difficulties encountered by the HR Committee in presenting a homogenous view. The social, political, legal and political terrain surrounding the decriminalisation of homosexual acts makes it difficult for the HR Committee to present a unified view on these issues.¹⁸⁷ This is especially germane in light of the findings that Committee membership has a significant impact on whether LGBT issues are discussed during periodic review meetings of States Parties. Nevertheless, the key role of the HR Committee is not to defer its mandate to monitor and promote compliance with the ICCPR to the domestic mores of States Parties, despite early opinions of the HR Committee which suggested otherwise.¹⁸⁸ The conceptual nature of the Committee, that is, a non-political, neutral body of experts should provide a fertile ground for constructive progression. Due to the periodic nature of concluding observations, the infrequent drafting of General Comments and the responsive nature of Individual Communications, the work of the HR Committee is necessarily slow. However, these three complementary outputs are also amenable to the creation of broader strategies to explore and address the legislative frameworks and internal policies of States Parties. Furthermore, as an expert body, the HR Committee can approach the issues in a way which engages individual matters 'rather than being bifurcated into "pro" or "anti" camps on LGBT rights.'¹⁸⁹ General Comments should be seen as a tool to mainstream LGBT rights into more widely acknowledged rights, and Draft General Comment 35 suggests that the HR Committee is moving in this direction.

The important role played by the HR Committee in ensuring compliance with the ICCPR can be bolstered by adopting improvements to its internal mechanisms. The first recommendation is to take up a suggestion of the UNHCHR Report that treaty committees specifically address particular issues within their concluding observations which should increase the likelihood of their comments and recommendations being adopted by States Parties. Given that the HR Committee is a panel of experts, it seems axiomatic that the Committee's work should be cohesive and actionable. The second recommendation is therefore that the Committee address LGBT issues within the context of the regional, political and social realities on the ground by mainstreaming LGBT rights into existing human rights frameworks. This could entail using domestic constitutions or supra-national norms to solidify observations on compliance with the ICCPR.

The HR Committee's track record in addressing LGBT issues, and the poor performance of many States Parties in protecting the rights of sexual minorities, indicate

187 Members of the Commonwealth of Nations, an intergovernmental organisation of 53 states formally part of the British Empire, demonstrated similar disunity, when in 2011 members refused to endorse a recommendation of the Eminent Persons Group that all Commonwealth states decriminalise homosexuality: see gaynewsnetwork.com.au/news/chogm-fails-to-move-on-homosexuality-human-rights-2538.html [last accessed 20 May 2014].

188 See discussion Section 4(A)(iv) above.

189 Cowell and Milon, 'Decriminalisation of Sexual Orientation through the Universal Periodic Review' (2012) 2 *Human Rights Law Review* 341 at 352.

there is a need for a General Comment that clarifies the scope of the protection of the ICCPR for LGBT persons. Such a General Comment would not only give authoritative guidance to States Parties but could also be referred to by the HR Committee in its concluding observations and Views to reinforce its recommendations and decisions.

Much can be achieved by making relatively small adjustments to the workings of the HR Committee to make its efforts more effective. Although these changes may create an additional burden on the HR Committee at first, it is likely that in the long term, it will reduce the effort required in maintaining its supervisory function, and enable the HR Committee to make a greater contribution to the protection of the rights of sexual minorities, including the repeal of laws that continue to criminalise consensual homosexual conduct.